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THE AMERICAN PROSECUTOR

A SEARCH FOR IDENTITY

The American Prosecutor: A Search for Identity

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**The American Prosecutor:
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To these who are the ties that bind,
my mother, Pearl McGrady
my daughters, Christina, Jennifer, and Erica

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Introduction

The American prosecutor is a unique figure, not only in the American system of justice but in the criminal justice systems of the world. In no other country is there an official like the prosecuting attorney, who exercises a special hybrid of quasi-judicial and political power. The prosecutor is established as the representative of the state in criminal litigation, by either constitutional or statutory mandate, and yet is directly answerable to the local electorate at the ballot box. Although the American system of justice evolved from a wide mix of European predecessors, the office of the prosecuting attorney is a uniquely American institution; it has no exact counterpart in England or in any of the other European states.

The power and significance of the prosecutor is derived from the many roles that he plays daily in the administration of justice. He is the principal representative of the state before the courts, charged with the responsibility of upholding the laws and the constitution. He is the reviewing officer for all arrests made by the police and is therefore an interpreter of the laws, capable of influencing the character and quality of law enforcement through the decisions he makes in charging crimes. He takes active part in reviewing the functions of the criminal justice system and often makes suggestions about remedial legislation or alterations in the substance and procedures of the criminal law. He is a locally elected politician with an independent source of power—the local voters—and can exercise independent judgment and discretion by making key policy decisions for his community.

Despite the fact that the prosecutor has held a key position in the criminal justice system for over two hundred years, his role has been virtually ignored by the literature. Little has been written about the prosecutor; scant research has been conducted. As recently as 1971, the National Association of Attorneys General complained that “virtually no primary data on prosecutors are available from any source.” Since then, three separate surveys have been conducted, but information is still indefinite and incomplete.

The lack of inquiry into the function of the prosecutor reflects the general limits of understanding about the nature of the office both among the general public and in academic and research communities. The prosecutor has a vague image in the public eye, and much of this arises because the prosecutor’s own self-image is fuzzy. The concept of the proper role of the prosecuting attorney lacks uniformity; there is wide diversity of opinion about his proper role from jurisdiction to jurisdiction. The diversity of situations in which the prosecutor must operate perpetuates this vagueness. It is hoped that analysis of the role of prosecutor from a perspective that includes both environmental constraints and specific policy choices will begin to clear up this definition.

This study attempts to focus on all these dimensions to provide a better understanding of the prosecutor's functional responsibilities, his relationship with other agencies and systems, and the issues of prosecutorial power and its control. This analysis of the local prosecutor's identity will provide insights into what properly designed systems of prosecution are and what they mean. The general approach will be to conduct a broad and generalized examination of the prosecutive function in American society, to look at the origins of prosecution in America, the diverse situations in which it thrives, and the nature and character of different prosecutorial styles. This book is written for those who know little about prosecution or who have had only limited experience or contact in this area. The aim is to expand the reader's view by exposing him to the diversities and problems inherent to this uniquely American institution.

Approach and Methodology

To describe the American local prosecutor as he functions in diverse environments, we have merged three approaches: (1) a historical overview of the prosecutor's origin in America and subsequent development; (2) an analysis of the effects of the diversified environmental and systemic characteristics on the more than three thousand prosecutors who operate in the counties and districts of the fifty states; and (3) an evaluation of the emerging role of the prosecutor with respect to the different prosecutorial policies that are most clearly exemplified in the charging function. Case studies of three different prosecutor's offices are presented to draw the important issues into a meaningful context.

Historical Traces

An understanding of the past is important in studying any subject. It is certainly significant in examining the local prosecutor, both because of the scarcity of information about him and because of his institutional uniqueness. In the beginning chapters the historical factors bearing on the origin and development of the office of prosecutor and leading to his modern position as a locally elected official are traced. The approach taken was to follow the major issues that led to the present definition of the prosecutor as a "locally elected official": to see why his jurisdiction is local rather than state or federal; why he is elected rather than appointed; and why he exercises wide discretionary power rather than simply becoming a court or police functionary.

The locally elected prosecutor is unknown to either the English legal system or to any of the other major European systems of justice. The

English system was one of private prosecution, a system that was never adopted by the early American colonists. After early settlement, the responsibility for bringing criminal actions in each of the thirteen colonies was lodged in a centralized figure—the King's Attorney or Attorney General. But because this responsibility was not directly equivalent to the role that the King's Attorney had played in the English legal system, the role of the Attorney General remained undefined as to the extent of his involvement in criminal prosecution. Furthermore, as the nation gained its independence, and as expansion began in the ensuing movement west, centralization of this responsibility became impractical. Local prosecutors were appointed at first to represent various communities; later, as will be seen, they gained elective status. Today, forty-five of the fifty states elect prosecuting attorneys on a local level.

Decentralization of judicial and quasi-judicial power is the legal tradition within the United States. The basic structure of the American legal system was taken from the British common law system, of course, although some influence has been felt from various civil law systems, most notably the French influence in Louisiana and some Spanish influence in California and the southwestern states. But, overwhelmingly, American law is a direct descendant of the British common law tradition. America's own contributions to the development of this system have come, in a large measure, in its unique procedures and officers. Much of this alteration can be attributed to the different nature of the American continent—to the vast expanse of land and sparse population—which spawned stronger institutions of local government than were known in England or anywhere else in Europe.

Local government in America developed its strong traditions because its characteristics comported with the essentially rural and agrarian nature of American life and economy during the developing period of the late eighteenth and early nineteenth centuries. This may be the single most influential factor in the historical forces that shaped the prosecuting attorney. Local government certainly had been a factor in the English system of government—the sheriff and the coroner have long traditions in England. They were transferred into the American system. But the prosecuting attorney developed here because of the greater reliance of American society on settling local problems quickly and independently and because of the demand of the citizens of small towns and rural counties for autonomy and independence in decision making. There have been movements down through the years to establish state-controlled or state-administered systems of prosecution, but, for the large part, these have failed to make a dent in the strong tendency to preserve local prerogative.

In essence, the office of the locally elected prosecutor is the logical result of the forces and events that shaped the entire nature of American

government. As will be seen, the characteristics of local prosecution have been somewhat inevitable. Attempts to change the nature of this political phenomenon run against the basic traditions and historical trends of the past three centuries.

Diverse Environments

Although early political trends did much to solidify the prosecutor as a locally elected official with primary responsibility for bringing criminal actions in the courts, more recent social and economic trends have placed him within a widely diverse and confusing system of external and environmental constraints. Modern industrial society, the advent of large urban areas, the increase in crime, and the new mobility of the American public have combined to place increased pressures on the individual who has been delegated the responsibility of enforcing the laws. Even the system of justice in which the prosecutor works has changed drastically. No longer can the prosecutor operate simply in the environs of the local county court, executing his office in the context of a small and closely related work-group.

There have been, of course, marked changes in the criminal justice system in the last half-century. Even the concept of a criminal justice system is new—a realization that the different agencies involved in the enforcement of the criminal laws—the prosecution, the courts, the police, the public defender, and the corrections agencies—have formed highly complex and interdependent relationships. The criminal justice system itself has been the subject of a number of studies, most notably those conducted by several national commissions during the past decade.

Many of these studies have pointed out the diversity that exists as a result of the complexity of modern life. Components of the system, in fact, have relationships that are more often symbiotic than systemic, and the actual interaction between the parts of the system has become difficult to describe and to predict because of the subtle differences that have developed in their goals and objectives. Each component has developed independently, and often it has different perspectives about crime and about the relative roles that it plays in the processing of a criminal case.

This fragmentation is aggravated by the operation of criminal justice services at different jurisdictional levels—across counties, at state or municipal levels. Traditionally the prosecutor's role has been less clear than that of some other components of the system, such as the police or corrections. The tendency has been to think of the prosecutor as a functionary of police or court power rather than to see him as an independent agent with his own discretionary power. Yet it is obvious that he has his own duties and his own independent goals. Measures of success for one agency will not

necessarily be a measure of success for the prosecuting attorney. The police have traditionally been interested in "clearing" cases as an indicator of performance; a judge thinks of performance in terms of his ability to move the trial docket. Yet neither measure properly indicates success for the prosecutor, who, as will be seen, is interested in a combination of measures that indicate both his ability to deal with the case volume that he receives and his ability to make discrete choices about the charges that he levels in those cases.

Is there any one feature that is characteristic of the typical prosecutor? As has been suggested, little research has concentrated on this office. A Law Enforcement Assistance Administration (LEAA) census, taken in 1970, lists approximately 3,400 state and local prosecutors. Three other national surveys have collected data and information about the local prosecutor, but these provide only scant information about his characteristics or jurisdiction: The National Association of Attorneys General (NAAG) collected basic information about the office of the local prosecutor; a more comprehensive survey attempt to collect more information was conducted in 1972 by the National Center for Prosecution Management (NCPM) under the auspices of the National District Attorneys Association (NDAA); a follow-up to this survey was conducted by the NDAA in 1974-1975.

Of special interest to this study are the results of the NCPM survey, since its primary purpose was to investigate and identify the environmental factors that affect the prosecutor in the performance of his duties and characterize his operations. This was the only nationwide, research-oriented study of prosecutors ever to look at external influences. Statistically significant factors that influenced the prosecutor were identified, and these are reported in part II of this book. An examination of the effects of exogenous factors on prosecution permits the researcher to separate factors over which the prosecutor has little or no control from those for which he can be held accountable. The factors in the NCPM study results can be classified in two groups: (1) the demographic and population characteristics of the jurisdiction, and (2) the component activities within the criminal justice system itself. A major objective of this work is to highlight the diversity that exists, because of these factors, in the prosecution process and to show how and why different prosecutorial responses occur.

The overwhelming majority of local prosecutors are elected for a 4-year term, although the range of terms runs from 1 to 12 years. Despite the emphasis that is placed on the needs of urban prosecutors who must cope with case overloads and backlogged courts, the overwhelming proportion of local prosecutors are from rural counties or small towns. (Seventy-six percent of all prosecutors represent jurisdictions with populations of less than 100,000.) Furthermore, 74 percent of all prosecutors operate either as a "one-man" office or with fewer than four assistant prosecutors to aid them.

Although the general focus of the prosecuting attorney is on criminal case processing, he is not simply a criminal litigator. More and more the prosecutor has been assigned other duties by the legislature. Three out of four prosecutors have civil responsibility for representation of the county board of commissioners or for the local governing agency. The prosecutor's duties have been extended to include involvement in juvenile matters, in family and domestic-relations court, in answering or responding to citizen complaints, in conducting nonsupport programs, in handling traffic, consumer, or environmental protection projects, and in pursuing appeals. His interests and jurisdiction have been extended to cover a wider avenue of community problems. When attempting to analyze or evaluate the prosecutor's role in criminal case processing, one must consider the demands of these other activities and the effect that they have on his total effort.

The prosecution function is most effectively analyzed by viewing it as a highly discretionary decision-making system operating in a complex set of constraints. These constraints must be identified and analyzed thoroughly before a proper evaluation can be performed. Prosecution can only be evaluated in terms of what it can control. Thus, any search to establish the identity of the prosecutor must eliminate those factors over which the prosecutor has little or no control and focus on those on which he does have definite impact.

The office of the prosecutor is created by the state constitution or legislation and operates, first of all, within these constraints to his power. For example, modern and efficient charge review procedures in Michigan are made possible by a statutory requirement that complaint warrants be reviewed and their issuance recommended by the prosecutor before cases can be filed in court. This is a favorable environment for screening and contrasts significantly with other states where there are no such rules and where the assistant prosecutors may not even know of the existence of a case until days after it has been filed with a justice of the peace or a committing magistrate.

The external factors examined in this book can be grouped into four general areas. The first and most important is the geographic and demographic characteristics of the jurisdiction. This forms the primary descriptor of the prosecutor's role. Obviously the type, size, and population of the jurisdiction distinguishes the small-town or rural prosecutor from the large-city or suburban prosecutor. Second, the character and volume of the workload determines the size and composition of the office. As the people's lawyer, the prosecutor must respond to the work brought to his office by the police, sheriff, or citizens. The amount and type of crime in a jurisdiction forces certain prosecutorial responses and priorities.

The preceding factors also determine the resources that are made available to him (primarily through his budget) and that define the bounds

of his activity. What programs are implemented may be more realistically determined by the level of local appropriations than by office policy. (Almost 60 percent of the offices responding to the NCPM survey reported that 90 percent or more of their funding was received from the county.) The resources that are available and how they are allocated within the office not only has a fundamental bearing on the prosecutor's ability to perform his duties as defined by the state but also sets performance priorities according to his personal policy. These policy implications are the basis for part III.

The last factor affecting prosecution is the type of criminal justice system in which the prosecutor must work, particularly the type of court system. From the prosecutor's perspective, the problems of intake, review, case preparation, and disposition are compounded or minimized by these systems. If many police agencies provide crime reports of varying quality, the quality of charging has to be affected. If lower courts are not "courts of record," the prosecutor must anticipate heavier caseloads resulting from *trial de novo* appeals. If courtroom capacity is not available to handle the existing caseload, the prosecutor may be forced into plea bargaining at levels he would not accept under more favorable circumstances. If judicial districts exist and the prosecutor has county jurisdiction only, more fragmentation occurs. The absence or presence of the use of a grand jury, the characteristics of the defense bar, and even the type of docketing system all temper the prosecutor's role and distinguish one prosecutor's office from another.

Internalizing the Prosecution Function

A key characteristic of the American local prosecutor is the independent source of power he exercises as a result of his locally elected status. He enjoys an unreviewable discretionary power to prosecute, a power that has been consistently upheld by the courts. It is this dimension of his role that gives birth to the most problematical aspects of his existence and raises issues fundamental to our democratic form of government. As an elected official, his duty is to respond to the community's values and mores. His discretionary power, if exercised, reflects not only political influences but, more importantly, the social environment. The extent to which charging policies and discretionary power color the character of prosecution and American criminal justice is the subject examined in part III.

Part III explores the most prevalent responses by the prosecutor to his environment: a traditional, conservative, legal response; a discretionary, interpretive response; and a policy-making response that extends the power derived from an elected status. These categories are not necessarily mutually exclusive but exist along a continuum of increased discretion. For purposes of this analysis, they will be treated separately, since each points up important distinctions.

In 1972, the NCPM surveyed a small group of prosecutors attending a National District Attorneys Association meeting to test their perceptions of their jobs. The results of that informal experiment were insightful. The survey revealed that the original expectations of newly elected prosecutors were to view their role as lawyers and their primary function as prosecuting criminal cases. As the elected prosecutors gained experience and time in office, they saw themselves assuming more administrative and management duties, and finally they begin to perceive their role as leaders in the community.

Varying interpretations of prosecutorial roles and responsibilities naturally occur. Depending on his experience or predilection, a prosecutor may view himself primarily as an officer of the court or, alternatively, as an agent of a law enforcement agency. It is not uncommon to find a prosecutor who is unaware of his discretionary authority and responsibility. This naiveté was exposed during a question-and-answer exchange between prosecutors attending a statewide seminar in the midwest. A small-office prosecutor complained about the quality of the reports he received from the sheriff. They were so poorly prepared that he did not have enough information to try the case. His question to the panel was, "What should I do?" Patrick Leahy, then State's Attorney from Burlington, Vermont (now a U.S. Senator), responded, "Have you considered not prosecuting?" With obvious surprise, the prosecutor asked, "Can I do that?"

A conservative legalistic approach to prosecution is, to a certain extent, the safest response the prosecutor can make to his environment. It is an approach that requires little effort to justify. This response is sanctioned by the standards of the American Bar Association (ABA), the ethics committee of the local legal society, the judiciary, and the law enforcement agencies. The weakness of this approach is that the prosecutor is not truly protecting the interests of the public or moving to improve the law. He is, rather, providing only a minimal level of service with respect to his inherent powers.

A more dynamic approach is the discretionary, interpretive response, wherein the prosecutor accepts the discretionary power inherent in his position. The amount of discretion and the extent of control of that discretion vary from office to office. The first and most important area of the prosecutor's discretionary power is the decision to charge a defendant with a crime. The policies concerned with that decision are the focus of attention in this book. In some offices, the charging policy is published and disseminated to all assistants, and the charging decisions are monitored. In other offices there are no articulated charging policies and no controls on the assistant's discretion. When the prosecutor responds in an interpretive manner, evaluating cases for prosecution, he broadens his authority and widens his role. For the evaluation of the case, the prosecutor assumes a quasi-judicial role. Once he has decided to accept the case for prosecution, he assumes an adversary role.

The exercise of discretionary power, particularly at intake, not only influences the quality and quantity of work flowing into the criminal courts but also requires that the prosecutor expand the perception of his role to include managerial or executive characteristics.

The prosecutor assumes his most powerful position when he uses the independence bestowed on him by his elected status to exercise leadership beyond processing the criminal case docket. This response is uniquely characteristic of the American prosecutor. The independent source of power given him as an elected official not only makes him responsive to the desires of his constituency but also permits him the opportunity to influence social, economic, legal, or political changes in his community. The advantages lie in the potential benefits for improving welfare in the community. These leadership activities can include giving drug-abuse lectures to schoolchildren, initiating basic consumer-protection programs, or operating diversion programs. However, this response is not without its drawbacks because it exposes the active prosecutor to criticism. It has both the greatest potential for exercise of political power and the greatest potential for partisan attack.

The approach followed in this book has been to integrate knowledge about the prosecutor—his genesis and historical development, the type of power and discretion that is unique to his office, and the external forces that affect his operation—to define his role in American criminal justice today. In many ways, the identity of the American prosecutor is only now beginning to be sorted out. The picture presented here represents not only the efforts expended by the author during this fellowship but also the results of almost ten years of work and research in this field.

Structure of the Book

The book's format reflects the developmental approach taken to describe the American prosecutor. Part I, which is quite extensive, chronicles the origins and development of the prosecutor in this country. It demonstrates that the office of the prosecutor is a logical and consistent outgrowth of the American concept of justice. Part II examines several of the external factors that affect the prosecutor and looks at how some of the major social and demographic trends in this country have also had specific impacts on prosecution. It specifies the large amount of diversity that exists in prosecution and destroys some of the more well-recognized stereotypes. Part II also focuses in on the internal functions of prosecution and examines the way in which the office operates within the criminal justice process. It examines the exercise of discretion at various processing points—intake, accusation, trial, and postconviction. It looks at the prosecutor's relationship

with defense counsel and the effect that that relationship can have on case processing.

Part III includes an examination of prosecutorial policy and how the exercise of discretion affects the character and nature of the application of the law. It is derived, in large part, from research done during a National Evaluation Phase I Project on this topic. It sets out the typology that was developed during that project and expands on it through the use of three case studies of prosecutors whose styles and approaches to prosecution are vastly different from one another. These case studies should demonstrate the existing diversity in prosecution and the wide-ranging influence it has on the system of criminal justice. Part IV summarizes the issues raised in the preceding chapters, offers some preliminary findings, and suggests areas for further research.