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Prosecutorial Discretion

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Discretion within the criminal justice system is “the lawful ability of an agent of government to exercise choice in making a decision” (Neubauer 1999: 17). With regard to the office of the prosecutor, such choices include whether to begin an investigation, instruct the police to make an arrest, recommend release on bail, reduce or dismiss charges, present a case to a grand jury, offer a negotiated plea, make a sentencing recommendation, and in the most serious cases, seek the death penalty. While some federal and state prosecutors handle civil suits, the importance and power of prosecutorial discretion is most apparent in the functioning of local prosecutors who represent the citizens in their jurisdictions against people accused of crimes. The choices such prosecutors make have a profound impact on the lives of defendants and victims, and the criminal justice system as a whole.

Gatekeepers to the Criminal Courts

Prosecutors have been referred to as “the most influential of the courthouse actors” (Neubauer 1999: 9), but their role can begin long before a criminal case reaches the courthouse. While the role of the prosecutor is often thought of as beginning only after an arrest has been made, prosecutors sometimes directly investigate allegations of criminal activity. Such investigations may be conducted by the prosecutor's staff or the police, or may involve the two working together. A prosecutor decides which complaints will be investigated and the extent of that investigation. Only those that the prosecutor decides warrant further attention have the potential to enter the court system. If an investigation does not reveal evidence that the prosecutor feels is sufficient to warrant further action, the suspect does not become a criminal defendant. In most cases, whether guilty or innocent, suspects will not even know that they have been under investigation. Complex cases involving organized crime or white-collar offenses often begin as investigations within the prosecutor's office. In such cases, only after evidence has been collected and successfully presented to a grand jury for an indictment do warrants issue and arrests occur.

The grand jury is one of the oldest Anglo American criminal justice institutions. Although abolished in the United Kingdom, it has been retained in most U.S. states. Ideally, the grand jury is an independent mechanism for screening the prosecution's evidence

in felony cases. In practice, however, whether an indictment is issued is very much influenced by the prosecutor: It is the prosecutor who decides whether to place a case before the grand jury, which evidence to present, and how it is presented. And since at trial there must be enough evidence to sustain a finding of guilt beyond a reasonable doubt, the prosecutor always focuses on evidence that indicates guilt.

In order to determine the charges in a given case, a prosecutor must have a working knowledge of the criminal statutes in his or her jurisdiction, because in order to sustain a conviction the available evidence must match the requirements of the law. If the alleged actions fit the definition of more than one offense, it is the prosecutor who decides which charges are most appropriate. Indictments may contain multiple charges and counts, and some prosecutors have been accused of overcharging defendants in order to induce a plea bargain.

Little is known about the inner workings of grand juries, because as a general rule the grand jury meets in secret. Multiple factors may affect a prosecutor's decision to present a case to the grand jury. It is commonly believed that grand juries follow a prosecutor's direction regarding case outcomes. Some states allow [p. 1280 ↓] prosecutors to file formal charges against a defendant without the input of a grand jury. Instead, the charges appear in a document called a prosecutor's information, and are for the most part limited only by the available evidence. This is true whether the case was initiated by a prosecutor or the police. Absent grand jury presentation of a case, or failing an indictment if the case is presented, charges are not filed.

Pretrial Decisions

Once an arrest is made, prosecutorial discretion plays a major role in determining how a criminal case will proceed. Prosecutors review the available evidence to determine what charges should be pursued, what recommendations should be made regarding the defendant's pretrial release, and whether the case should be resolved through a negotiated plea or taken to trial.

The Bureau of Justice Statistics indicates that just over 50 percent of state felony arrests result in a determination of guilt or innocence. of those that do not move forward,

almost 25 percent are diverted or rejected by the prosecutor at an initial screening; an additional 21 percent are dismissed in court. of those cases that proceed, in most jurisdictions nearly 90 percent are resolved by a guilty plea. Only a small number of cases go to trial; the majority of these result in conviction.

Most prosecutors agree that the primary legal factor affecting the processing of a case, following arrest, is the sufficiency of the evidence. In the preliminary stages of processing, the concern is with the existence of probable cause: facts that make it more likely than not that a crime has been committed and that the arrestee was involved in that crime. If there is no probable cause, additional investigation is initiated or the case is dismissed.

Evidentiary issues may also result in charges being reduced from felonies to misdemeanors. "Downgrading a charge" results in a case being diverted from a major trial court, where the accused may face a significant period of incarceration, to a lower court, where a fine, probation, or a short jail term is the likely sentence. Defendants who have their charges reduced avoid the social stigma and loss of civil liberties (e.g., the right to vote or obtain certain professional licenses) that may attach to convicted felons.

Individual office policy and practice differ with regard to the disposition of cases that are considered legally weak. Some prosecutors attempt to eliminate such cases before formal charges are filed; others weed them out later in the process. One study of incoming cases in New York County revealed that only 2 percent of cases presented by the police are rejected before the filing of formal charges; in Los Angeles County, prosecutors reject 35 percent of cases before formal charges are filed. In New York County, 40 percent of cases are dismissed following the filing of formal charges, compared with only 10 percent in Los Angeles. In a study of Los Angeles prosecutors, 50 percent said they would file a formal complaint only if they thought the case would probably be won at trial; 30 percent said they would file formal charges even if they thought the case would be lost. Only 20 percent said they would file a complaint even if they thought the case would not survive a preliminary hearing (a court proceeding in which a judge decides if there is sufficient probable cause to move the case forward toward trial).

For those cases that are believed strong enough to proceed, a decision must be made as to where the defendant will spend the time awaiting trial. The prosecutor may recommend (or not oppose) that the defendant be released on his or her own recognizance, post bail, or be held in jail. A recommendation that a defendant not be permitted to post bond is generally based on the belief that the defendant is a flight risk, or presents a danger to the community. The latter, preventative detention, is expressly permitted by the U.S. Supreme Court. Where a defendant spends his or her pretrial time is important. A study conducted by the Vera Institute of Justice in New York City found that defendants held in jail prior to trial stood a greater likelihood of conviction than did those who had been released on bail. On the other hand, if a defendant presents a threat to victims or witnesses, pretrial confinement significantly reduces that risk.

Negotiated Pleas

The breadth of prosecutorial power stems from a number of court cases dating back to 1833. An affirmation of this broad power is contained in the Illinois Court of Appeals decision in *People v. Wabash, St. Louis and Pacific Railroad* (1882) in which the court noted that the prosecutor “is charged by law with large discretion in prosecuting offenders against the law. He may commence public prosecutions ... and may discontinue them when, in his judgment the ends of justice are satisfied.”

Prosecutors cannot pursue every case that comes to [p. 1281 ↓] their attention, let alone take each one to trial. In the interest of judiciously handling the high volume of cases that come to many offices, and consistent with their broad discretion, prosecutors may enter into agreements with defense attorneys about the resolution of charges pending against criminal defendants. These plea bargains allow prosecutors and defense attorneys to agree to a reduced or modified plea that spares the state the cost of a trial and guarantees the defendant a sentence more lenient than the original charge warranted.

Over time the name of these discussions and the ultimate agreement reached has changed. Most prosecutors' offices now make reference to a negotiated plea when a defendant agrees to plead guilty in exchange for some concession by the prosecutor. This arrangement typically involves a charge reduction, removal of a charge, or

some sentencing leniency. "Negotiation" describes what occurs more accurately than "bargaining," because such discussions often involve a series of offers by the prosecution and counteroffers by the defense. In addition, negotiated pleas may not truly amount to a bargain when viewed from differing perspectives. For example, in the face of strong evidence, a defendant who is in fact innocent may accept a reduced sentence in exchange for a guilty plea. Other defendants may plead guilty to a lesser charge even though the evidence against them was obtained in violation of constitutional guarantees, or defendants may plead guilty to lesser charges and receive lighter sentences than their victims feel they deserve. At the other extreme, by overcharging (e.g., charging murder instead of manslaughter or charging multiple counts), a prosecutor may coerce a defendant into pleading guilty to a lower charge or fewer counts. The threat that going to trial might result in multiple convictions and harsher penalties than those offered convinces some defendants to relinquish their right to a jury trial.

In some jurisdictions, the prosecutor's office may file the most serious charges warranted by the facts and evidence. The prosecutor can then lower the charge to one that carries a lesser penalty, in exchange for a guilty plea. In other cases, the prosecutor may agree to drop other charges pending against the defendant in exchange for a guilty plea. If charged with a number of different offenses arising from the same incident, an offender may plead guilty to one of the lesser offenses in exchange for dropping the more serious ones. Or, if there are a number of indictments pending against the defendant for the same type of crime, committed on different occasions, a guilty plea to one may result in the others being dropped.

Discussions between the prosecution and the defense also typically involve an agreement by the prosecutor to recommend a lighter sentence in exchange for a guilty plea. Although the agreement is not binding, in practice the sentencing judge usually accepts the recommendation. As a matter of policy, some offices require that before entering into a plea agreement the prosecutor must first explain the agreement to the victim or get the victim's approval of the revised charge or sentence.

Plea agreements represent a significant portion of the discretion exercised by prosecutors. As long as the prosecutor's recommendations fit within statutory guidelines, there is little other control over what offer is made to which defendant.

Trial and Postconviction Decisions

Although procedural rules, rules of evidence, and professional ethics provide some constraints, prosecutors have broad discretion in how they conduct trials. Typically, only the cases with the strongest evidence go to trial, but prosecutors have considerable leeway in how they present that evidence; testimony and physical exhibits may be introduced as the prosecutor sees fit, and in any order.

At the conclusion of a successful trial, the prosecuting attorney typically makes a sentencing recommendation to the judge. Usually this includes a request that the judge impose a greater sentence than any offered during pretrial negotiations. Although this recommendation is not binding, rarely does the prosecutor leave the sentencing decision totally to the discretion of the trial judge.

Factors Influencing Prosecutorial Decision Making

Although the most visible prosecution work takes place in the courthouse, the prosecutor is part of the executive branch of government, not the judiciary. As a law enforcer and an officer of the court, prosecutors are expected to “dispense justice by weighing the available penalties provided for certain crimes and then using their discretion to ‘do justice,’ perhaps not by prosecuting” (Adler et al. 2000: 251). Hence the strength of evidence is not the sole criterion by which prosecutors make the decision to prosecute. Other factors include [p. 1282 ↓] the degree of physical injury to the victim, the value of property loss, whether a weapon was used, the nature and extent of the suspect's criminal record, whether the suspect has confessed, and the relationship between the victim and the accused. A prosecutor is more inclined to file charges, not reduce charges, or continue prosecution after the initial charges have been filed if the victim has been seriously injured or killed, if a weapon (particularly a firearm) was involved in the crime, or if the accused has a prior record of serious arrests.

Victims and their relationship to defendants have differing effects on prosecutorial decision making. For example, one study that examined 200 domestic assault cases found that “victim wishes” accounted for nearly half of those in which charges were not filed. A study of New York County prosecutors found that district attorneys often judge the victim's credibility and use this assessment in weighing prosecution decisions. If a prosecutor feels that the victim is less than credible, the case is likely to be downgraded to a lower charge or rejected altogether. The opposite is also true: A prosecutor might be willing to take a case to trial even if the evidence is less than optimal if the case involves a very credible witness who has been seriously injured. However, if it appears that a victim may have provoked the actions leading to his or her victimization, or otherwise played a role in the alleged crime, there is a decreased likelihood that the case will be taken to trial. There are also indications that personal characteristics are used by prosecutors to decide whether to prosecute. For example, in some locations and for some charges, women are less likely to be prosecuted than men. Research has also shown that some prosecutors are more likely to request the death penalty in cases where the murder victim is white.

It has been noted that prosecutors sometimes act as “political enforcers” (Adler et al. 2000: 251), aggressively prosecuting or failing to prosecute certain kinds of offenses, consistent with the politics of the time. Prosecutors may work with police and other law enforcement agents to target certain kinds of offenders. Over time these have included career criminals, violent criminals, drug offenders, prostitutes, and white-collar offenders. These cases receive considerable attention from prosecutors at one point in time but may receive less attention when they are not the political focus.

Prosecutorial Immunity

While the majority of cases enter the criminal justice system via an initial investigation or arrest conducted by police, in a small percentage of cases police officers have difficulty deciding whether certain conduct amounts to an offense for which they should make an arrest. At these times, they may turn to the prosecutor for advice. This exercise of prosecutorial discretion has led to litigation over what should happen if the prosecutor makes a mistake when giving such advice. In *Burns v. Reed* (1991), the U.S. Supreme Court ruled that while prosecutors have wide discretion in initiating prosecutions and

presenting the state's case, they are not immune from civil suits stemming from the investigative and administrative aspects of their jobs. Writing for the Court, Justice Byron White noted that “public officials should be made to hesitate when giving advice that would violate statutory or constitutional rights.” Under the common law, prosecutors enjoyed absolute immunity from civil suit for actions performed in an official capacity. This immunity even extended to knowingly using false testimony before a grand jury or at trial. Advocates of absolute immunity argue that without it prosecutors might be too intimidated by the threat of lawsuits to adequately do their jobs. Opponents of absolute immunity note that violations of the law must be prosecuted in a way that guarantees that the rights of defendants are respected and protected. While prosecutors continue to be immune from civil suits based on actions taken in reference to trial and pretrial proceedings, in *Burns v. Reed* the Supreme Court held that absolute immunity does not protect a prosecutor who gives faulty legal advice to the police. The extent to which the investigative actions of prosecutors may expose them to civil liability is somewhat unsettled.

Abuse of Discretion

In a 1933 article that has become a classic on the role of the prosecutor, Newman Baker wrote. “On paper, the rules for the administration of the criminal law provide that all offenders should be treated equally—no defendant should receive more or less punishment than another who has committed a similar offense and the rich and powerful should be prosecuted as vigorously as the poor and weak. Actually, however, whether or not a particular offender is prosecuted depends very largely upon the personal reactions (or judgment) of the prosecutor” (1933: 770).

In 1996, the U.S. Supreme Court case *United States v. Armstrong* focused attention on the issue of racebased prosecutorial strategies in drug cases. The defendants [p. 1283 ↓] alleged that the U.S. attorney's office in Los Angeles engaged in “selective prosecution” based on race. Attorneys for the defendants showed that from 1990 to 1992, in Los Angeles, all twenty-four Los Angeles crack cocaine cases tried in federal court during the same period involved African American defendants. By contrast, all 222 white defendants charged with crack cocaine offenses during the same period had been prosecuted in state court, enabling them to avoid the harsher federal sentencing laws.

This occurred in other areas of the country as well. In more than half of the federal court districts handling crack cocaine cases, only minorities had been prosecuted. A 1992 study revealed that no white defendants had been prosecuted federally on crack cocaine charges in seventeen states and many cities, including Los Angeles, Boston, Denver, Chicago, Miami, and Dallas. At the time of the study only one white had been convicted in federal court in California, two in Texas, three in New York, and two in Pennsylvania—this despite the fact that according to a 1995 report, whites were 52 percent of known crack cocaine users. Although the appeal in *United States v. Armstrong* was not successful, the Supreme Court has said that a prosecutor's discretion is “subject to constitutional restraints” and that prosecutorial decisions cannot intentionally be based on race.

A 1991 analysis of 800 cases tried in the Eighth Circuit Court of Appeals sheds additional light on whether blacks are disadvantaged by prosecutorial decisions. The findings revealed that federal prosecutors routinely charged more black men than white men with offenses that called for mandatory sentences. It was also found that prosecutors were less inclined to offer plea bargains to black defendants, and that when plea bargains were offered they were less generous than those offered to white defendants. As a result blacks received sentences 49 percent longer than those of whites convicted of similar offenses. The U.S. Sentencing Commission (an advisory committee created by Congress in 1984 to develop federal sentencing guidelines that would, among other things, reduce sentencing disparity) found that black defendants could reduce their terms only if they turned in accomplices.

Prosecutorial discretion also seems to work to the disadvantage of black defendants in murder cases, especially when the victim is white. In such cases, prosecutors request the death penalty 70 percent of the time, compared with just 32 percent of cases involving a white defendant and a white victim and only 15 percent of cases involving a black defendant and a black victim. In southern U.S. states, the ratios are even more skewed. For example, the Baldus study (Baldus et al. 1990), a comprehensive examination of more than 2,000 murder cases, found that Georgia prosecutors sought the death penalty in 70 percent of cases involving black defendants and white victims but in only 19 percent of cases in which the victim was black and the defendant white. Studies have also documented apparent racial bias in pretrial detention requests (both

adult and juvenile) and in sentencing recommendations under three strikes legislation. These studies have led some to question the impartiality of the U.S. justice system.

Summary

Prosecutors have tremendous discretion in determining how cases that come to their attention will be handled. They may conduct or decline their own investigations into accusations of criminal wrongdoing. They may reduce or dismiss charges that are brought by the police. Through grand jury presentation, or the lack thereof, they can determine whether a defendant will face a prison term or be subject only to a fine, probation, or short jail term. In addition, they can determine if a particular defendant will spend the time awaiting trial at home or in a jail cell.

The decisions a prosecutor makes have the potential to positively or negatively affect defendants, victims, and society. Decisions that result in physical harm to victims or substantial interference with a defendant's constitutional rights can have negative effects on a prosecutor's career. The likelihood of poor decisions by prosecutors is high, given that many prosecutors enter the profession straight out of law school and are given few, if any, guidelines for making decisions about the cases they handle.

Although input from victims is sometimes solicited in making decisions about a case, the strength of the evidence is the primary influence on a prosecutor's actions. There are, however, indications that some prosecutorial decision making is influenced by other factors, some of which are constitutionally impermissible.

Concern about prosecutorial discretion is magnified because prosecutorial decisions are rarely subject to review. In many instances, courts give great deference to prosecutors. Adler et al. note that, "Advocates of discretion argue that a trial effectively serves as a review of the prosecutor's actions. If the prosecutor acted improperly or brought charges without justification, the defendant will be acquitted. But this is small consolation [p. 1284 ↓] to the innocent person who has been charged with a crime and possibly placed in a detention facility while awaiting trial" (2000: 256).

Numerous suggestions have been offered to control prosecutorial discretion, including the propagation of written guidelines, similar to the sentencing guidelines for the judiciary. As Breitel (1960: 427) points out, oversight by experienced prosecutors and periodic review of office policies and practices have also been suggested to ensure that the exercise of prosecutorial discretion avoids “the unequal, the arbitrary, the discriminatory and the oppressive.”

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See also

- [Due Process](#)
- [Grand Jury](#)
- [Plea Bargaining](#)
- [Procedural Justice](#)
- [Prosecutor](#)

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