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THE PROSECUTOR CONSTRAINED BY HIS ENVIRONMENT: A NEW LOOK AT DISCRETIONARY JUSTICE IN THE UNITED STATES*

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I. INTRODUCTION

The broad discretionary power of the American prosecutor subjects the office to criticism and enshrouds the prosecutorial function in controversy. However, the criticism usually is overbroad and lacks factual support. Is a first offender convicted of aggravated assault treated differently in Brooklyn, New York, than in New Orleans, Louisiana? Is a shoplifting suspect found with a gun in her purse treated the same in Boulder, Colorado, as in Detroit, Michigan? Such questions have gone unanswered and, indeed, unasked, by any comprehensive survey of prosecutorial discretion in America.

This study examines the spectrum of state prosecutorial styles in America's urban areas. Our purpose is to identify those differences which affect the uniformity, the quality, and the equality of justice administered by local prosecutors.

In order to examine and analyze policy and the dimensions of uniformity and consistency in prosecutorial decisionmaking, ten geographically dispersed and otherwise diverse, large urban prosecutors' offices participated in this study.¹ This Article outlines some findings and con-

* The data presented and the views expressed are solely the responsibility of the authors and do not reflect the official positions, policies, or points of view of the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, or the Department of Justice.

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¹ The participating prosecutorial offices, in order of jurisdictional size were: Wayne

clusions of Phase One of the prosecutorial decisionmaking research project conducted by the Bureau of Social Science Research (BSSR).

The research findings reveal several striking patterns. First, in some cases the external environment imposes substantial limits on a prosecutor's ability to act. Second, the prosecutorial policy in force, perhaps dictated in part by the environment, significantly affects the so-called "discretionary" decisions made by the prosecutors' offices studied. Third, the selection and implementation through office organization of a prosecution policy, or the acceptance of an environmentally mandated office organizational structure is extremely significant: it represents a discretionary judgment. The importance of organizational discretion hitherto was unrecognized because no prior study has attempted an analysis of major prosecutors offices' practices from case intake to post-conviction disposition. This research seeks to fill that gap.

The study concludes that prosecutors in America cannot be discussed in universal terms. Whether in a phillipic about unbridled prosecutorial discretion, a diatribe against plea bargaining, or a learned discourse on the charging decision, most commentators fail to recognize that prosecutors are hardly homogenous. This study reveals that prosecution in American states is marked by diversity. The differences in prosecution policy are often mandated by environmental factors over which the individual prosecutor has no control. Through an analysis of the external factors which prosecutors cannot control, this study explains how they exercise discretion, and why they execute policy that often differs significantly from one jurisdiction to another.

This Article will begin by considering why policy became an issue in the debate over prosecutorial discretion. A brief description of the study's methodology prefaces a discussion of the policies and organizational styles identified. This Article concludes with a review of the continuing aspects of the BSSR research project on prosecutorial decisionmaking.

II. PROSECUTORIAL DISCRETION

Discretion is an essential component of the American system of criminal justice. It is the element which makes the system uniquely American—the flexible and individualized treatment of persons accused of crimes whereby each accused suspect's rights to confrontation, counsel, and a speedy trial, among other things, are secured. Yet this discre-

County (Detroit), Michigan; Kings County (Brooklyn), New York; Eleventh Judicial Circuit (Miami), Florida; San Diego County, California; King County (Seattle), Washington; Orleans Parish, Louisiana; 31st Judicial Circuit (Crown Point), Indiana; Salt Lake County, Utah; The City of Norfolk, Virginia; and 20th District (Boulder), Colorado.

tionary element is also the shibboleth of critics who question whether a system which handles like cases differently provides due process and equal protection to the defendant.

Policy as articulated by rules, regulations, standards, and guidelines is a key to measuring abuse of discretion. As Kenneth Culp Davis observed:

Discretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder. In a government of men and of laws, the portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is a government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules.²

Encouraged by Davis and other critics³ during the past decade, both the American Bar Association (ABA) and the National District Attorneys Association (NDAA) promulgated standards relating to prosecution.⁴ The ABA standards address the ethical, professional, and legal responsibilities of the prosecutor in the charging process and emphasize the requirement for policy manuals to encourage the uniform and consistent application of policy.⁵ The NDAA standards attempt to acknowledge diversity in that the problems faced by a one-man prosecutor's office differ significantly from those confronted by a large urban office staffed by three hundred or more attorneys. Nevertheless, both sets of guidelines support the proposition that a carefully planned and articulated policy is essential as a guide for the prosecutor in the exercise of discretion.

This is not to say that the ABA or the NDAA standards give prosecutors rigid rules to follow in making discretionary decisions. According to the ABA, "[t]he public interest is best served and evenhanded justice best dispensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice."⁶

² K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 25 (1971).

³ See generally *id.* See also F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1969); Halligan, *A Political Economy of Prosecutorial Discretion*, 5 AM. J. CRIM. L. 2, 4 (1977); Reiss, *Discretionary Justice*, in *HANDBOOK OF CRIMINOLOGY* 693 (D. Glaser ed. 1974); Rosett, *Discretion, Severity, and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 16 (1972).

⁴ ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971) [hereinafter cited as ABA STANDARDS]; NDAA NATIONAL PROSECUTION STANDARDS (1977). In the federal system, the United States Attorney General recently released guidelines to channel the discretion of federal prosecutors. See UNITED STATES DEP'T OF JUSTICE, *PRINCIPLES OF FEDERAL PROSECUTION* (July 28, 1980).

⁵ ABA STANDARDS, *supra* note 4, § 2.5, at 64-66.

⁶ *Id.* at 94.

The general interest in guidelines encouraged a spate of legislation to curb the exercise of discretion by the sentencing judges. The debate over mandatory sentencing laws served both to highlight the importance of policy to govern discretion and to increase criticism of how the prosecutor exercised his. Senator Edward Kennedy observes that the problems which stem from uncontrolled judicial discretion "are subordinate to a fundamental flaw in our current system: the lack of an articulated philosophy of correction that expresses the general purposes and goals underlying the sentencing of federal offenders."⁷ Detractors of the new laws try to pin the problem on the prosecutor:

[B]ecause it is always easier to beat dead horses than to tame living ones, many commentators still direct their criticisms at the unfettered discretion of the sentencing judge. In continuing to whip this crippled horse, critics themselves may have donned a set of intellectual blinders that causes them to miss other less visible variables, such as the role of the prosecutor⁸

Perhaps it was easier to attack discretion at sentencing, the end of the process, than at the gatekeeping threshold where the prosecutor made the charging decision. Sentencing decisions are relatively quantifiable: it is simple to count convicts, parolees, and those on probation. Tabulating the cases settled, pled out, dropped, or never charged, and understanding the reasons for those decisions is a monumental and for the most part previously unattempted task. For decades generalized attacks focused on the nature of the prosecutors' power⁹ but no systematic information was available on how prosecutors abused their power. Nor were statistics available measuring how many assistants made discretionary decisions as their superiors would have or followed whatever directions they might have received regarding case handling. Commentators assumed the prosecutor had discretion but it was not clear how he exercised it. No one presumed that in some cases the prosecutor's actions might be attributable to circumstances beyond his control.

⁷ Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 364 (1979).

⁸ Coffee, *Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission*, 66 GEO. L. J. 975, 979 (1978).

⁹ Nearly thirty years ago, then Attorney General, later Justice Robert Jackson, observed: The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have persons investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled and unveiled intimations. . . . He may dismiss the case before trial, in which case the defense never has a chance to be heard. . . . If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants.

K. DAVIS, *supra* note 2, at 190.

III. THE STUDY

Pursuant to an LEAA funded grant, BSSR undertook a study of prosecutorial decisionmaking and the effect of the external environment on prosecution in the United States through an examination of ten jurisdictions.¹⁰ BSSR attempted to select sites randomly while attaining geographic dispersal and diversity among the sites selected. The format of the study required that the prosecutor be willing to participate; that his office keep statistical records which could be utilized by the research team;¹¹ and that the jurisdiction serve a population of at least 150,000 persons.

Accordingly, the prosecutors volunteering to participate in the study represented large urban areas ranging in population size from 165,000 to more than 2.5 million. The participating offices presented ten state environments for examination and as many different local criminal justice system settings.¹²

¹⁰ L.E.A.A. Grant No. 78-NI-AX-0006, from the National Institute of Law Enforcement and Criminal Justice/Law Enforcement Assistance Administration ("National Institute") funded this project. Reports of the findings to date include: J. JACOBY & L. MELLON, POLICY ANALYSIS FOR PROSECUTION (1979) [hereinafter cited as PAP]; J. JACOBY & L. MELLON, POLICY ANALYSIS FOR PROSECUTION EXECUTIVE SUMMARY (1979) [hereinafter cited as EX. SUM.]; J. JACOBY, E. RATLEDGE & S. TURNER, RESEARCH ON PROSECUTORIAL DECISION-MAKING PHASE 1: FINAL REPORT (1979).

¹¹ A lack of quantitative information hampered the study. Although all participants kept records to which the research team had free access, among the ten offices studied only one, the Wayne County (Detroit) Prosecuting Attorney, had case disposition data available in a form which could be readily incorporated into the study by the research team. As a result, quantitative information to support the qualitative assessments made by the researchers was, for the most part, simply unavailable.

¹² The following table offers further information about the participating offices and the communities in which they are based. Table source: PAP, *supra* note 10, at 155; EX. SUM. *supra* note 10, at 29.

SUMMARY OF SELECTED CRIMINAL JUSTICE SYSTEM CHARACTERISTICS

	Population (1,000s)	Principal City	Population of Principal City (1,000s)	Felony Caseload	Number of Assistants	Number of Branch Offices	Number of Police Agencies	Accusatory Instrument	Indigent Defense	Court Structure	Juris. Other Than Criminal	Trial De Novo
Wayne Co., MI	2,518.8	Detroit	1,335.1	18,000	126	1	44	Inf. A.C.	Mixed ^b	Yes	Yes	
Kings Co., NY	2,411.0	Brooklyn	2,411.0	39,500	305	0	1	Ind. P.D.	Two-Tier	No	Yes	
San Diego Co., CA	1,594.0	San Diego	774.0	8,500	153	5	19	Inf. A.C.	Two-Tier	Yes	No	
Dade Co., FL	1,445.7	Miami	365.1	11,000	100	0	26	Inf. P.D.	Two-Tier	Yes	No	
King Co., WA	1,149.2	Seattle	487.1	6,300	52	0	36	Inf. P.D.	Two-Tier	Yes	Yes	

The researchers included members of the project staff and consultants combining experience in law, management, systems analysis, prosecution, statistics, and related areas of law and social science.¹³ For site visits to each jurisdiction, researchers formed teams of three to five persons depending on the size of the office. At each site one individual collected quantitative data. The other team members gathered descriptive or qualitative information through lengthy interviews with decisionmakers in each office and with other members of the local criminal justice system.¹⁴ Frequently, articulated perceptions of what was hap-

SUMMARY OF SELECTED CRIMINAL JUSTICE SYSTEM CHARACTERISTICS

	Population (1,000s)	Principal City	Population of Principal City (1,000s)	Felony Caseload	Number of Assistants	Number of Branch Offices	Number of Police Agencies	Accusatory Instrument	Indigent Defense	Court Structure	Juris. Other Than Criminal	Trial De Novo
Orleans Parish, LA	562.4	New Orleans	562.4	6,000	61	0	4	Inf. P.D.	Unified	Yes	No	
Lake Co., IN	546.0	Gary	167.5	1,000	40 ^a	6	7	Inf. P.D.	Multiple ^c	Yes	No	
Salt Lake Co., UT	512.9	Salt Lake City	169.9	2,400	24	2	12	Inf. P.D.	Two-Tier	Yes	Yes	
Norfolk, VA	285.5	Norfolk	285.5	4,500	14	0	1	Ind. A.C.	Two-Tier	Yes	No	
Boulder Co., CO	165.5	Boulder	78.6	500	12	1	5	Inf. P.D.	Two-Tier	Yes	No	

NOTE: Felony caseload figures are estimated figures.

a All assistants in Lake County are part-time employees.

b Wayne County has two separate systems. In Detroit, the Recorders Court is a unified court; in the outlying county areas, there is a two-tiered system.

c Lake County has two trial level courts of general jurisdiction, and two lower level courts of overlapping limited jurisdiction.

¹³ The BSSR Project Staff researchers included: Joan E. Jacoby, Leonard R. Mellon, Bruce Dunning, Sharon Biederman, and Kevin Brosch. Consultants included: Dan L. Johnston, Edward C. Ratledge, Stanley H. Turner, and William Wessel.

¹⁴ All site visits occurred during a six-month period: March through August of 1978. The initial phase of each site visit consisted of a thorough interview with the chief prosecuting attorney and his top policymakers. Each interview normally took one and one-half to two hours and featured two researchers asking questions of one decisionmaker. Researchers took written notes as unobtrusively as possible because tape recording is expensive, time-consuming, and considered by some to be fear-provoking. In order to preserve the clarity and accuracy of the written observations, at the end of each day researchers reviewed their notes for: (1) statements or areas needing verification; (2) comprehensibility; (3) completeness, noting exclusions or omissions; (4) need of additional information; and (5) the development of additional lines of questioning. Daily transcription occurred when possible or necessary. Researchers used a standardized form for final reports.

Each on-site visit concluded with a final session with the chief prosecutor. The researchers used this meeting to clarify additional policy questions, to verify the prosecutor's policy or the researchers' perceptions thereof, to explain how the information would be used as docu-

pening in the prosecutors' offices did not coincide precisely with what researchers observed to be the actual practice.

The interviews during the on-site visits identified the predominant policy of the office. In addition, the teams examined and described the communication, transmittal, and implementation procedures for the office's policy.¹⁵ This involved scrutiny of the overall organization of the office and an analysis of procedures at each step of the decisionmaking process from case intake through post-conviction activity.

Moreover, team members strived to be alert to the effect of the external environment on the office. Pursuant to the instructions for on-site observations, the researchers noted where environmental constraints affected the prosecutor's policy and actions. While post-visit comparative analysis was the source of some observations, the instructions encouraged sensitivity to the environmental issue from the beginning.

mentation for a policy and procedures manual, and to seek further assistance with the continuing aspects of the research project.

¹⁵ Researchers observed the following formal and informal methods of policy transmittal in the offices studied.

	ARTICULATED SETTINGS AND MEDIA	NONARTICULATED SETTINGS AND MEDIA
WRITTEN	Policy documents	
	Operating procedures, guidelines, instructions	
	Administration procedures, guidelines, instructions	
	Letters and memoranda	Letters and memoranda
	Recurring reports	
	Reports specified for exceptional situations	Unspecified exceptional reports
UNWRITTEN	Staff meetings/conferences	Casual conferences:
	Verbal reports in specified situations	Rap sessions
		Watercooler/coffee cup meetings
		Hallway meetings and drop-ins
		Lunches
		After-work cocktail hour
		Social occasions
	Car pool conversations	

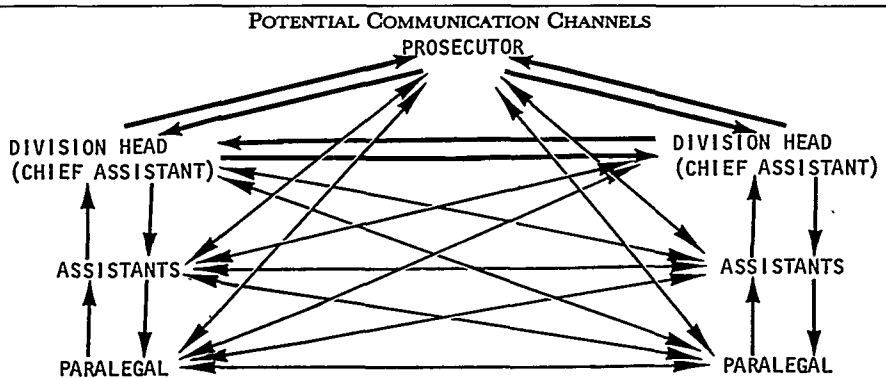
BSSR researchers concluded that the free flow of information tends to produce greater organizational effectiveness, which is to say, more decisions consistent with an articulated decisionmaking policy. They developed the following model for communication maximization within an office.

IV. DESCRIPTIVE ANALYSIS OF ON-SITE FINDINGS

An earlier BSSR research project highlighted the importance of clear prosecutorial policy guidelines at screening or intake, the threshold of the criminal justice process. Intake is generally where a prosecutor's assistants decide whether to drop the case or to file charges, and if the latter course is selected, which charges to file:

Since the charging decisions are the first expression of prosecutorial policy, they must be consistent with what the chief prosecutor hopes to achieve and made uniform by the charging assistants. Arbitrary and capricious decisions can be made by assistants if the prosecutor's policy is not clearly stated and if means are not developed for internal review by those ultimately responsible for the decisions reached.¹⁶

The researchers observed that the prosecutor's policy governing intake sets the tone for the subsequent handling of all cases accepted for prosecution. They identified and classified four basic policy types or models: Legal Sufficiency, System Efficiency, Trial Sufficiency, and Defendant Rehabilitation. The current study confirmed the existence of these policy types and revealed that some prosecutors transfer, or suffer the transfer of, their decisionmaking power (usually to the police) at the screening or intake stage. This transfer results in variations in office structure which may significantly affect the achievement of the chief prosecutor's objectives in a given office. Researchers also found a unit style of operation in some offices wherein each individual assistant had decisionmaking autonomy. Some offices utilized a combination of policies to effectuate the chief prosecutor's objectives; in other offices several different policy styles operated together as the process of switching from one type to another was accomplished. The analytical framework expanded to include the unit and transfer style variations. The following briefly describes the policy types and variations discovered in both re-



¹⁶ J. JACOBY, *THE PROSECUTOR'S CHARGING DECISION: A POLICY PERSPECTIVE* 4 (National Institute of Law Enforcement and Criminal Justice 1977).

search projects.¹⁷

A. LEGAL SUFFICIENCY

The Legal Sufficiency policy is probably the simplest from an organizational perspective. At charging, the case is examined primarily for legal elements and not necessarily for any constitutional or evidentiary issues that may subsequently affect the course of a trial (or any alternative disposition). If the initial complaint (usually a police report) is legally insufficient, that is, the evidence reported does not establish the crime charged, the attorney making the charging decision either orders additional investigation or drops the case.

This policy operated effectively in two very different, large urban offices: Wayne County (Detroit), Michigan, and San Diego, California. Two other jurisdictions participating in the study also displayed elements of a legal sufficiency policy.¹⁸ Thus, four of the five largest offices studied either elected or accepted a Legal Sufficiency approach.

Because screening is incomplete under the Legal Sufficiency policy, a large number of cases meet the minimal requirements of the office and are accepted for prosecution. This could pose serious problems in De-

¹⁷ It should be noted that prosecutors did not think in terms of the strict policy categories set out in the study's typology. The models are an attempt to categorize the policy perceptions of individual prosecutors.

The following chart illustrates the categorization of the participating offices by policy style.

INTAKE STYLE	POLICY	SITE
OFFICE	Legal Sufficiency—	Wayne County (Detroit), Michigan *King County (Seattle), Washington San Diego County, California
	System Efficiency—	*Kings County (Brooklyn), New York
	Defendant Rehabilitation—	Boulder, Colorado
	Trial Sufficiency—	Orleans Parish (New Orleans), Louisiana
TRANSFER		Dade County (Miami), Florida Norfolk, Virginia
UNIT		Salt Lake City, Utah Lake County (Gary), Indiana

Table Source: PAP, *supra* note 10, at 204; Ex. SUM, *supra* note 10, at 32.

* Undergoing change.

¹⁸ Kings County (Brooklyn), New York, discussed at section IV B *infra*, and King County (Seattle), Washington, discussed at section IV E *infra*. Brooklyn made the transition to a System Efficiency policy while the Seattle office suffered from a lack of clear policy.

troit but for two factors—a state statute and the prosecutor's carefully conceived response.

By Michigan law,¹⁹ the prosecutor must approve the issuance of all arrest warrants. Thus, prosecuting attorneys in Wayne County have an opportunity to screen each case at the earliest possible time. In order to make this review as effective as possible the Warrant Section staff consists of five experienced assistant prosecutors, some with more than ten years' service in the office. This arrangement weeds out weak cases before the suspects are even arrested.

As the Warrant Section staffing pattern demonstrates, the Wayne County Prosecuting Attorney's office appears efficiently structured and organized with well developed and documented office procedures. Such organization is essential because the Prosecuting Attorney suffers severe funding deficiencies and, as a result, personnel shortages exist in almost every aspect of his activities. As compared to the national average of 100 felony cases per assistant per year,²⁰ Wayne County assistant prosecutors carry an average of 143 cases each. Only three clerks helped process the 18,000 cases handled in Recorder's Court, the felony court in Detroit. Nevertheless, the Prosecuting Attorney manages his caseload without an apparent backlog in a most adverse environment created by the shortage of personnel.

In contrast to Wayne County, the San Diego District Attorney has vast resources available and employs a large staff of 135 attorneys, 121 investigators, and more than 200 clerical and support staff. Yet despite its large staff, San Diego is one jurisdiction in which plea bargaining is a vital dispositional tool.²¹ Extensive use of plea bargaining is common in a Legal Sufficiency office because it is a necessary tool for eliminating many cases from a fixed capacity court system. In San Diego, for example, charging decisions are made so that some lesser flat sentence is available to a pleading defendant rather than a single, maximum, "top" count. A San Diego Assistant District Attorney discussing this practice indicated that although the office recommends sentences, it does not

¹⁹ MICH. STAT. ANN. § 28.860 (Callaghan 1978).

²⁰ See J. JACOBY, J. ETHRIDGE & J. BOURLAND, FIRST ANNUAL REPORT OF THE NATIONAL CENTER FOR PROSECUTION MANAGEMENT (Nat'l Center for Prosecution Management 1972).

²¹ Approximately 90% of all felony cases are disposed of in San Diego by guilty pleas. Unlike most of the other offices participating in the study, cases are negotiated not in terms of reduced charges, but in terms of whether the District Attorney will oppose "local time." This is an important consideration to the defendant since under California law, CAL. PENAL CODE § 17(b)(4) (West 1970), a prosecutor can file certain crimes as either felonies or misdemeanors. Sentences in such cases can be served either in the state prison or the county jail. Thus, the prosecutor's "no objection to local time" is often as persuasive in plea negotiations as is his decision to charge certain felonies which carry determinate sentences.

sentence bargain. "We charge bargain," he said. However, another Assistant District Attorney in the same office observed, "In view of determinate sentencing, we are sentence bargaining when we dismiss counts and in effect strike allegations in connection with enhancement of punishment and charges."

This is an ironic comment on the position that determinate sentencing is a way of curbing discretion on the part of the judiciary. Often, as in San Diego, the discretion is not curbed; rather, it is transferred to the prosecutor who uses it in charging.

The availability of enhancements in both Detroit and San Diego highlights the significance of the prosecutor's charging decision. An enhancement requires the automatic imposition of a greater punishment under certain circumstances. The classic illustration is the example of a subject arrested for a burglary of a dwelling while in possession of a revolver. In most jurisdictions he can be charged with burglary and the possession of a dangerous weapon or firearm. However, these charges and their attendant possible punishment can be enhanced in those jurisdictions which make it a crime to be armed at the time a felony is committed.

Under California law, enhanced charges may be imposed for the infliction of grave bodily injury, in instances where the defendant is armed, or where the defendant inflicts great injury.²² Michigan law, on the other hand, mandates an automatic two-year prison sentence upon conviction for a crime committed while in possession of a firearm.²³ An assistant prosecutor in Detroit illustrated the difficulty posed by mandatory sentences with this example. A seventeen-year-old girl (first offender) was arrested for shoplifting. In the course of the search incident to arrest, police found a pistol at the bottom of her purse. The fact that the weapon was in her possession mandated a two-year jail term upon charge and conviction. The mandatory nature of these laws has produced new demands for prosecutorial inventiveness to mitigate the inflexibility inherent in predetermined punishments.

B. SYSTEM EFFICIENCY

Another policy common to large urban offices is System Efficiency. A high volume caseload mandates the speedy and early disposition of as many cases as possible. The existence of this policy usually indicates a backlogged court and an overworked prosecutor's office with limited resources. At the time of the site visit, the Kings County (Brooklyn), New York District Attorney's office processed more than 80,000 felony and

²² CAL. PENAL CODE §§ 12022, 12022.7 (West 1980).

²³ MICH. STAT. ANN. § 28.424(2) (Callaghan 1980).

misdeemeanor arrests each year. One of the top assistants in Brooklyn pointed out that of those arrests, about 24,000 were on felony charges. He stated that the office was "not looking to prosecute all cases—we're looking for help in disposing of them." There was a consciousness in the office that cases had to be disposed of in a reasonable, but efficient fashion. The tight, efficient organizational structure was the main reason for success in this monumental task.

As is typical with System Efficiency, the policy articulations of the Brooklyn District Attorney's office had a distinct management flavor. The District Attorney and his chief assistants discussed the goals and the objectives of the office in terms of organization control, efficient management, and accountability.²⁴ This pronounced management emphasis was to be expected from one of the largest prosecutor's offices in the country. In 1978, almost three hundred Assistant District Attorneys worked in the office.

However, a comparison by the research team between the articulated policy and the actual operation of the office revealed a startling contrast: although the office had an expressed policy of System Efficiency, the overwhelming effect of both the volume of cases and a lack of control over intake produced a dispositional pattern more consistent with the Legal Sufficiency model.²⁵ The major impediment to System

²⁴ It is noteworthy that in the interests of efficiency the Brooklyn District Attorney selected different organizational modes for different bureaus. Specialized bureaus exist to prosecute Supreme Court (felony trial court) cases involving Rackets, Narcotics, Major Offenses, Homicide, and Economic Crimes and Consumer Fraud. With the exception of the Economic Crimes and Consumer Fraud Bureau, these bureaus assign cases to individual assistants on a trial team basis, thereby reducing the problems associated with the assembly-line case processing system ordinarily in use.

Some of the smaller bureaus have their own unit style internal organizational procedures for handling cases. In Narcotics, for example, one group of attorneys handles investigations and one group is assigned to trials. Homicide, Narcotics, and Rackets cases are assigned to one Assistant District Attorney, who is responsible for it through all steps of the process. By contrast, in the two largest bureaus in the office, Criminal Court and Supreme Court, attorneys are responsible for all cases heard in specified parts of the respective courts. Thus, in these bureaus the typical case will be handled by several Assistant District Attorneys in the course of its disposition.

²⁵ Statistics from Brooklyn for the last half of 1978 reveal that the majority of cases (85%) were disposed of at the Criminal Court (misdemeanor) level, through either a dismissal or a plea of guilty. Thirty-nine percent resulted in dismissal while 46% ended with a guilty plea. One reason given for such a high dismissal rate was that police filed cases with the Criminal Court prior to scrutiny by the District Attorney's office.

This type of dispositional funnel resulted in little more than 8% of the cases being referred to the grand jury. Thousands of grand jury indictment cases ended with guilty pleas in the Supreme Court. When trials occurred, convictions outnumbered acquittals in a ratio of roughly two to one. In addition, 16% of the cases resulted in dismissals by the court, and 3.3% resulted in supercession, consolidation, or abatement.

These dispositional statistics are not surprising when two factors are considered: the sheer volume of cases processed and the prosecutor's lack of control over the charging deci-

Efficiency was that the prosecutor did not pick which cases to file; the police did.

By tradition, the New York Police Department filed cases directly with the Criminal Court without the prior approval of the Brooklyn District Attorney. The police would arrest and book a suspect at any one of several police stations which had lockup facilities. Once there, the suspect could be held until his first appearance in Criminal Court the next day. With the dispersal of detention facilities throughout Brooklyn, it was difficult for the prosecutor to develop a functional intake and screening unit.

However, at the beginning of 1978 the Police Department consolidated booking activities in Brooklyn into one central precinct. This single act was enough to allow the prosecutor to create an intake unit with a screening staff assigned to the precinct station. Designated the Early Case Assessment Bureau, the new intake unit's primary function was to review all felony arrests at the booking precinct and to set priorities for prosecution.²⁶

The Early Case Assessment Bureau will permit the District Attorney to increase control over charging.²⁷ Ultimately this should help the office to achieve its efficiency goals. Of necessity, a System Efficiency policy emphasizes pre-trial screening. The use of experienced assistants at screening ensures that weak cases are removed from the system at the earliest opportunity. Under this policy, the prosecutor continuously explores additional avenues for case dispositions, examines cases for their plea bargaining potential, and extensively uses community resources, especially treatment and diversion programs. The goal is to reduce the

sion. Thus, the results anticipated under a Legal Sufficiency system are found. In Brooklyn many cases were dismissed at the preliminary hearing in Criminal Court. Plea bargaining was emphasized at all levels. However, the fact that many plea offers were withdrawn if not accepted by trial date, further indicated the office's basic desire to be efficient even though the circumstances at intake were not very supportive of this approach.

²⁶ This initial classification of cases was, of course, entirely consistent with the System Efficiency goals of the office. The case rating system designated each case as either strong or weak on a scale of A to E, and identified the accusatory process to be used. A cases, the strongest, went immediately to the grand jury for indictment. B cases, the slightly weaker ones, were to proceed first through a preliminary hearing before an indictment was sought. C cases were divided into: "C up" or "C down." Whether to proceed as a felony (up) or a misdemeanor (down) was the first determination needed for these cases. D cases could be reduced as part of a plea bargain, or reduced to a misdemeanor level for trial in the Criminal Court. E cases, the weakest designations, were to be dismissed at the first appearance.

²⁷ The initial effect of the screening unit was not to make accept/reject decisions. The traditional roles and procedures of the police did not disappear overnight. Although the prosecutor now had the option of refusing to prosecute a case altogether by notifying the police officer that the case was too weak to pursue, this was rarely chosen as the means of disposition. As a result the intake assistants filed the cases in almost every instance. Dismissals, if needed, occurred at the first appearance hearing.

total number of cases that enter the system. At this time, the Brooklyn office offers an excellent opportunity to observe the effect of making the prosecutor a gatekeeper.²⁸

C. DEFENDANT REHABILITATION—THE ENVIRONMENTALLY PERMISSIBLE POLICY

The goals of a Defendant Rehabilitation policy are early diversion of most defendants from the criminal justice system coupled with vigorous prosecution of those cases allowed in the system. These two goals are entirely consistent since a repeat offender who commits serious crimes has demonstrated that, for him at least, rehabilitative programs are not effective.

Offices which adopt a Defendant Rehabilitation policy rely on non-criminal justice system resources and community support to assist in moving eligible defendants out of the judicial and correctional systems. This individualized defendant orientation makes this policy difficult, if not impossible, to maintain in an assembly-line, high-volume court system.

A compatible environment in Boulder County, Colorado, made possible this essentially humanitarian policy orientation. The university dominated county²⁹ was the smallest of the jurisdictions studied, produced few serious or violent crimes, supported a liberal attitude toward drug usage, and had defendants who generally could be treated in diversion and rehabilitation programs. Furthermore, according to the District Attorney, young professionals with a moderate to liberal attitude toward the criminal justice system dominated the community and supported his philosophy.

The District Attorney explicitly expressed his concern about the human consequences of the establishment of criminal records, particularly in the cases of young, non-violent, first offenders with otherwise excellent chances of becoming useful and productive citizens. He noted that criminal records in Colorado carry the risk of stigmatization for extended periods prior to possible expungement—five years in the case of misdemeanors, seven years in felony cases.³⁰ At the same time, he observed the relative lack of success of the Colorado penal system in achieving rehabilitation objectives, while other modes of treatment ap-

²⁸ Unfortunately, the procedure was still so new at the time of our visit that we were unable to analyze its effects or the full implications of its power.

²⁹ Twenty-five percent of the population of the City of Boulder and 11% of the county are young university students. Interview with Alexander M. Hunter, District Attorney, 20th Judicial District, Boulder, Colorado (August 9, 1978).

³⁰ COLO. REV. STAT. § 24-72-308 (1973).

peared somewhat more successful.³¹ During his tenure in office, however, he became aware of a persistent insistence by Boulder residents for accountability in the criminal justice system. As he put it, "I can see it and feel it in the courthouse." His philosophy became more conservative. Although "less and less patient" with repeat offenders and crimes of violence, he continued to be attuned sensitively to the problems of first offenders.

Early in 1978, the District Attorney instituted a plea bargaining reform.³² Prior to that time, the policy of the office was to overcharge by filing multiple counts to be negotiated later. Under the reform, charging became the central stage of the prosecutorial process. The District Attorney viewed accurate charging, that is, charging that took into account both the facts of an offense and the equities involved in a case, as essential to the sound administration of justice. Consequently, the "plea bargaining reform" program encouraged a shift from negotiating the charge during the course of a case through the courts, to an early and more-or-less unilateral determination of an accurate charge based on all available information.

D. TRIAL SUFFICIENCY

In contrast to the first three policies, in a Trial Sufficiency office a case is accepted for prosecution only if the prosecutor is willing to have it judged on its merits and expects a conviction at trial. One researcher in the current study described the Trial Sufficiency policy's impact in the Louisiana office as: "If you go to court as a defendant in New Orleans, you'd better bring your toothbrush because you're going to jail." If a constitutional question is discovered at screening which would ad-

³¹ The Colorado State Penitentiary experiences a 66% recidivism rate while probationers in Boulder County have a recidivism rate between 8 and 15%. The recidivism rate in cases in which deferred sentencing has been employed is 2-3%.

³² The key mechanism for implementation of the plea bargaining reform was a daily Staffing and Charging Conference attended by all Deputy District Attorneys not in court. Defense attorneys, law enforcement officers, and representatives of diversion programs also participated. The purpose of the conference was to make the basic decision of how to proceed with a case. As the District Attorney told an interviewer "Once a charge is filed, we say this is it. Plead to this charge or go to trial." The District Attorney defined a number of contingencies upon which exceptions might rest including: 1) nonavailability of a witness, 2) a case weakened significantly by the granting of a pretrial motion, 3) desirability of obtaining a defendant's agreement to testify against a more important defendant—the so-called "big fish" exception, 4) where a defendant was charged in another or several other jurisdictions in addition to Boulder, 5) the equity case in which later information indicates an appropriate disposition was something less than the original charge.

With the rehabilitation of non-violent first offenders as a goal, the District Attorney's office made liberal use of release on recognizance, diversion, deferred sentencing, and, on rare occasions, deferred prosecution. However, these rehabilitative programs were not used in cases involving violent or repeat offenders.

versely affect the convictability of a defendant, the case well might be dropped.

In 1974, during his first campaign for the Office of District Attorney, the future prosecutor of New Orleans perceived that the voters of his parish³³ wanted "criminal types" put in jail. True to his campaign promises, upon assuming office he implemented a Trial Sufficiency approach to prosecution.

The effective operation of a Trial Sufficiency policy requires organization and discipline. In addition, competent police reporting is required, as is a cooperative police-prosecutor relationship, so that the merits of a case can be ascertained quickly and decisions made in a nonadversarial environment. Since the initial charge forecloses most options under this policy, careless decisionmaking cannot be tolerated. The policy also requires alternatives to prosecution because many cases are not prosecuted. Court capacity is an important factor under a policy which expects that once a case is accepted it goes to trial. Finally, strict management controls are essential with experienced personnel assigned to the screening and initial charging level so that once the decision is made, charges ultimately are not changed or dropped.

The new prosecutor all but eliminated plea bargaining, targeted career criminals, created a screening and intake division staffed by the most experienced prosecutors,³⁴ and generally changed the charging standard. He required that all cases with less than a reasonable chance of successful prosecution be rejected. The office had extensive feedback, review, and approval mechanisms. These enabled the District Attorney to monitor the flow of cases through the office and helped to insure adherence to his policies. The allocation of resources also clearly reflected his intent. He assigned the most experienced assistants to the intake unit to make the majority of the discretionary decisions. The least experienced assistants went to trial court where they had little freedom to plea bargain and dismiss cases.³⁵

³³ Parish is the term used to describe county-like governmental subdivisions in Louisiana.

³⁴ The Screening Division examined all cases and had responsibility for charging accurately all cases accepted and all offenses committed. Nine experienced assistants staffed the division with assistance from four investigators as well as paraprofessionals and clerical personnel. In June, 1978, all Screening Division Assistants had served at least 12 to 18 months in the office. All had trial experience and the Division Chief had been in the office four years with previous experience in private practice. The Division assigned one assistant to armed robbery cases, one to homicides and rapes, one to narcotics, one to vice cases, and four to general duty covering all other cases. All declined cases had to be approved by the Division Chief. Each Screening Assistant also tried one or two cases a month, a Division requirement.

³⁵ New Orleans has a unified court system in which the District Attorney's office operates two Trial District Court Divisions, each covering five courtrooms and headed by a co-chief. These divisions prosecute both felonies and misdemeanors, but most of their work involves felony trials. In each court section, a more experienced attorney is teamed with a less exper-

The office also maintained a Post-Conviction Tracking Unit (PCTU) which served a dual function as a post-disposition case review entity and as the organizational unit responsible for following up on post-conviction proceedings such as parole and pardon hearings. In the first respect, this special unit reviewed all closed files. The PCTU attorney reported any case *nolle prossed* without approval to the first Assistant for remedial action. In the second respect, the Chief of the PCTU represented the District Attorney at parole and pardon hearings. The office opposed parole or pardon petitions from all career criminals and as a regular practice reviewed the cases of all felons up for parole or pardon.³⁶ By its opposition to applications from serious or dangerous criminals, the office was consistent with the "get tough" attitude of the Trial Sufficiency policy at intake.

E. UNSTABLE POLICY—AN ATTEMPT AT CERTAINTY OF PUNISHMENT
IN A CONTEXT OF LEGAL SUFFICIENCY

The chronicle of policy and procedural changes of King County (Seattle), Washington, illustrates the importance of policy implementation in a stable and consistent manner.

Twice during his eight years in office the Prosecuting Attorney of King County made major changes in his charging policy. The first occurred shortly after his election in 1971. His predecessor, whom he had

inced one. Before assignment to District Court trial duties assistants are assigned to either the Magistrate or Juvenile Divisions. The most experienced served either in the Screening Division or in supervisory positions.

³⁶ At the time of the BSSR inquiry, New Orleans was the only district attorney's office participating in this study which offered parole or pardon opposition of career criminals on a routine basis.

The following table outlines the research teams' findings related to post-conviction practices. (Table Source: PAP, *supra* note 10, at 280; Ex. SUM., *supra* note 10, at 53.)

POSTCONVICTION ACTIVITY IN WHICH THE PROSECUTOR ROUTINELY PARTICIPATES

	Presentence Investigation	Sentence Recommendation	Diversion or Restitution	Appeals	Parole or Pardon Opposition	Expungment
Wayne County, MI	No	No	No	Yes	No	No
Kings County, NY	No	Yes	No	Yes	No	No
Dade County, FL	No	No	No	Yes ^c	No	No
San Diego County, CA	No	No ^a	No	Yes	No	No
King County, WA	Yes	Yes	Yes	No	No	No
Orleans Parish, LA	No	Yes	No	Yes	Yes	No
Lake County, IN	No	No	No	No	No	No
Salt Lake County, UT	No	No ^a	No	No	No ^b	No
Norfolk, VA	Yes	Yes	No	No	No	No
Boulder County, CO	Yes	Yes	Yes	Yes	No	Yes

a Exception — local or state incarceration

b Attempting to institute

c Appeals duties shared with Attorney General

defeated at the polls, operated the office under a strict set of charging standards very similar to a Trial Sufficiency policy. Cases were not prosecuted unless a conviction was almost certain. As one senior deputy described it, "the policy imposed an incredibly high standard for filing. The test was 'Can you win this case at trial?' It was a cautious, conservative approach." Under the new administration, the question was no longer "Can you win this case?" but rather "Can this case survive motions?"

As a policy matter, the office minimized the number of cases declined, keeping that figure below 10–12%. A senior deputy explained that "the refusal of this office to decline many cases is a reflection of fine police work, as well as the willingness of the prosecutor to take and try tough cases." The change in intake standards created a significant increase in the number of cases filed. In turn this created increased pressure for expeditious case dispositions. Disposition by an early negotiated plea was an acceptable strategy having judicial approval. Judge shopping was possible since any defendant who wished to plead guilty could choose the judge who would sentence him.³⁷ There were other means of expeditiously disposing of cases (such as not charging first offenders arrested for non-violent crimes) but they could not equal the power of the inducement offered by judge shopping. Thus, the change in the charging policy permitted a larger number of cases to be accepted for prosecution and disposed of with no increase in processing time.

While campaigning for re-election in 1974, the Prosecuting Attorney discovered that the voters' attitudes toward crime and punishment differed decidedly from his own. During his first term, he maintained an "individual treatment" philosophy about criminal offenders. However, the electorate seemed to believe individual treatment of serious offenders only resulted in a spiralling increase in crime committed most often by repeat offenders. After his re-election in 1975, the Prosecutor replaced the treatment approach with a new "certainty of punishment" style. This approach calls for the imposition of specific criminal penalties as punishment for certain crimes upon adjudication. The concept of proportionality which dictates a punishment in direct measure to the

³⁷ The Prosecuting Attorney's 1978 Budget Submission to the King County Council discussed the value of this inducement to plead:

'Judge shopping' allowed defendants who entered a guilty plea before a trial date was assigned to essentially select their sentencing judge. Guilty pleas entered after a trial date was assigned resulted in a much less favorable sentencing judge being assigned. This created a very powerful inducement for the entry of early guilty pleas. Our office received substantial benefits from this policy since cases are not assigned to individual trial deputies until after a trial date was assigned. Thus, cases which plead before being assigned do not become a part of the trial deputies' caseload.

C. BAYLEY, SEATTLE: OFFICE OF THE KING COUNTY PROSECUTING ATTORNEY, 1978 BUDGET SUBMISSION 41 (1978).

seriousness of the offense committed is an important element of the certainty of punishment philosophy. As a result, the defendant's past criminal behavior is of critical importance.³⁸ The Prosecutor saw this certainty of punishment stance as a device to reduce and control the exercise of discretion by both the police and the assistant prosecutors. His view was that: "One of the major reasons for the exercise of the most important discretionary power of police and prosecutors—the power not to arrest and not to prosecute—is the desire to avoid what are perceived to be unduly harsh consequences that could follow from an arrest or prosecution."³⁹

So that the new policy would not significantly increase the total workload, less serious cases were expedited by filing in the lower, District Court.⁴⁰ Priorities and charging standards were developed to govern the filing and disposition of cases. Discretionary authority was reduced; decisions were strictly governed by standards for charging and case dispositions.

To support this new activity and to ensure accurate and uniform charging decisions, the Prosecuting Attorney created a filing unit and staffed it on a rotating basis with experienced deputies who were relieved of trial responsibility during their time in the unit.⁴¹ For high impact crimes such as rape, robbery, or residential burglary, charges could not be reduced, counts dismissed, or special allegations dropped except in exceptional cases. The same inflexible rules governed the handling of assaults and homicides. Assistants also followed strict standards governing the use of sentence recommendations. Even first offenders participating in high impact crimes had "loss of liberty" included as part of a sentence recommendation.⁴²

These new policies might have been implemented smoothly except

³⁸ However, as will be discussed later, sentence recommendations as to loss of liberty in certain cases involving non-violent crimes applied even to first-time offenders.

³⁹ Bayley, *Good Intentions Gone Awry—A Proposal For Fundamental Change in Criminal Sentencing*, 51 WASH. L. REV. 529, 559 (1976).

⁴⁰ Washington (like California) has a criminal code that permits the filing of certain felonies in either a lower court or in the state court of general jurisdiction. The new Washington State Criminal Code became effective July 1, 1976. It reduced many felonies to misdemeanors, which in Seattle are tried in the District Court.

⁴¹ The unit was responsible for the charging decision and held accountable for following the guidelines. The charging decision standards and procedures were spelled out with great specificity in a 50-page document. With a case intake acceptance rate of 88-90%, one could question the need of staffing this unit with senior trial assistants who could only make restricted discretionary decisions, especially when the number of trials was increasing.

⁴² The lowest priority was given to crimes involving less than \$500 such as certain thefts, thefts of credit cards, and some forgeries. Joyriding, under certain conditions, and a variety of marijuana and other drug crimes involving the possession of small amounts of contraband also were classified, generally, as low priority crimes.

Even for these low priority crimes, depending upon the requirements of the law and the

that the 1974 elections stunned the court and forced a major change, thus setting the stage for the failure of the prosecutorial policy. At the same time the prosecutor learned the electorate wanted him to "get tough" on crime, two King County Superior Court judges lost re-election bids. Both were reputedly "soft" on criminals and known for giving light sentences to defendants who pled guilty. In 1975, as a result, the Superior Court in King County abolished judge shopping.

This action effectively brought plea bargaining to a standstill. The assistants, circumscribed by the new inflexible charging standards, could not make concessions. Indeed, they were hamstrung by standards which required sentence recommendations including the loss of liberty in certain cases. Any negotiated pleas had to be reached within the bounds of the standards.

Trials were the only alternative. The loss of a friendly, lenient judge of the defendant's own selection left the defense with few incentives to bargain early, if at all. As a result, although the volume at intake did not change, the dispositional outlets were reduced as the incentives to plead diminished. In fact, the system changed to present an environment that encouraged delay either in coming to trial or in entering a guilty plea on the chance that the case would break down.⁴³

The early pleas obtained routinely in the old system precluded the need for omnibus or other evidentiary hearings. Now, however, as the cases aged with pleas not entered until much later in the process, there was a concomitant increase in the number of pre-trial hearings—all of which required additional preparation and attendance time for the prosecutors. These changes and the basic incompatibility of the procedures developed and implemented, produced an unstable system—one which could not be maintained over time without changing. While each of the process steps appeared to be proper as implemented (with the possible exception of the resource allocation inconsistency—using experienced prosecutors, at intake), once assembled the parts created an unstable whole.

The floodgates at intake should not have been opened, that is, more cases should not have been admitted to the system, without increased dispositional capacity to accommodate the extra volume. Both the aboli-

discretion of the prosecutor, the punishment length could vary significantly and the location of imprisonment could vary from the local jail to the state penitentiary.

⁴³ The changing policy and the increased workload was readily apparent to the trial assistants. One stated, "You can't do as good a job as formerly." In the past, new assistants first assigned to prosecuting felonies were aided by senior assistants both at trials and also in interviewing witnesses and checking subpoena lists. "Now, young assistants are winging felony trials. I perceive a great increase in the number of acquittals and hung juries. The office policy is such that hung juries are not considered a loss."

tion of judge shopping and the imposition of charging guidelines diminished the use of pleas. Even if the practice of judge shopping had continued, the prosecutor's certainty of punishment stance could not have been maintained. The system had to change eventually because the increase in case volume magnified the case backlog.

A limited change did occur. The Prosecuting Attorney permitted his chief assistants to adjust the system by deciding what was an expedited case (and hence, subject to lower court processing) and what was not (those cases which had to be filed in the felony court). By varying the definitions, volume increases could be counteracted at least on a short term basis.

F. THE TRANSFER STYLE

The office that does not control case intake nor make the charging decision presents a different style of prosecution from an office with active and plenary charging. The term "transfer" implies either that the prosecutor gave up the charging function or had it taken away. The reason he does not control charging often results from the combination of a complex number of factors and influences, some structural, some voluntary, and some traditional. This so-called "transfer" does not necessarily produce detrimental effects upon either the activities of or efficiency of the prosecutor's office. The State Attorney's office in Dade County (Miami) Florida is a transfer style office. Prior to the spring of 1972, the State Attorney maintained a separate intake unit staffed with senior experienced attorneys. Police officers and detectives filed cases directly with the intake unit assistant prosecutors and occasionally with other assistants in the office when intake prosecutors were unavailable.

The State Attorney gave high priority to cases involving incarcerated defendants who could not make bail. However, under the jail system then in effect, subjects could be held for as long as thirty days prior to the filing of charges or any judicial review of their incarceration. In the spring of 1971, a class action suit⁴⁴ was filed in the United States District Court in Miami against the State Attorney and other officials of the Dade County criminal justice system. The plaintiffs were persons incarcerated in the county jail charged with various crimes and awaiting trial under pending informations. None of the plaintiffs had been accorded a preliminary hearing. They sought injunctive relief and a declaration requiring a preliminary hearing before a committing magistrate on probable cause after arrest and before trial pursuant to the fourth and fourteenth amendments of the Constitution.

The District Court found the Dade County practices unconstitu-

⁴⁴ Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971).

tional on the grounds alleged in the plaintiffs' petition, and subsequently adopted a plan calling for adversarial preliminary hearings to be held shortly after arrest and incarceration.⁴⁵ Although the United States Court of Appeals for the Fifth Circuit stayed the plan⁴⁶ pending appeal by the State Attorney, the Dade County Circuit Court and other involved parties implemented a proposal of their own. This plan used the Dade County Jail for the booking of all persons arrested in any of the twenty-seven municipalities in Dade County on state charges. A standardized Arrest Form used at intake became the charging document for preliminary hearing purposes. Thus, the State Attorney suddenly had no control over charging at intake; this was effectively transferred to the police. The court acted on police arrest charges until the preliminary hearing. The prosecutor first saw the case and had the opportunity to exercise his discretionary authority at the preliminary hearing. This procedure is similar to the traditional pattern in Brooklyn, New York, under the old Legal Sufficiency system previously discussed.

Despite the United States Supreme Court ruling in the case⁴⁷ that the adversarial hearing and the other "panoply of adversary safeguards"⁴⁸ ordered by the District Court were not constitutionally mandated, the preliminary hearing system in Dade County remained in effect under the local court rule. The State Attorney continued to process cases after intake and charging by police officers although he could have resumed responsibility for intake if he had so desired.⁴⁹

The prosecutor in Norfolk, Virginia also reacted to a charging decision initially made by the police. As in Miami, he too could dispose of weak cases before they reached trial. In the Norfolk Commonwealth Attorney's office a mere fourteen assistants processed about 4500 felony cases a year. Yet, despite the large caseload, the office had no intake or case screening unit and traditionally the police, not the prosecutor, made the charging decisions. Within twenty-four hours of the arrest of a suspect a first appearance was scheduled before a magistrate. This practice developed over time in Norfolk, and was not originally the conscious choice of either the police department or the Commonwealth Attorney. Traditions like these define the limits of the power of the respective com-

⁴⁵ Pugh v. Rainwater, 336 F. Supp. 490, 491 (S.D. Fla. 1972).

⁴⁶ The stay was by unreported order, as noted in Gerstein v. Pugh, 420 U.S. 103, 109 (1974).

⁴⁷ Gerstein v. Pugh, 420 U.S. 103.

⁴⁸ *Id.* at 119.

⁴⁹ At the time of the site visit, police filed the initial charge in Miami. However, the prosecutor could react at an early time by screening cases. The prosecutor could question the arresting officer and/or detectives as well as the victim and other witnesses prior to the preliminary hearing. Police charges could be, and quite often were, amended by the prosecutor at the preliminary hearing.

ponents of the criminal justice system and create environments wherein procedures are questioned rarely and more workable alternatives sought infrequently.

Two factors explain why screening could be non-existent yet not detrimental in Norfolk. First, there was a strong tradition for the prosecutor to enter a *nolle prosequi* at the first appearance if the case was weak. This had almost the same effect as rejecting the case at intake. Some prosecutors might interpret such actions as indicating a weakness in their operation or as an indicator of poor charging decisions. This was not the attitude in Norfolk. There was system-wide recognition that weak cases should not enter the system and that it was the proper role of the prosecutor to eliminate cases in this manner. The second factor counteracting the effects of no screening was plea bargaining which occurred early in the process, thereby disposing of many cases at first appearance.⁵⁰

G. THE UNIT STYLE

As in a transfer style office a shift of decisionmaking power occurs in offices that delegate the charging authority to each assistant. In such offices, the individual prosecutors receive little or no guidance for or review of their decisions. The original framework for the current study assumed the existence of an office policy implemented by rules and procedures and controlled by management with review and approval mechanisms. Where there was no indication that the prosecutor attempted to guide the decisions made by his assistants, but rather delegated control of the decisionmaking process at intake to his assistants, BSSR researchers questioned the effect of less bureaucratic and more collegial organization on consistency and uniformity in decisionmaking. Additional questions covered the degree to which policies can be informally developed and communicated in the absence of more formal transmissions and expressions of policy.

The two most striking features of the prosecution system in Lake County, Indiana, (a jurisdiction which includes the city of Gary) were the part-time status of the fifty-attorney staff and the process by which the prosecutor established control late in the trial stage over a decentralized, autonomously operating system. The Prosecuting Attorney staffed courts in at least seven locations. Furthermore, the court system had four different types of courts for criminal case processing.

⁵⁰ The office used plea negotiation to dispose of more than 90% of all cases in Norfolk. There were few offers to reduce the top count of the charge. The Commonwealth Attorney's office usually offered to drop additional counts in the indictment in return for an agreement by the defendant to plead to the top count. Trials in Norfolk, both bench and jury, occurred in only about 180 cases out of the total 4,500 felonies processed in the office.

This disparate and complex court system adversely affected the transmittal of policy. Working part-time, the assistant prosecuting attorneys operated more as contractors to the office than as staff members. There was little mobility between courts or parts of the office. Consequently, there was little integration of the staff into an "office," and individual discretion and autonomy thrived. The office reflected a "unit style" of decisionmaking as each assistant operated as his own policy-making unit. However, the centralization of plea bargaining under the supervision of three senior assistant prosecuting attorneys gave consistency to negotiated dispositions. This procedure also had the effect of imposing uniformity on the diverse decisions made at intake.

With no control over intake and despite a substantial desire to plea bargain, one out of seven arrests ultimately resulted in a trial. A critical variable beyond the control of the prosecutor had an important effect on this trial rate. Determinate sentencing, which is in effect in Indiana, greatly restricted the type of bargain that the court would accept relative to length of sentence.⁵¹ Thus, suspects had little incentive to plead guilty to the crime as charged since the alternative of going to trial with flat sentencing did not result in any more severe punishment than that imposed with a negotiated plea.⁵²

The County Attorney's office in Salt Lake County, Utah, afforded another perspective of the unit style decisionmaking process operating under vastly different circumstances than those observed in Lake County, Indiana. In Salt Lake, the Attorney's office demonstrated the consequences of a collegial approach to prosecution with little centralized control over either staff or case flow through the office. Autonomy in decisionmaking made office policies difficult to implement initially or to monitor and maintain.

Twenty-four assistant prosecutors worked in the Criminal Division at the time of this inquiry. The Chief Criminal Deputy believed that each attorney should be competent enough to make his own decisions almost from the day hired. Attorneys were assigned case screening on a rotating basis as their caseload permitted. Individual attorneys made decisions to accept or reject. Once an attorney accepted a case, he assumed total responsibility for its trial and disposition, barring unanticipated conflicts. This system of prosecution ensured that decisionmaking on individual cases was exercised by the same assistant.

The system in Salt Lake City did not permit a superior to monitor

⁵¹ Or so the Prosecuting Attorney indicated as a possible explanation of the high trial rate. See IND. CODE §§ 35-50-1-1, *et seq.* (West 1978).

⁵² Contrast this rationale with that articulated by prosecutors in San Diego County in connection with plea bargaining and the effect on it of determinate sentencing, in section IV. *A supra.*

variations of prosecutorial treatment from one case to another, or among assistants. There was no articulated office charging policy. With discretion delegated autonomously, any policy, if it existed, probably developed informally.⁵³

Limited court capacity was an important environmental factor which affected the Attorney's Office in Salt Lake.⁵⁴ A single judge tried all felony cases. Thus, assistants favored negotiated pleas⁵⁵ in an attempt to lighten the docket. Yet, despite the high number of pleas, the County Attorney's office is very trial oriented. Every assistant is expected to be able to try a case within days after joining the staff.⁵⁶

Yet Salt Lake City prosecutors are remarkably similar in their perceptions and decisionmaking. This similarity may be attributed to a number of factors: the socialization of the group; the small size of the office; and the use of the Prosecutors Management Information System (PROMIS)⁵⁷ which made more information available to each member of the staff. The County Attorney had a strong interest in conforming to PROMIS' recommended guidelines. As a consequence each assistant felt subtle pressure to be in line with general averages and disposition rates. The result was an office exhibiting few outward controls, yet possessing a good deal of internal consistency.

In contrast with the findings in other sites, it seems that the unit

⁵³ Nevertheless, there seemed to be a high degree of uniformity of thinking among staff attorneys. Researchers believe this is attributable in part to collegiality. Policy resulted from the least structured types of communications, that is, the unwritten messages transmitted in non-articulated settings. See note 15 *supra*.

⁵⁴ Since the inclination of the office was toward trials and not pleas, it was not surprising to note that the County Attorney has consistently, but unsuccessfully (save for one occasion), advocated increasing the number of judges to hear felony matters.

One senior deputy indicated in an interview that on one occasion, the County Attorney had been successful. He said that in November, 1977, only two felony trials were held during the entire month. The County Attorney's severe criticism of the court at that time resulted in several additional judges being assigned to felony trials and the "heat" being placed on the County Attorney. His office responded by trying 40 cases during a following month. The senior deputy indicated that this was a rare occurrence, and that usually "we're only trying five to ten cases a month."

⁵⁵ Plea negotiations started in earnest after the filing of a bill of information. Although official limits circumscribe the duration of the plea bargaining period, unofficial plea negotiations continue until the very day of trial.

⁵⁶ A deputy who had a bench trial on his second day in the office, and his first jury trial within a month, characterized his experience as a baptism by fire. He noted that he had been "burned to the ground" by judges on several occasions.

⁵⁷ PROMIS is perhaps the best known of the prosecutorial information systems. For discussion of another system known as the Case Management System, in use in the Suffolk County (Boston) District Attorney's Office in Massachusetts, see Lasky, Murray & Ratledge, *Automated Court Case Management in the Prosecutors Office*, TRIAL, Feb. 1978, at 36. PROMIS is either in use or planned for use in almost one hundred jurisdictions.

style of prosecution, both in Salt Lake and in Lake County evolved by default rather than through deliberate planning.

V. CONTINUING ASPECTS OF THE RESEARCH PROJECT

The research described above supported two major activities: first, the identification of prosecutorial policies and the determination of how they are implemented and transmitted based on the study of the ten previously discussed prosecutors' offices, and second, the development of a standard set of criminal cases to provide a quantitative measure of prosecutorial policy and decisionmaking consistency.

The standard set of cases covered the three primary variables used by prosecutors—the seriousness of the offense, the seriousness of the defendant's criminal history, and the evidentiary strength of the case. This last category led to the development of a conceptual framework for legal and evidentiary matters. For the research, evidentiary strength was separated into four components: (1) the inherent complexity of the offense; (2) constitutional questions; (3) the nature of the evidence—both physical and testimonial; and (4) the circumstances of the arrest.

Using a standard set of thirty cases, 855 attorneys in fifteen jurisdictions nationwide⁵⁸ set priorities for urgency of prosecution, predicted dispositions, and recommended sanctions. Research to date indicates that nearly all prosecutors set the same priorities. As would be expected in a rational system, procedures differ according to the priorities set for the cases being processed. The most urgent cases represent the most serious crimes. They receive the most attention and when necessary have the largest dedication of resources. Similarly, trivial cases receive the least attention and minimal effort is attached to their disposition.

The establishment of priorities for prosecution produces a strong ordering effect on dispositions. The lowest ranked cases tend to be either declined at intake or pled out as misdemeanors early in the process. The cases in the middle ranked group usually are disposed of by pleas, some reduced and some at the original charge. The high priority group generally goes to trial. These results were found universally throughout the United States among all of the prosecutors tested. In a reasonable and rational system, this result is expected.

There are three individual factors which assume different roles at

⁵⁸ Prosecutors in the following places participated in the testing of the Standard Set of Cases: King County (Seattle), Washington; Hennepin County (Minneapolis), Minnesota; Jackson County (Kansas City), Missouri; Kings County (Brooklyn), New York; Wilmington, Delaware; New Orleans, Louisiana; Salt Lake City, Utah; Montgomery County, Maryland; Lake County (Gary), Indiana; Polk County (Des Moines), Iowa; Baton Rouge, Louisiana; Wayne County (Detroit), Michigan; Erie County (Buffalo), New York; Maricopa County (Phoenix), Arizona; Dade County (Miami), Florida.

each step of the process and for each of the major dispositional decisions: first, the seriousness of the offense; second, the legal and evidentiary strength of the case; and third, the defendant's criminal history. The seriousness of the offense is the most consistently important factor of all three, and with few exceptions, influences most decisions. At intake the legal and evidentiary strength of the case is the primary factor upon which the charging decision is based. In some jurisdictions this factor is supplemented either by a consideration of the seriousness of the offense or the criminality of the defendant. For example, in Kings County (Brooklyn), New York, the charging decisions made in about forty thousand felony arrest cases are based on both evidentiary and criminality factors. This leads to the conclusion that in high volume systems some selectivity is introduced early in the process to sort cases into expected dispositional routings. The extra dimension is the nature of the defendant; thus, for cases where the decision to accept or reject is marginal, the past crimes of the defendant may be the critical variable. In other jurisdictions, where volume is not as high, the legal and evidentiary factor is the primary criterion.

In addition, evidentiary strength plays an important role at trial. Generally, a disposition by a plea is more likely to occur as the evidentiary strength of the case is reduced. Conversely, the stronger the case, the more likely it is to go to trial. Also influencing this decision is the defendant's record. The more criminality, that is, the longer the record and the more serious the past crimes, the less likely a plea. With respect to expected sanctions, the defendant's criminal history is consistently the single most important factor considered when making the decision to incarcerate.

The general decisionmaking pattern that emerges is one which relies on the seriousness of the offense and the legal and evidentiary strength of the case for decisions made at intake, accusation, and trial. The defendant's record has importance during trial and post-conviction proceedings, but rarely at intake. This is important because it confirms the viability of our principles of justice. Moreover, it shows that a significant amount of the variation in decisions can be explained by these legitimate factors which operate within rational relationships.

The research also reveals that assistant prosecutors generally make decisions in a manner consistent with their policy leaders. These results are heartening since, over time, organizations should establish routine and stable systems of operation. In fact, if this were not the result and consistency in decisionmaking was not high, then one would expect to see daily displays of chaos and conflicts. Instead, as the discussion of offices participating in this study reveals, prosecutors are an adaptable group who adjust their policies to meet changing environmental con-

straints. As the standard case set research reveals, the assistants generally tend to follow their policy leaders.

In the broadest sense, this study considers the extent to which prosecution controls or influences the uniform and equal distribution of justice and concludes that it is inherently inappropriate to evaluate any agency or function on the basis of factors beyond its control. Furthermore, it is unrealistic for anyone to conclude from this study that any one policy is best for either curbing or promoting prosecutorial discretion. Accordingly, this Article does not draw any broad normative generalizations.

An awareness of a prosecutor's policy can change dramatically the interpretation of statistical data from any given office. In Table A, note that there were twice as many trials completed in New Orleans in a given year as there were in Brooklyn. Yet, police in Brooklyn made nearly three times as many arrests as police made in a year in New Orleans. If one examines the bottom line, the ratio of trials to intake of cases, a great variety of conclusions could be drawn. Whatever conjectures or interpretations one might make would be inappropriate and probably erroneous unless one examined the figures in the context of, or with an awareness of the prosecutorial policy in effect in each office.

TABLE A
SELECTED WORKLOAD AND DISPOSITIONS
FOR THREE SITES⁵⁹

	NEW ORLEANS	SALT LAKE CITY	BROOKLYN
INTAKE			
Police Arrests*	8,982	9,802	39,500
Decline to Prosecute	3,919	1,164	1,671
Percent of Intake	43.6	11.9	4.2
TRIALS			
Total Felony Court Dispositions	5,568	1,497	3,694
Ratio of Felony Court Cases Disposed to Intake	1 to 2	1 to 7	1 to 11
Number of Trials Completed	1,069	110	525
Ratio to Felony Court Dispositions	1 to 5	1 to 14	1 to 7
Ratio to Intake	1 to 8	1 to 89	1 to 75

* Arrest figures include felony and misdemeanors for New Orleans and Salt Lake City; felonies only for Brooklyn.

⁵⁹ Table Source: PAP, *supra* note 10, at 371.

The numbers suggest that more cases come into (or perhaps are in) the system than go out. One must keep in mind that for the years shown in the table there were existing cases in each jurisdiction's system at the beginning of the year. For example, in New Orleans there appear to be more trials than there were cases accepted for prosecution. Obviously, a number of trials resulted from cases accepted for prosecution in the previous year(s).

Thus, comparisons should not be made without determining, first, the policy and goals of the offices; second, their effect on dispositional patterns; and third, the backlog of cases. For example, the high ratio of jury trials in New Orleans is an expected consequence of the charging standards and the constraints placed on plea bargaining. To compare this ratio with that of Brooklyn, (which must rely on plea bargaining to dispose of the volume and minimize trials to keep the backlog under control) is clearly meaningless. Each office is attempting to achieve something different. Brooklyn, with three hundred assistants and approximately 24,000 felony arrests annually, shifted from a Legal Sufficiency stance to a System Efficiency policy. (The 1977 data presented above can be interpreted as resulting from this former Legal Sufficiency policy.) New Orleans figures reflect the dispositional pattern of a Trial Sufficiency office—where cases are accepted with the expectation that they will be sustained at trial. The one out of eighty-nine ratio displayed in Salt Lake City is eminently reasonable once one realizes that only one judge hears cases on a regular basis. Thus, in Salt Lake City, trials were an exceptional dispositional route.

The real lesson here is that discretion is not the issue. Rather, prosecutors and their critics alike should recognize that distinctive environments (community differences) create significant variations in approaches to crime and prosecution. These differences can be understood, minimized, explained, or controlled by careful attention to prosecutorial policy.

VI. CONCLUSION

The prosecutor is a resourceful creature. He has adapted to his many areas of operation by seizing those factors under his control and refining their uses to such a highly developed level that they mitigate the adverse effects of the environment. He has been able to achieve some level of organizational and functional sophistication, not always deliberately, but sometimes intuitively. His wide-ranging discretionary power is a significant factor in his survival. The very power so often subject to criticism contains the key to his success. He can make policy and pursue as a primary goal rehabilitation, punishment, or efficiency, by letting his discretionary decisions reflect these goals. He can manage his resources

to support these objectives by distributing his personnel to ensure that the charging decisions reflect his priorities, and that dispositions occur as he expects them. He can assign to these areas the more experienced or the least experienced personnel as he determines. The organizational and management structure of his office becomes the primary means of insuring conformance with his policy and achieving the desired results. The ultimate test for whether a prosecutor's office is applying its efforts in a uniform and consistent manner must rely on first identifying what the prosecutor is attempting to achieve, then testing whether the justice within this context is distributed in an equal, fair, and consistent fashion. We now have the tools with which to test and results which show that prosecutors throughout the United States appear to operate consistently and with uniformity in distributing justice.⁶⁰

⁶⁰ An empirical analysis of the discretion of federal prosecutors, in some respects parallel to our own, has recently been published. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980). This study focused on one jurisdiction, the United States Attorney in the Northern District of Illinois. However, it dealt primarily with the reasons for a decision not to prosecute a crime, and the categories of crime dealt with, and did not emphasize (as this article did) the organizational style of the office.