

THE PROSECUTOR: A MODEL FOR ROLE AND FUNCTION

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I. INTRODUCTION

Beginning with the now classic studies of DeLong and Baker in the 1930s,¹ an extensive literature has developed around the role and function of the prosecutor. This literature has concentrated largely on three areas: the prosecutor's administrative function (decisions to charge and the associated problem of discretion);² the prosecutor's judicial function (conduct at trial);³ and the general function of the prosecutor's office, which has been described both impressionistically⁴ and statistically.⁵ Because the literature ignores the multiplicity of vantages and their interrelation,⁶ however, a comprehensive analysis of the prosecutor's role is lacking.⁷

This article addresses the analytic void by describing prosecutorial function from a variety of angles. Prosecutorial decisions which may

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1. See Baker, *The Prosecutor: Initiation of Prosecution*, 23 J. AM. INST. CRIM. L. & C. 770 (1933); Baker & DeLong, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. AM. INST. CRIM. L. & C. 926 (1933).

2. Most of the literature falls within this category. For representative works, see F. MILLER, *PROSECUTION* (1970); Mills, *The Prosecutor: Charging and Bargaining*, 1966 U. ILL. L.F. 511.

3. See, e.g., Comment, *Prosecutorial Misconduct—Recent Second Circuit Cases*, 2 HOFSTRA L. REV. 385 (1974).

4. See, e.g., P. HEALY & J. MANAK, *THE PROSECUTOR'S DESKBOOK* (1971).

5. See, e.g., Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584.

6. The usual single vantage approach is exemplified by the studies of discretion. These studies analyze discretion in terms of criminal justice goals and, from that perspective, either justify discretion as necessary in the interests of justice, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 133 (1967) [hereinafter cited as PRESIDENT'S COMMISSION]; Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 535 (1963), or suggest structures that limit its use. See, e.g., Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130 (1975).

7. A more complete analytical approach is found in Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1975), but its scope is limited to discretion.

appear problematic when analyzed from any single vantage can be understood more fully when viewed from a number of perspectives. Two highly visible and controversial prosecutorial decisions, the acceptance of Spiro Agnew's *nolo contendere* plea and the prosecution of Tokyo Rose, are analyzed to demonstrate the utility of this approach.⁸

II. THE FIRST VANTAGE—THE ADMINISTRATIVE AGENCY MODEL

A. *The Functional Component*

The prosecutor's office has recently been compared to an administrative agency⁹ and the suggestion has been made that structures designed to control agency activities are relevant to the control of prosecutorial conduct. Two pertinent viewpoints which derive from administrative law reflect variant methods of dealing with discretionary and often arbitrary prosecutorial activity: the first looks to the administrative law notion of 'delegation';¹⁰ the second to concepts of agency rulemaking and disclosure.¹¹

Article I, section 1, of the United States Constitution vests all legislative power in Congress, presumably because Congress is a representative and therefore democratically accountable body. Whether such deference to the legislature is justified by the Constitution or by policy choice, Congress must articulate its prerogatives before the executive may undertake certain activities. When Congress delegates authority to an administrative agency,¹² that agency must act within the confines of its specific grant of authority.¹³

8. This article does not attempt to resolve any discrete problems associated with prosecutorial function. Yet, to the extent it suggests a procedure to analyze prosecutorial decisions, it does have a discrete purpose. Two notable decisions were chosen for analysis so that the various considerations are brought into greater relief. The analysis should apply equally to everyday prosecutorial decisions.

9. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* 109-14 (3d ed. 1972). See also K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971); Note, *supra* note 6.

10. The delegation doctrine has been in little use since the decisions in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). Recent reliance on the doctrine has proven unsuccessful. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

11. See, e.g., Administrative Procedure Act §§ 3 (disclosure), 4 (rulemaking), 5 U.S.C. §§ 552, 553 (Supp. V 1975).

12. Certain legislative powers may be considered exclusive and not concurrent, however, and thus nondelegable. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41 (1825).

13. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-85 (1965). In *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974), the court struck down elaborate Department of Transportation requirements for labelling

The correlates to the prosecutorial function are clear. For example, the designation of certain conduct as criminal and the repeal of statutes that proscribe conduct no longer deemed criminal, are legislative activities. Prosecutorial action that falls outside the parameters of legislative authority may therefore be viewed as impermissible. Although the prosecution of nonexistent offenses does not create a significant problem, the prosecutor's refusal to enforce certain criminal statutes obviously avoids the legislative mandate. The application of this vantage requires that inquiry into the reasons for nonenforcement focus on this constructive repeal of criminal laws, rather than on the nature of prosecutorial discretion. Further inquiry should examine both the particular statute and the interdicted conduct to determine whether the legislature, rather than prosecutor, is better suited to perform this "legislative" role.

Another aspect of this vantage suggests that the prosecutor first determine his statutory authority and act only when clearly empowered to do so. The prosecutor customarily makes several important decisions in each case,¹⁴ including what offense to charge and whether to accept a lesser plea; when and where to initiate the prosecution and on what theory; what position to take on bail; and, what sentence and probation recommendations to make to the court.¹⁵ Legislation would necessarily govern each decision.

Extending this "delegation" vantage to its logical conclusion would require a considerable reevaluation of the substantive criminal law. There are presently too many proscribed activities to enable the prosecutor to function effectively without exercising some degree of selective enforcement. In addition, the legislature has failed to provide prosecutors with guidance as to the manner in which they should pursue certain substantive offenses.¹⁶ Thus, to employ this vantage successfully, the legislature must reduce the number of offenses and substantially refine the elements of particular offenses and the range of permissible sanctions.¹⁷ Only reforms of this kind would result in a reduction of the prosecutor's significance, which would have broad systemic effects. If the legislature erred, for example, in designating a criminal activity, the prosecutor

retread tires except those few markings that were necessary to comply with the congressional mandate.

14. The range of prosecutorial decisionmaking is discussed in F. MILLER, *supra* note 2, and ABRAMS, *supra* note 9, at 1-3.

15. See Comment, *The Prosecutor's Role in California Sentencing: Advocate or Informant?*, 20 U.C.L.A. L. REV. 1379, 1387-402 (1973).

16. It is unlikely, for example, that the legislature will instruct the prosecutor to ignore certain offenses.

17. Even if the number of offenses was reduced, the prosecutor's discretion would be a significant force if ambiguities remained to be construed.

would be forced to prosecute this conduct and a participant, or actor, further on in the criminal process (*i.e.*, a jury) would be responsible for remedying the situation.

The problem is not merely one of reducing ambiguities in the criminal law, either, for its scope is institutional. Legislative reevaluation of the grounds for prosecutorial action would force negotiation and compromise on issues that are frequently delegated because of their political volatility. To be sure, two distinct perceptions are created by a prosecutor who merely chooses not to enforce a certain statute, and by a legislator who recommends the repeal of a statute and thus implicitly approves the underlying conduct. This dichotomy is reflected in the dual role legislatures perform in defining societal norms. First, the legislation may prohibit certain conduct. Second, and more symbolically, the statute embodies the community's legal standards, regardless of the enforcement pursued. The legislature's repeal of any criminal statute may thus represent a response to the community standard function as well as a sincere desire to remove sanctions from particular conduct.

The second rulemaking and disclosure perspective raises additional questions about the decisionmaking structure within the criminal process. In any particular case, there may be many reasons for a prosecutor's decision not to prosecute. He may have doubts as to probable cause, or as to the extent of harm. He may feel that the only available sanctions are improper. He may be worried about the complainant's motives, the victim's testimony, or the jury's verdict. He may personally approve of the underlying conduct. He may desire to use immunity from one prosecution to further other prosecutions, or he may believe that a particular prosecution will impede his career goals.¹⁸ Similarly variant reasons will support decisions to charge and ancillary decisions relative to the particular circumstances.

A prosecutor's decision not to prosecute because of the absence of probable cause is most likely within the scope of legislative intent. Similarly, evaluating the extent of harm prior to a decision to charge may reflect values implicit in a graduated scheme of offenses and sanctions. But discerning a scheme of prosecutorial prerogative from legislative silence is, at the least, problematic. Even conceding that prosecutorial action can be justified, a rulemaking and disclosure vantage would subject these justification processes to public scrutiny. Prosecutors now

18. See Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 513-15 (1976); Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1148-49 (1973).

are rarely required to explain their decisions or relate their rationale to a legislative context.

The importance of rulemaking and disclosure derives from the need for a coherent and evenhanded prosecutorial policy. Rulemaking also provides a basis for legislative scrutiny if, for example, legislators are displeased with the prosecutor's procedures. This vantage requires the prosecutor's office to propose and adopt rules that articulate the office's 'substantive' practices, the permissible reasons for deciding whether to prosecute, and detailed procedures governing individual decisions.¹⁹

Once a rule and decisionmaking structure is established, the second level judicial structure, which would oversee the prosecutor's decisionmaking in individual cases, could be superimposed. Ordinarily, several perceived barriers preclude judicial review of prosecutorial action, including the lack of an adequate record;²⁰ prosecutorial refusal to act;²¹ a reluctance to interfere with executive function;²² and the absence of a sufficiently interested party willing to contest the refusal.²³ The rulemaking process disposes of most of these problems; the decisionmaking process is regularized to produce an adequate record. The permissible grounds for prosecutorial action and inaction are adequately detailed to allow for judicial review. Finally, the separation of powers issue is less acute because the court is not interposing its own standards, but is insisting only that the prosecutor conform to his own.²⁴ The problem of standing admittedly presents distinct difficulties, but congressional authorization for private attorneys general may provide the remedy.²⁵

This vantage would have other implications. The superimposed judicial process, which would adjudicate the propriety of prosecutorial conduct, would effectively shift the ultimate decisionmaking away from the prosecutor's office. For example, suppose the prosecutor were per-

19. Cf. Administrative Procedure Act § 3, 5 U.S.C. § 552 (Supp. V 1975) (requires extensive agency disclosure to public of both internal and external rules and policies).

20. See Note, *supra* note 6, at 139.

21. *Id.* at 134.

22. *Id.* at 136.

23. The standing problem is compounded by the Supreme Court's recent narrowing trend. In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), for example, the mother of an illegitimate child sought to enjoin the district attorney from declining to prosecute the father of the child for failing to contribute support. The Court held that although the mother had an interest in the child's support, prosecution would not result in support but only in the father's incarceration, and a private citizen lacks a judicially cognizable interest in the prosecution of another. *Id.* at 616-19.

24. Cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (internal executive decisions unreviewable unless promulgated regulations circumvented).

25. Congress undoubtedly has broad authority to grant standing. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940).

mitted to forecast jury reaction and use his assessment of that reaction as a ground for prosecution. Through this rulemaking vantage, a challenge to that decision, whether it was to prosecute or not, would require a play within a play: there would be judicial scrutiny of the facts to determine the probable subjective, or jury, assessment of the same facts.

There are institutional implications as well. The pressure on legislatures to define offenses carefully would be lightened because the internal rulemaking process would refine otherwise inadequate legislative guidelines. Concomitantly, the legislature could satisfy its community standards function by continuing to proscribe offenses which it no longer sought to punish, presuming that prosecutorial rulemaking would lead ultimately to nonenforcement.

These two viewpoints, delegation and rulemaking, are not intended to be exclusive, although their implications provide differing insights. As a predictive matter, it is likely that a restructuring of the criminal law to provide standards for prosecutorial action would result from stricter legislative guidelines and the creation of internal standards. The implications of this dual system cannot be articulated merely as a cumulation of the implications of each function. Indeed, in a dual or mixed system, it is unclear whether the prosecutor or the legislature would bear the burden of justifying decisions that were reached jointly. For example, suppose the legislature proscribed only those assaults that involved physical injury, and the prosecutor determined that physical injury was to be defined as injuries that required medical assistance. Does the individual complain to the legislature or the prosecutor about the failure to prosecute the assault of elderly women who are only "shaken up" and do not require medical attention? The legislature made the initial, limiting determination, but the prosecutor's office may be more accessible, particularly if it has standardized procedures for citizen input.

Additional problems in considering the implications of a mixed system reflect the geometric complexity of drawing those implications. For example, the diverse character of persons who would respond to proposed prosecutorial rules as opposed to legislative enactments and the varying degree of information possessed by each group presents an institutional audience issue.²⁶ Prosecutorial rulemaking procedures, if public, will be dominated by those with special knowledge and interest in

26. Group differences are reflected in court decisions that create standards for citizen input. In administrative proceedings, the question is whether the proper parties, those with explicit interests, have been heard. *See, e.g.,* *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 862 (D. Del. 1970). Legislative input is generally a question of the proper constituency, at least since *Baker v. Carr*, 369 U.S. 186 (1962).

the criminal law and its processes. Legislative proposals, on the other hand, would elicit a broader public reaction. The result of this group interaction is by no means certain.

It is clear that prosecutorial function cannot be instantly refashioned. The order of reforms may affect the response to them, and the order of the response may in turn affect the reforms themselves. When applied to a mixed system, the allocation of stresses may well be a function of whether legislative or prosecutorial guidelines are first enacted. This temporal sensitivity is relative to the community's changing perception of certain behavior, and their willingness to deem that behavior "criminal" at any given point in time.

B. *The Personal Component*

Another vantage by which the prosecutor's role may be analyzed is to focus on the individual as decisionmaker, and to assess his academic and professional preparation, biases, and personal interests, because they affect his ability to function reasonably and independently. Although statistical information concerning prosecutors' education and experience would facilitate this analysis, none exists. Nevertheless, some information can be deduced from the existing "impressionist" literature, and its implications can be considered in relation to the due process required of independent decisionmakers.²⁷

Prosecutors are licensed attorneys; there is usually no requirement of specialized or continuing education.²⁸ The level of experience varies widely among prosecutors and there is no consensus as to which prosecutorial functions demand experience. Thus in Manhattan, an inexperienced prosecutor will handle the original charge decision; in Los Angeles, where that decision is made a week or two after arrest, the prosecutor is usually experienced.²⁹

The implications of this viewpoint would compel a study of prosecutors' training and the assignment of prosecutors with certain experience and education to particular tasks. Yet it is difficult to conceive of what

27. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Laird v. Tatum*, 409 U.S. 824 (1972).

28. The training of a prosecutor is generally limited to his legal education and whatever courtroom experience he has had. While this may meet the need for the courtroom and trial aspects of the job, it does not necessarily prepare the man for his administrative and law enforcement functions. Many young assistant district attorneys are appointed without specialized knowledge of the criminal law or experience in court or in the investigative and discretionary parts of their work.

PRESIDENT'S COMMISSION, *supra* note 6, at 148.

29. See *Abrams, Prosecutorial Charge Decision Systems*, 23 U.C.L.A. L. REV. 1 (1975) (compares the prosecutorial function in Manhattan, Los Angeles, and Tel Aviv).

this training would consist of (beyond crafts common to trial lawyers) and what the optimal allocation of prosecutorial "expertise" would be. Although the President's Commission on Law Enforcement suggests that increased prosecutorial quality would accompany the appointment of more competent and better educated attorneys, the Report does not discuss the nature or extent of that education nor define "quality" in that context.³⁰

"Quality" could be measured by the number of errors at trial, the number of overturned convictions, or the successful prosecution rate.³¹ Each definition implies different "quality" goals, and education may further a particular set of goals, but not others. For example, although a prosecutor may learn about trial practice, that education is arguably irrelevant to intelligent charge decisions³² which require a sensitivity to community needs and goals.

The vantage of the prosecutor as an individual also requires a consideration of bias,³³ which can be separated into two categories: those situations in which the prosecutor may stand to gain financially from a successful prosecution, and those circumstances that place the prosecutor in a broader position of personal conflict. The inquiry prompted by the first category is obvious; the second introduces a variety of possible problem sources. The prosecutor may be related to the witnesses, the judge or opposing counsel. A judgment may affect his personal life. A conflict may arise from the method of his selection—a responsibility to legislative standards, and personal loyalties to the person who appointed him.³⁴

There are less obvious ways in which the prosecutor may encounter personal dilemmas. Prosecutorial performance may conflict with career interests. Certain cases (the prosecution of notorious underworld figures, for example) may advance the prosecutor's career and may therefore be pursued more readily than others even though insufficient cause exists and the probability of obtaining a conviction is slight. The prosecutor's perception of the seriousness of certain offenses provides other inconsistencies. He may, for example, prosecute instances of breaking and

30. PRESIDENT'S COMMISSION, *supra* note 6, at 148.

31. The use of variant criteria to determine the quality of prosecutorial functions will inevitably lead to variant conclusions. *See* Abrams, *supra* note 29, at 49-55.

32. *See* note 28 *supra*.

33. This vantage deals with bias types, not with methods for its control, which is properly within the scope of the vantage that considers the prosecutor's office as a bureaucratic structure.

34. The prosecutor may, of course, be directly elected by the people. *See, e.g.*, 11 N.Y. COUNTY LAW § 926 (McKinney 1972).

entering because those offenses occur with frequency near his residence. He may refuse to enforce laws against homosexual activity because of his own homosexual tendencies. His socio-economic status may provide the basis for a pervasive skewing in the persons he chooses to prosecute and the offenses he finds objectionable.³⁵ On any of these grounds, a prosecutor may decide not to charge but, more importantly, if he chooses to proceed, his predisposition may color his performance.

The bias and interest viewpoint provides a microcosm of the prosecutor's world. Process values, institutional values, and community values are internalized by the prosecutor, and are reflected only by his expression of other, independent values and perceptions. Because of this complexity, the viewpoint may serve only as the basis for a study of the clearest forms of personal conflict. Characterizing the complexity of bias and pointing out the difficulty of using it as a locus for analysis is relative to the difficulty of drawing meaningful distinctions with respect to its source and nature. The prosecutor's bias may be a mere reflection of values established by the legislature, by his office, or by the process itself; yet those values may be functionally equivalent to values held independently by the prosecutor. For example, it is unclear whether discriminatory values inherent in the process are sufficient justification for prosecutorial bias; yet it is equally unclear whether the answer to that inquiry should be affected by the prosecutor's own views. In addition, the prosecutor may be judged by whether his own preconceptions correspond to those of his dominant constituency³⁶—a measure which evokes certain views as to the propriety of independent judgment. Consequently, dealing with the person of the prosecutor leads to a series of questions about the intersection of individual belief and institutional principles. These issues so involve the heart of the entire system that one is tempted to suggest that the system as a whole cannot be changed until the prosecutor's role is reconstructed; yet this temptation belies the complexity of the task.

III. THE SECOND VANTAGE—THE CRIMINAL PROCESS

A. *The Prosecutor's Specific Role*

To analyze the prosecutor's role in the criminal process,³⁷ a paradigm

35. One manifestation of attorneys' affluence is a noted failure to sanction white collar crime. Institutional factors, moreover, may reinforce this oversight by imposing conservative standards—for example, protection of the propertied class' property.

36. In this way, the prosecutor achieves a democratic justification for his actions which, if he is an elected official, may be his primary object.

37. This vantage is similar to the one applied to police behavior in Goldstein, *Police*

for that process is suggested; the subsequent observations, however, do not mean to imply that there is necessarily a connection between any one paradigm and the process' proper functioning.³⁸ The paradigm is modeled after that in force in the New York City borough of Manhattan:³⁹ The police officer, usually in response to a complaint, apprehends a suspect and brings him to the station where he records both the suspect's and, if feasible, the victim's stories. The officer delivers the transcript to the junior prosecutor who files charges or, if the offense is a felony, directs the matter to the grand jury. The suspect is either charged, pleads, and is held or released on bail pending trial or, similarly, held or released pending a grand jury indictment. Either way, the release decision is made shortly after police apprehension. If a felony charge is contemplated, counsel may be appointed and another court appearance scheduled for the charge after the grand jury has made its determination. In the case of a not guilty plea, a trial will be held, judgment rendered, and possibly sentencing, incarceration, or parole will follow.

There are many opportunities for the exercise of discretion. Following initiation of the process, the police may not respond to a complaint or may release the suspect;⁴⁰ the prosecutor may refuse to charge or may later "nolle" the charge.⁴¹ In particular instances, the prosecutor may suggest that the individual be diverted from the criminal to a cognate civil process.⁴² These actions result in the termination of process; still other decisions, such as the level of offense to be charged, affect the character of the process.

A theory of the prosecutor's role in the process derives from the nature of his decisions. One mode of analysis is suggested in a study of police functions which considers both process roles and the performance of process roles in terms of criminal justice system goals.⁴³ That study noted that the police can either invoke or refrain from invoking the criminal process, and that the latter decision is of such low visibility that it often

Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543 (1960).

38. See Abrams, *supra* note 29. Although Professor Abrams contends that different prosecutorial charge systems produce variant results, it is conceivable that these systems could achieve a degree of efficiency measured, for example, by processing speed and charge decision accuracy.

39. See Abrams, *supra* note 29, at 4-5.

40. See Goldstein, *supra* note 37, at 580.

41. See F. MILLER, *supra* note 2, at 312-17; Emery, *The Nolle Prosequi in Criminal Cases*, 6 ME. L. REV. 199 (1913); Kosicki, *The Function of Nolle Prosequi and Motion to Dismiss in Connecticut*, 36 CONN. B.J. 159 (1962).

42. See PRESIDENT'S COMMISSION, *supra* note 6, at 134.

43. See Goldstein, *supra* note 37, at 543-54.

evades review.⁴⁴ In many respects, the prosecutor has a defining rather than invoking role. The police officer's report reduces the invoking incident to a verbal phenomenon, and the character of that report transforms the incident by its use of legal terms. Yet the prosecutor has the ultimate defining function, reducing the actual occurrence to a single legal signification—naming a particular offense.

The authority to name the offense has significance independent of the underlying fact situation. This is true particularly in circumstances in which the facts are unclear and few individuals possess clarifying information. The prosecutor's use of legal terminology imparts a certain quality to the act which is not defined by the incidents preceding the charging of an offense, but by the criminal processes to follow.

The defining function certainly affects all participants in the process, but particularly defense counsel. Because the prosecutor controls a number of relevant legal determinations by virtue of his charge, the defense counsel is often relegated to a responsive role. He sifts the evidence mindful of the elements of the chosen offense. This power of initiation and definition is overlooked in typical analyses of the distribution of power. The presumption of innocence places the initial burden on the prosecutor, but by defining the offense, he shifts the justifying burden to the defendant. The plea bargain's attractiveness is thus enhanced because it again shifts the focus away from the definition fixed by the prosecutor to one formulated by negotiation.

Other process participants respond to the prosecutor's defining role as well. For example, the jury may not convict the accused of an offense greater than that which the prosecutor charges and the jury's verdict limits the judge's sentencing discretion. Finally, the severity of the offense significantly affects the penal authorities' parole determination.

The prosecutor's function extends beyond the charging decision to an investigative role which creates further implications for the criminal process. The evidence necessary to convict may never be uncovered if the prosecutor decides not to investigate adequately. In this context, the prosecutor's role closely resembles that of the police officer who chooses not to pursue a complaint. In another distinct role, the prosecutor, as a judicial figure, extends his influence beyond the capacity either to invoke (through investigation) or define (through his charge) the process. For example, the prosecutor's decision to introduce or suppress evidence will affect the jury's determination of guilt or innocence—particularly if the adequacy of prosecutorial definition is measured by the jury's concep-

44. *Id.* at 552-54.

tions.⁴⁵ The suppression of evidence will also affect the record which the judge uses in determining an appropriate sentence. Moreover, evidentiary decisions bear on the value of a right to counsel, modifying the nature of defense counsel's role as an adversary.⁴⁶

The prosecutor's decisionmaking is even more significant when accompanied by substantial input into the sentencing decision. In California, for example, the prosecutor voices both sentencing and parole recommendations.⁴⁷ He thus makes charge decisions which affect sentencing and later refines that defining conduct by suggesting specific sentences.

B. *General Effects on the Criminal Process*

The general effects of prosecutorial decisionmaking on the criminal process are discerned from patterns of prosecutorial activity. As an analytic matter, the validity of this vantage depends upon the pattern information's availability to other actors within the process; different decisions will present variant levels of visibility. While a cognizable pattern may occur if the prosecutor chooses not to charge a certain offense at all, a particular investigatory pattern may be far less visible. Moreover, those most likely to respond to these patterns, people who are sufficiently aware of prosecutorial activity, are only a particular subset of criminal process participants. The jury, for example, may not be influenced by activity patterns because there is little reason to attribute to them any familiarity with general prosecutorial practices.⁴⁸

Prosecutorial patterns have perhaps the clearest impact on legislative activity. If the elements of a particular offense are inartfully drawn, the prosecutor may be unwilling to charge that offense knowing conviction will be difficult. Variant underlying fact situations that give rise to prosecution for the same offense may indicate the existence of a gap in the substantive law. In either situation, and in others, it is likely that an awareness of these prosecutorial patterns will spur the legislature into action.

Prosecutorial patterns affect defense counsel in a qualitatively different way. Particular activity patterns may clearly indicate the feasibility of

45. See notes 51-53 *infra* and accompanying text.

46. See generally Rabinowitz, *The Prosecutor: The Duty to Seek Justice*, in VERDICTS ON LAWYERS 231 (1976).

47. See Comment, *supra* note 15, at 1387.

48. Another possibility is that the process will not run its course or that the actors, who are defined by their process roles, will nevertheless be motivated by independent sources. A police officer, for example, may view harassment as an important process goal and behave unaffected by prosecutorial conduct. See generally Goldstein, *supra* note 37;

plea bargaining; others may suggest to defense counsel a waiting strategy, allowing the prosecution time to initiate discussion of a reduction in charge. The pattern of prosecutorial practice thus becomes a tool in the dynamics of negotiation.

The judge's reaction to prosecutorial activity is part of a wholly different dynamic. He may prescribe a certain sentence on the basis of the charge, and not on the basis of the underlying conduct. After a period of time, the severity of the charge may be a cue for judicial sentencing behavior. Prosecutorial trial conduct patterns may also affect the character of the judge's activity.⁴⁹ A prosecutor notorious for introducing questionable evidence at trial, *i.e.*, hearsay, may find that the judge more carefully scrutinizes his other tactics.

Finally, patterns of prosecutorial activity may influence the conduct of potential and actual defendants. Following patterns of prosecutorial action and inaction, individuals may alter their criminal activity or change jurisdictions. Defendants' pleas may depend in part on the prosecutor's reputation for pursuing certain cases; or on his tendency to recommend lenient or stringent sentences. There is thus a temporal aspect to prosecutorial action—actions in every criminal prosecution affect subsequent actors' views of the offense charged, and the possibilities of conviction and sentencing.

C. *The Prosecutor's General Process Role—Some Further Refinements and Theory*

A systematic way to measure the relationship between prosecutorial patterns and criminal process operation would be through statistical analysis. A sophisticated post-audit system could measure the rate of rejections, dismissals, straight pleas, gross pleas, trial convictions, and overall convictions.⁵⁰ In this way, actors' perceptions, particularly the jury's, would determine the propriety of a charge. Empirical studies could further refine the system by gauging the attitudes of actors later in the process. For example, a study could determine the jury's willingness to convict the defendant on a more severe offense than that which was charged.

A control process model that dispensed with the prosecutor's specific function is another device with potential to measure the effects of prosecutorial patterns. Under this system, the prosecutor would bring only broad

Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962).

49. See cases discussed in Comment, *supra* note 3.

50. See Abrams, *supra* note 29, at 1387.

charges that were defined by a wide range of conduct (*e.g.*, "causing bodily harm"). The jury would hear evidence relevant to this broad category, and subsequently request instructions with respect to those offenses they believed to arise from the underlying behavior and evidence. Their verdict could include both the offense and the determination of guilt or innocence. The series of determinations could then be compared to jury determinations in analogous cases in which the prosecutor enjoyed his traditional powers.

The prosecutor's criminal process activities have thus far been analyzed without refining their character. But suppose the range of the prosecutor's charging activity is divided into three categories: "charging," "plus charging," and "minus charging." This conceptual division stems from a belief that in an ideal world,⁵¹ the criminal occurrence can be defined within the scope of a variety of offenses. The proper charge is the greatest charge the facts will allow; a "plus charge" is a charge greater than the facts will sustain; and, a "minus charge" is a charge that alleges a lesser included offense. The institutional, legislative edict instructs the prosecutor to charge at the mediate offense level.⁵² This attempt at refinement, however, is not meant to attach normative values to every charging level; rather, those values serve as the basis for observations concerning other process participants and their reactions to different charge levels.

The most severe process effects of minus charging occur when the jury perceives that it has taken place, for there is little they can do to alter the situation. The sanction issue normally is out of their control, but a minus charge forces them also to label conduct criminal in a way which they perceive to be inadequate. A striking example would be if a prosecutor charged an individual with manslaughter, but the facts would sustain a conviction for murder. The jury's perception of the inadequate charge would lead to a swift conviction for the lesser offense. The judge is the only person with power to counteract the minus charge. In some circumstances, he can impose a sentence more severe than is normally associated with the lower charge. But if the judge does not agree with the jury's minus charge finding, the sentence actually imposed may be far less than the jury would have recommended. One source of the problem is the differentiation in criminal process functions which causes certain actors to modify their behavior in anticipation of another's conduct. Thus

51. An ideal world, for these purposes, is one in which language precisely reflects the underlying reality.

52. The proper charge requirement may be read into the prosecutor's obligation to enforce the law. *See* 11 N.Y. COUNTY LAW § 700 (McKinney 1972).

the charge decision, made early in the process, not only affects actors further on, but also influences the way those later actors predict the behavior of others.

“Plus charging” results in less severe process effects only if the jury has the power to convict on a lesser included offense. Absent such power, the effects may be considerable. A jury may acquit rather than subject an individual to a prison term that is potentially greater than their view of the offense would dictate.

These patterns will have legislative effects as well. If, for example, the jury is dissatisfied with the highest sentence it can impose, there may be strong pressure on the legislature to allow greater sanctions for lesser offenses. Moreover, a pattern of acquittals of persons obviously guilty of lesser offenses than those charged, will create pressure for legislative authority to impose lighter sentences for certain serious charges. The jury will thus be able to convict without concern that the punishment may be grossly disproportionate to the offense.

Patterns of prosecutorial activity will also affect defendants. Unless the prosecutor has adequate control over both sentencing and parole, the individual who has plead to a lesser offense may find his “bargain” is not all that he hoped for. The problem is clear: If the prosecutor controls the charge, should he not also control the other process aspects in sufficient number to determine effectively an individual’s fate? In some respects, vesting the prosecutor with such power would destroy the purpose of the present allocation of functions.⁵³ On the other hand, the plus charged individual presents a dilemma. Although the jury wants to convict the defendant because they cannot conceive of allowing him back on the street, they hope the judge will be lenient in sentencing. If the judge imposes the maximum sentence, the prosecutor has managed to deprive the individual, in large part, of the jury’s determination of his lesser degree of guilt.

This division of prosecutorial activity into “charging,” “minus charging,” and “plus charging” permits consideration of a broader perspective: the effects of prosecutorial activity on possible criminal process goals—specific and general deterrence, retribution, and rehabilitation. Unfortunately, because of the absence of data indicating that the process actors are aware of prosecutorial activity patterns, this discussion focuses merely on possible avenues of inquiry.

53. The present allocation separates criminal process function much the same way checks and balances operate on the broader, institutional level, and for primarily the same purpose—to provide process actors with constant, interdependent, supervisory roles.

“Plus charging” appears to be the greatest deterrent. If we assume the behaviorist view that an individual is affected most strongly by temporally linked responses, it should follow that a pattern of severe charges (perceived as such) would provide a strong deterrent to criminal behavior.⁵⁴ The behaviorist’s contemplation of temporal proximity, however, is such that the only probable effective deterrent is the criminal’s actual apprehension by the police. Moreover, the knowledgeable criminal will soon realize the “plus charge’s” potential for enhancing his opportunity for acquittal. Of course, the converse is true for the “minus charge.” If the individual is aware that the “minus charge” may facilitate his conviction and is conscious of the substantially higher risk of incarceration, he may be more easily deterred by the possible lesser charge than by the initial shock of a severe charge.

The question that arises with respect to general deterrence is whether society is more likely to react to charges that appear inconsistent with its perception of the underlying offense’s severity or to those that create a perceived equality between act and social sanction. The answer would seem to depend on delicate psychological variables: whether the charge seemed merely harsh, or so unrelated to the sanctioned criminal conduct as to appear capricious. The general deterrent effect of “minus charging” raises a more difficult issue: whether society is deterred by swift “justice” (assuming the “minus charge” hastens the process), even if the “justice” is not considered equal to the crime. It should be noted, however, that this analysis relies on a societal awareness of charging behavior, an awareness which may not exist.

Rehabilitation presents other problems. “Minus charging” and “plus charging” may create states of mind that are inconsistent with the rehabilitative model. The “plus charged” individual who is ultimately sentenced is demoralized; the “minus charged” individual, who receives a lesser sentence than he should have, senses his good fortune and anticipates his release without remorse. The simplicity of this paradigm points out the difficulties of an analysis of the rehabilitative model from the process perspective. The rehabilitative model is essentially personal to the individual incarcerated and does not respond to the system’s pressures like general or specific deterrence models which are “act” oriented. The rehabilitation question concerns how the totality of process will affect the criminal’s mind. The difficulty of answering that question

54. The underlying assumption correlates the severity of the stimulus with the character of the response, an assumption apparently borne out by the literature on aversive conditioning. See R. ULRICH, T. STACHNIK, & J. MABRY, 1 CONTROL OF HUMAN BEHAVIOR 303 (1966).

may explain the futility of attempting to rehabilitate individuals through manipulation of the criminal process.

Retribution⁵⁵ presents the greatest dilemma because it brings into relief the difficulty of defining an appropriate charge, whether by external or internal criterion. Retribution, in the practical sense, is effected by an appropriate finding (guilty/not guilty) and the imposition of an appropriate sentence, as measured by one's peers. The retributive model is not fulfilled to the extent that a "mischarge," which is determined from the process actors' internal vantage,⁵⁶ prevents these appropriate results. What is an externally defined "plus charge" or "minus charge," however, may not actually prevent an appropriate retributive effect. There is no requirement that the jury find guilt or innocence on the basis of an appropriate, externally defined charge.

Beyond the question of external or internal standards, additional problems arise because the charge decision itself is connected with variant sanctioning qualities; for example, the more serious the charge, the more onerous the trial and the attendant social stigma. These retributive effects also must be considered in measuring the degree to which the process achieves retribution. A charge that is not externally appropriate and is internally so perceived thus may skew the process' retributive effect even though the ultimate finding may comport with the above suggested notion of retribution.

The prosecutor's internal vantage, as a theoretical matter, points out the difficulty of attempting to understand the operation of any complex system. Indeed, Llewellyn's instruction to the realists that they keep their goals modest is well taken.⁵⁷ Within the criminal process, although it may be possible to analyze the effect of decisions to terminate process (e.g., police decisions not to invoke and prosecutorial decisions not to charge), the analysis of other actors' behavior is more complicated when the action affects only a slight change in the process' operation. To demonstrate the complexity, the following scheme may be viewed as the mere inception of analysis. First, the character of the process actors' action must be considered—is it consistent with or does it represent a departure from prior norms? This possibility is the most difficult task because it requires the

55. Retribution has once again been recognized as a legitimate sanction motive. See *Gregg v. Georgia*, 428 U.S. 153 (1976). But the controversy over its validity is longstanding. See Weihofen, *Retribution is Obsolete*, in J. GOLDSTEIN, A. DERSHOWITZ, & R. SCHWARTZ, *CRIMINAL LAW: THEORY AND PROCESS* 715 (2d ed. 1974).

56. The jury's reaction to the charge presents the internal vantage.

57. See Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

assumption of a normative posture, whether it is the prosecutor's common practice or some other external "justice" viewpoint. Second, other actors' expectations concerning the prosecutor's actions and the flexibility in their expectations for aberrant behavior should be considered. Third, there should be an attempt to describe the way other actors altered their behavior. Finally, there must be a consideration of the process' long run alterations and the degree of flexibility available in process institutions to accommodate future nonconforming behavior.

A simple hypothetical reflects the inherent difficulties: A husband and wife have an argument over his abuse of their child; twenty minutes later, the husband, who has borrowed a gun from his brother, kills her. The prosecutor charges manslaughter although the facts would sustain a charge of murder. In prior, similar circumstances, the prosecutor had charged either of the two offenses. The jury believes a murder conviction would have been appropriate and thus convicts readily on manslaughter. The judge does believe that lengthy incarceration will be helpful to this individual and sentences him to fifteen years, a light sentence for manslaughter. The lowest possible sentence for murder would have been thirty years; parole is possible for a person who has completed one-third of his sentence on good behavior.

The jury vantage is a reasonable starting point to consider the process effect issues that arise in this context. The jury is presumptively dissatisfied with the outcome, but is effectively overruled by the decisions of both the prosecutor and judge. They could petition the legislature, but there are attendant difficulties. It is doubtful whether they could muster the concerted strength necessary to evoke an adequate legislative response. The jury's ends would not be served by a mere redrafting of the murder and manslaughter statutes, unless the legislature also removed all prosecutorial discretion. They could suggest changes in the sentencing structure, but still the judge may exercise his authority to foreclose any effective jury input. They could voice their displeasure to the prosecutor directly, but a change in his behavior is unlikely, particularly in light of his recent successful prosecution. Although he may be made aware of the jury's displeasure by their prompt, almost automatic, guilty verdict, it is conceivable that he will attribute the jury's behavior to his intelligent charge selection.

Doubts remain as to whether the criminal process will change to accommodate this perceived displeasure. The adoption of a normative stance, which delineates both the appropriate allocation of pressures between those actors, will help determine whether the process is design-

ed to avoid this degree of dissatisfaction. It is unlikely that focusing on one process actor will provide the analytic intensity that is required.

IV. THE THIRD VANTAGE—SEPARATION OF POWERS: AUTHORITY, IMMUNITY, AND CONTROL

The prosecutor, perhaps more than any other individual in the criminal process, maintains a relationship with all three branches of government. He enforces a legislative enactment—the criminal code—and his office is customarily a legislative creation.⁵⁸

The normal scope of empowering statutes is limited. The New York Code, for example, provides for an office of the prosecutor and defines his duties as the prosecution of all crimes and offenses cognizable in the county of his jurisdiction.⁵⁹ It requires the prosecutor to keep records of his pending cases and to turn over any payments, fines or otherwise, to the treasury within thirty days.⁶⁰ Other provisions provide for (a) a special district attorney when the regular district attorney is disabled from properly performing his job;⁶¹ (b) the appointment of assistant attorneys;⁶² (c) the employment of outside counsel when the complexity of the case requires it;⁶³ and (d) the defraying of special expenses associated with the pursuit of criminal trials.⁶⁴ Apart from these broad guidelines, the internal operation of the office is within the prosecuting attorney's jurisdiction.

This remaining area is generally considered one of executive function,⁶⁵ a designation that reflects the executive appointment of the prosecutor. On the federal level, for example, the President appoints the Attorney General who, in turn, appoints his assistants. Courts recognize the essentially executive character of the prosecutor's office and, in *United States v. Cox*,⁶⁶ it was held inappropriate to review the prosecutor's decisions not to pursue certain indictments. The court reasoned that the Attorney General was specifically accountable to the President and, in the particular case, the district attorney had been acting on direct

58. This is true on both the federal level, *see* 28 U.S.C. §§ 541-548 (1970), and the state level, *see, e.g.*, 11 N.Y. COUNTY LAW §§ 700-706, 926-933 (McKinney 1972).

59. *Id.* § 700.

60. *Id.*

61. *Id.* § 701.

62. *Id.* § 702.

63. *Id.* § 703.

64. *Id.* § 706.

65. *See, e.g.*, Note, *The Use of Mandamus to Control Prosecutorial Discretion*, 13 AM. CRIM. L. REV. 563, 570-71 (1976).

66. 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

instructions from the Attorney General.⁶⁷ In *Inmates of Attica Correctional Facility v. Rockefeller*,⁶⁸ the court held that despite serious questions concerning the deprivation of inmates' civil rights, it would not interfere with a decision not to prosecute.⁶⁹ The strongest articulation of this separation of powers position, which uses the executive nexus as authority for discretionary prosecutorial decisionmaking powers, is found in *Newman v. United States*.⁷⁰ In *Newman*, Judge (now Chief Justice) Burger was presented with the question whether it was a denial of equal protection for a prosecutor to accept a lesser plea from one individual, but not from another, when both individuals engaged in similar behavior in the same incident. The court refused to find a denial of equal protection, and held that the discretionary exercise of executive authority was beyond the purview of judicial review.⁷¹ This suggests that although not all judicial review of prosecutorial action is precluded,⁷² the executive is a primary source of prosecutorial authority.

The judiciary provides the prosecutor with authority through its grant of immunity. In *Imbler v. Pachtman*,⁷³ the Supreme Court, after recognizing the prosecutor's absolute civil immunity in the course of his advocacy function, refused to reach the question whether the same immunity applied to his role as an administrator or investigative officer.⁷⁴ In focusing thus on the prosecutor's duty to disclose information at trial, *Imbler* concerns the adjudicative aspect of the prosecutorial task. This is consistent with the First Circuit decision in *Guerro v. Mulhearn*,⁷⁵ which rested immunity directly on the prosecutor's quasi-judicial function.

Control of the prosecutorial function is also divided among the various branches of government. The executive has a direct removal power, which is generally broader than that provided by statute.⁷⁶ Even if the executive does not remove the prosecutor, he can restrict his power by

67. *Id.* at 171.

68. 477 F.2d 375 (2d Cir. 1973).

69. *Id.* at 380-81.

70. 382 F.2d 479 (D.C. Cir. 1967).

71. "Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges." *Id.* at 481-82.

72. See note 81 *infra* and accompanying text.

73. 424 U.S. 409 (1976).

74. *Id.* at 430-31.

75. 498 F.2d 1249 (1st Cir. 1974).

76. A typical statutory provision is N.Y. CONST. art. 13, § 13. The executive's authority to remove the prosecutor is broader in scope because of the political nature of the appointment and office. The statutory standard requires serious breaches of conduct for removal, but executive pressure will often lead to resignation without so serious an offense.

limiting the scope of his activities. The executive and legislative branches together control virtually all the discretionary prosecutorial authority.

Judicial control is more limited. The judiciary is generally unwilling to interfere with prosecutorial decisionmaking, whether through a mandamus action⁷⁷ or by implying, through statutory interpretation, a right to compel prosecutorial action.⁷⁸ Individual constitutional claims alleging unequal and discriminatory enforcement have generally failed. *Oyler v. Boles*⁷⁹ involved a West Virginia statute that provided for a mandatory life sentence upon a third felony conviction. Invocation of the statute, however, was within the prosecuting attorney's discretion. An individual's claim that the statute required the prosecuting attorney to proceed equally against all three-time offenders was dismissed. The Supreme Court held that the plaintiff did not establish that impermissible grounds underlay the prosecutor's exercise of choice and the discretion, written into the legislation, was permissible.⁸⁰

Judicial control of selective enforcement, though infrequent, occurs most often when a particular statute itself promotes blatant discrimination. In *Yick Wo v. Hopkins*,⁸¹ which did not involve explicit prosecutorial discretion, the Court held that a statute, facially reasonable in its attempt to regulate the laundry business, nevertheless denied equal protection of the law because its primary focus was the Chinese population. Challenges to prosecutorial activity must show a similar deliberate selection, based unjustifiably upon an arbitrary classification. In *United States v. Falk*,⁸² a Vietnamese War protester was prosecuted for failing to carry his draft card. The court, advertent to *Yick Wo*, found a prima facie case of improper law enforcement because there was a published government policy not to prosecute violators of the card possession regulations, and the purpose of the prosecution appeared to be to punish the individual for the legitimate exercise of his first amendment rights.⁸³

Judicial restraints on the prosecutor are uncommon in other situations as well. *Imbler* represents the prevailing view that suits against a prosecutor alleging the unlawful deprivation of civil rights are generally unsuccessful. The immunity recognized in *Imbler*, however, does not

77. See generally Note, *supra* note 65, at 581-91.

78. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973).

79. 368 U.S. 448 (1962).

80. *Id.* at 456.

81. 118 U.S. 356 (1886).

82. 479 F.2d 616 (7th Cir. 1973).

83. *Id.* at 623-24.

protect all prosecutorial conduct which falls short of prevailing judicial standards. In *Dixon v. District of Columbia*,⁸⁴ for example, the court ordered the dismissal of a retaliatory prosecution instituted to pressure the defendant into dropping charges against certain police officers. In *United States v. Paiva*,⁸⁵ the court refused to allow the prosecutor to violate his agreement to drop charges which had induced defendant's guilty plea. The court noted that it had the power and concomitant duty to supervise the prosecutor's office "to the extent its [*sic*] uses the judicial administration of criminal justice."⁸⁶

Of like import is *McDonald v. Musick*,⁸⁷ in which the prosecutor suggested he would drop charges if the defendant would stipulate that there had been probable cause for his arrest. When the defendant refused, the prosecutor moved to amend the complaint to allege resisting arrest. The Ninth Circuit held that the prosecutor's action approached extortion and thus violated the defendant's civil rights.⁸⁸ The prosecutor's conduct should be judged by the same standards that apply to a private attorney, the court noted, which is in marked contrast to the treatment that accords him judicial immunity. In *Blackledge v. Perry*,⁸⁹ the Supreme Court held that it was a denial of due process and impermissibly vindictive for the prosecutor to raise the charge against a defendant at a trial de novo that was ordered after an appeal from a misdemeanor conviction for the same conduct.

These cases hold that prosecutorial misconduct will not be allowed to undermine the operation of the judicial system,⁹⁰ particularly when constitutional guarantees are involved. In those cases the courts will attempt to differentiate functions and subject the prosecutor's judicial role to stricter scrutiny.

There are additional important implications derived from the separation of powers' vantage. Questions arise with respect to the appropriate relationship between sources of authority and control. It is clear that while judicially granted immunity intensifies the prosecutor's executive and legislative powers, the judiciary fails to exercise an equivalent degree of supervision. Legislative control of prosecutorial behavior simi-

84. 394 F.2d 966 (D.C. Cir. 1968).

85. 294 F. Supp. 742 (D.D.C. 1969).

86. *Id.* at 746.

87. 425 F.2d 373 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970).

88. *Id.* at 375.

89. 417 U.S. 21 (1974). *See* 54 N.C.L. REV. 108 (1975).

90. For another case involving prosecutorial misconduct, see *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973), *aff'd on rehearing*, 511 F.2d 1049 (2d Cir. 1975).

larly lacks the degree of effectiveness that would correspond to its power to authorize prosecutorial activities.

Courts carefully scrutinize legislative enactments that define interests and sanctions, yet the prosecutor performs a similar (perhaps quasi-legislative) function and judicial intervention is the exception rather than the norm. Perhaps our institutions are incapable of adequately controlling the prosecutor's conduct. The judiciary would appear better suited to perform this supervisory function because the legislature may be limited by its inherent political nature. The legislature may be able to effect the first level compromises that are necessary to enact a criminal code, but may not be able to monitor the activities of any individual actor within the criminal justice system.

V. THE FOURTH VANTAGE—THE PROSECUTOR IN THE COMMUNITY

The prosecutor maintains a relationship with the community at large, both in his dealings with individuals intimately associated with the criminal process, *i.e.*, witnesses, juries, defendants, and victims, and those who might be deemed external to it. This view of the prosecutor's function is contrary to a common one that portrays him as insulated from the community by the police and subsequent process actors, notably the jury. Indeed, the communitarian perspective is most often applied to the police both because of their visibility and their pivotal role between the community and the criminal process.

Community response to prosecutorial action is generally fact-sensitive and, because it cuts through many possible theoretical formulations of prosecutorial role, does not lend itself to easy characterization. The vantage can be conceptualized nevertheless by focusing on three ways in which prosecutorial function and community response intersect. The first, which is process connected, is the prosecutor's relationship to the victim. The individual victim who chooses to invoke the process strongly reflects community sentiment by the very nature of the act. By initiating this "defining out" process,⁹¹ the victim necessarily makes assumptions about community sentiment and support. That the victim acts as spokesman for community sentiment is more clearly reflected in apposition to procedures which allow injured individuals to pursue statutory remedies. These procedures indicate that strong underlying social policies will be served by permitting the individual prosecution of essentially public

91. See A. FRANZ & S. HUGO, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 212-23 (2d ed. 1956).

rights.⁹² The prosecutor's decisions to prosecute thus are a response to perceptions of community sentiment. He alone is empowered to vindicate community rights and, in a sense, stands in place of the victim of criminal behavior. One can conceive of a system that allowed individual victims to prosecute cases if the appointed prosecutor chose not to do so. In the same manner, the prosecutor's relationship to the jury reflects his attitude toward community sentiment. The jury ultimately vindicates the original complainant and puts the imprimatur of community feeling on his or her prediction. The prosecutor's guidance and courtroom disposition encourage the jury to that end.

The prosecutor's reaction to the substantive criminal law also represents a response to community sentiment. Each time the prosecutor chooses not to enforce the law (assuming probable cause exists), he must believe that with respect either to the particular defendant or, to society at large, the community would rather not have those provisions enforced. He is making assumptions about the perceived goals of the system. Releasing a first offender because incarceration will not serve any purpose imports a rehabilitative or deterrent model to the administration of the criminal law. Whatever the justification, the prosecutor effectively furthers his own view of the community's purpose in enforcing the criminal law.

Community pressures brought to bear on the prosecutor's office create the clearest intersection of prosecutor and community. While the prosecutor's office generally is insulated from public pressures, certain circumstances spur public reaction. These circumstances may be of a continuing nature, like those which lead to a prosecutorial crackdown on illicit sexual activity. A period of lax prosecution is followed by public pressure to enforce the law, which soon changes to outcries against the expenditure of limited resources. The pressure operates initially on the police who are called to enforce the ordinance; arrests, however, effectively transfer the pressure to the prosecutor.

The circumstances that elicit prosecutorial action are also of an extraordinary nature, like those surrounding the Watergate affair. These situations may lead to the appointment of a special prosecutor, which reflects both the depth of public sentiment and the public's unwillingness to provide enforcement agencies the opportunity to exercise their customary discretion.

92. See *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972) (direct citizen action to collect statutory fines). See generally Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

VI. THE ADOPTION OF VALUES AND THE SEARCH FOR LEGITIMACY

In describing the vantages, this article has neither adopted values, nor suggested a scheme of values that would facilitate comparison of the vantages. But certain values inhere in the very choice of a perspective or set of perspectives, and each vantage suggests a legitimizing value which perhaps best expresses these ideals.

The administrative viewpoint, which considers the prosecutor both personally and functionally, supports legitimacy in two ways. First, it focuses on the personal legitimacy which evolves from trust in the integrity and intelligence of the individual decisionmaker. This legitimacy is rarely separated from the institutional role; perhaps we trust the President because of his individual identity, but more likely we trust him because of his office. It is difficult to separate this form of legitimacy from that which inheres in function and in office. The second form of legitimacy, therefore, is best expressed in the structures designed for authority and control. In suggesting that the prosecutor clarify the bases for his decisions, we demand that he elucidate the source of his authority and his position within the bureaucratic structure.

The criminal process vantage suggests a legitimacy grounded in a notion of instrumental rationality—the prosecutor's actions lead logically to some definable goal. When the prosecutor brings a charge on the basis of his determination of probable cause, he initiates two processes. The first is the one customarily thought of—the criminal process—which tests the guilt or innocence of the charged individual. At the same time, the other process actors test the accuracy of the prosecutor's charge prediction, a factor to be considered in measuring functional performance.

The separation of powers vantage also suggests a structural legitimacy, and questions of control and authority are pervasive. The legitimizing roots are deeper than those associated with the prosecutor's office as a bureaucratic entity, however; here they are fundamentally constitutional. From this perspective it is not so important that a particular prosecutorial action can be traced back to its power source, but rather that the branches of government compromise among themselves to provide the prosecutor with an operative structure.

The nature of the legitimacy ascribed to the community vantage does not relate to a legitimizing process or structure but rather to an amorphous entity. For this reason, two additional factors are relevant. First, one must discern the causal link between the prosecutor's action and the community. Second, and more importantly, one must analyze the precise

“community,” whether it be a group within or outside the process, which is applying pressure on the prosecutor.

Beyond, yet in part because of, questions of legitimacy, certain normalizing values attach to certain vantages. The normative position from the administrative viewpoint requires that the prosecutor be properly trained, unbiased, and act within some controlling bureaucratic structure. The normative position in the criminal process vantage seems to be a *via media*: The prosecutor should use the criminal process to determine the guilt or innocence of individuals without circumventing the process through plea bargaining, but the scope of process employment should be limited by probable cause. The normative position with respect to separation of powers distributes authority and supervision among the three branches of government; checks and balances is transformed into a notion of coequality. Finally, the normative position for the community vantage is that the prosecutor should be sensitive to the manifestations of community sentiment. Within the confines of legislatively determined criminal activity, the prosecutor should serve as a conduit for the expression of that sentiment.

There is no guarantee that the values expressed above will not influence the vantage application that follows. Nor is an overriding normative position disclaimed—the greater the number of vantages that describe and legitimize the prosecutor’s exercise of power, the more intelligent and appropriate that exercise becomes.

VII. APPLICATION OF THE VANTAGES

Both the decision to prosecute Tokyo Rose and the decision to accept Spiro Agnew’s *nolo contendere* plea have been the subject of controversy and debate. It is suggested here that the antagonists in the debate are antagonists precisely because they approach prosecutorial function from different perspectives. If all four vantages were considered, more intelligent decisions could have been achieved.

In August 1973, then Vice President Agnew issued a statement to the effect that he was the subject of a criminal investigation being conducted by U.S. Attorney Beall.⁹³ Kickbacks allegedly had been paid by contractors, architects, and engineers to various Maryland officials while Agnew was governor; certain campaign contributions also were at issue. On the day following this disclosure, the Vice President announced that he had no intention of resigning.⁹⁴ The investigation proceeded and on August

93. N.Y. Times, Aug. 7, 1973, at 1, col. 8.

94. N.Y. Times, Aug. 9, 1973, at 1, col. 8.

10, federal investigators subpoenaed Agnew's records of his two years as governor.⁹⁵ This and other material was given to a grand jury which proceeded to indict a Baltimore County executive on thirty-nine counts of bribery, extortion, and conspiracy.⁹⁶

During this period, Agnew discussed his possible resignation with President Nixon.⁹⁷ These discussions turned eventually to negotiating an exchange of Agnew's resignation for a guilty plea to a minor offense.⁹⁸ Finally, a deal was struck: there would be no prosecutions for criminal activity relating to the kickback schemes or campaign contributions in return for Agnew's *nolo contendere* plea to a charge of tax evasion and resignation of the Vice Presidency.⁹⁹

This agreement was formalized in three statements:¹⁰⁰ one by the Attorney General requesting that the court accept the agreement; one by the Vice President; and one by the Judge. The vantage analysis will be applied to these three statements.

Attorney General Richardson viewed the matter almost exclusively from a communitarian perspective. He noted that the decision must be "perceived [as] just and honorable, not simply to the parties but above all to the American people,"¹⁰¹ and thought that providing information to the national community would aid in that evaluation. But Richardson's presentation of the information had implications for the integrity of the process, particularly for the role of the jury, because he released information that normally would be used in the process itself. Richardson unwittingly reflected these ramifications when he noted that "this evidence establishes . . ."¹⁰²—a statement which the jury alone was entitled to make. Richardson also implicated the process to the extent his statements reflected on the character of possible witnesses and the reliability of their statements, *i.e.*, "None of the Government's major witnesses has been promised immunity from prosecution . . ."¹⁰³ Richardson adverted to the process (and conflated the criminal and impeachment processes) only to suggest that its purpose is to vindicate a defendant and,

95. N.Y. Times, Aug. 11, 1973, at 1, col. 1.

96. N.Y. Times, Aug. 24, 1973, at 1, col. 8.

97. N.Y. Times, Sept. 2, 1973, at 1, col. 8.

98. N.Y. Times, Sept. 21, 1973, at 1, col. 6.

99. N.Y. Times, Oct. 11, 1973, at 1, col. 4.

100. All three statements were read in open court in the District Court of Maryland in Baltimore, on October 10, 1973, and are reprinted in J. GOLDSTEIN, A. DERSHOWITZ, & R. SCHWARTZ, *supra* note 55, at 573-76.

101. *Id.* at 573.

102. *Id.*

103. *Id.*

if the defendant wishes to forego such vindication, communitarian interests must be considered paramount. By assuming this narrow view of the process' accomplishments, Richardson ignored the community values which inhere in the process itself. Finally, his failure to consider other vantages and, particularly, his oversimplified treatment of the process perspective was reflected in his willingness to suggest an appropriate sentence. He thus minimized the process' importance in ultimately arriving at an appropriate sentence decision and simultaneously ignored the process' extensive, underlying role differentiations.

In simplifying the process' inherent values, Richardson adverted neither to the character of the negotiations that produced the deal (an internal, functional perspective) nor, except in passing, to the implied separation of powers notions.¹⁰⁴ Both omissions were surprising. There had been an obvious departure from the standard bureaucratic process in the charge determination; Richardson had dramatically exercised his internal authority and supervisory functions. There was also an important degree of judicial abrogation to the executive.

Agnew's statement echoed and yet transformed Richardson's. He agreed that the point of departure was the community vantage, but did so in a peculiarly self-effacing manner, suggesting that community concern was better spent on other matters.¹⁰⁵ He essentially dismissed process, but instead found the grand jury as the one relevant point in the traditional criminal process. He proceeded no further, and made it clear that any hypothesis as to the process' result was unnecessary because he had altruistically dispensed with the process itself. He failed to consider whether the process might serve community interests.

Judge Hoffman's response was analytically more complex. He began, from an internal vantage, with a discussion of the procedures that led to the agreement, but lapsed quickly into the prevailing sentiment when he spoke of community perceptions. He objected to the publication of the evidence, not because it usurped an essentially process function, but because it would have led to further community discussion.¹⁰⁶ He addressed the process itself only at the end of his opinion, by discussing the propriety of a sentence rather than a fine.

The appropriate set of judicial considerations are more complex. It was the judge's responsibility to consider the fact and manner of negotiation:

104. Richardson conceded that the Department of Justice acknowledged Congress' power to proceed by impeachment, once the indictment had been returned. *Id.* at 574.

105. *Id.*

106. *See id.* at 575.

whether the deal was properly made and whether the prosecutor's office recognized the standards by which it was made. There is no reason to dispense with bureaucratic norms without justification; there is no reason the Attorney General should not be subject to standards in charge and plea decisions. The court should have more carefully considered process values in removing evidentiary doubt and vindicating either Agnew, Beall, or Richardson. Some discussion of community in that context also was warranted: the court should have considered whether the community would best be served by an ultimate resolution of the dispute by the proper process institution.

Independent of Agnew's political position, what are the process goals in this kind of prosecution? What are the separation of powers effects? Clearly passive concurrence in an agreement fashioned by the executive branch for one of its own raises issues with respect to the balance of power. Finally, there is the communitarian interest, which is represented by a desire to swiftly resolve the matter. Apart from the question of whether other means could be found to remove the uncertainty, *i.e.*, by appointing an acting Vice President, the court does not discuss the community interests at stake.

Essentially the same issues arise in the Tokyo Rose case.¹⁰⁷ Iva Toquino was an American living in Japan during the Second World War. In 1942, she took a job as a typist with Radio Tokyo and became acquainted with two prisoners of war who worked there, in charge of a program called "Zero Hour." When they needed a female voice for the program, which consisted of light entertainment and propaganda directed at American forces in the Pacific, Iva agreed to be that voice.

After the war, Iva gave an interview about her job and noted that she once broadcast the following line: "You fellows are all without ships. What are you going to do about going home now?"¹⁰⁸ This line was the crux of her subsequent trial on charges of treason. The United States Attorney decided initially not to prosecute because it would be difficult to locate the two corroborating witnesses required by the Constitution.¹⁰⁹ This decision was heatedly attacked by the public, particularly Walter Winchell, who accused Attorney General Clark of laxness. The trial was marked by the introduction of questionable evidence and a hung jury eventually reached a guilty verdict following a "dynamite charge."¹¹⁰

107. The discussion is taken from Legget, *Tokyo Rose: Traitor or Scapegoat*, N.Y. Times, Dec. 5, 1976, § 6 (Magazine), at 56.

108. *Id.*

109. See U.S. CONST. art. III, § 3.

110. In a "dynamite charge," the judge informs the jury of the case's importance to the government and of the taxpayer's expense already incurred in the prosecution.

The four vantages illuminate the decision to prosecute Iva Toquino. Because the Justice Department controlled decisionmaking, Iva Toquino was, in a sense, subject to double jeopardy. In normal circumstances, the prosecutor uses established standards in reaching a decision not to prosecute, and follows that determination unless further evidence is adduced. In Iva's case, there was no internal structure capable of reaching a determination and no standards available to reconsider the determination once made. It is also doubtful whether, in an office with articulated standards for prosecution, only one of a dozen Tokyo Roses would have been prosecuted. Selective prosecution does not seem appropriate to the offense of treason. These two points denote a clear normative position. They reflect nevertheless that the Tokyo Rose decision would have been analyzed differently if internal, administrative structure had been considered.

The criminal process vantage requires a consideration of whether the prosecution compromised process-related values. On the one hand, the character of her prosecution threatened the process' independence; on the other hand, an innocent Iva Toquino would have realized an important vindication of her loyalty.

The separation of powers perspective sheds more light on the matter. Perhaps prosecutions tinged by political controversy should be scrutinized more carefully by the judiciary. The political, primarily executive, process' mode of self-correction, however—the pardon power—counters the argument for stricter scrutiny.¹¹ Moreover, if treason is a crime against the state in its executive capacity as warmaker, executive and political controls are expected. Yet both the legislature and judiciary appear to have abrogated their responsibility in this case.

Finally, there is the communitarian perspective. There was a strong community desire to see Tokyo Rose prosecuted; unfortunately, the character of that community and whether it, in fact, represented majority sentiment, was not analyzed. Nor was the role of people like Walter Winchell analyzed to determine the proper community spokesmen. Perhaps some methodical inquiry into community sentiment could have been undertaken by the relevant actors. This care would have been consistent with the fact that treason is a constitutional offense and thus, unlike statutory offenses, reflects deep-seated notions of community needs and desires.

111. Before President Ford left office, he pardoned Iva Toquino. *See* N.Y. Times, Jan. 20, 1977, at 8, col. 3.

The final analysis of the Tokyo Rose decision leads to two fundamental perceptions. First, since community pressure was central to the progress of the prosecution, that pressure should have been analyzed more carefully. Second, the absence of internal bureaucratic structures made the prosecutorial decisionmaking process susceptible to community forces. It would be interesting to observe internal structures that were designed for control purposes to provide for community input and, at the same time, to ensure that the input did not altogether alter the decision-making process.

VIII. CONCLUSION

Let me express, finally, a note of pessimism. The suggested structures merely facilitate the articulation of reasons for prosecution and force a person considering the validity of a prosecutorial decision to confront all the elements. The structure cannot control the outcomes of those considerations since that ultimately is a question of personal values. One person may consider process values of the utmost importance; another may feel that it is the prosecutor's job to follow popular sentiment.

Even more importantly, the following caveat is necessary: this is a structure for analysis but not for the implementation of particular value schemes. A person devoted to process may analyze decisions to consider their process implications; it is much more difficult to use that analysis as the basis for action that is designed to further any one of the enumerated goals. The criminal law is a complex process that involves the intersection of many subsystems. It is doubtful whether even the most single-minded individual, endeavoring to alter it, could do so successfully.

WASHINGTON UNIVERSITY LAW QUARTERLY

VOLUME 1978

NUMBER 1

WINTER

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