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MAY 12 1986

47006

Prosecutorial Discretion:

An Exchange System's Approach

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May 9, 1986
POLS 499H

The state's attorney has the sole discretion to initiate criminal charges. Only exceptional cases are subject to judicial review (Nissman and Hagen, p. 13). Taking this discretionary power into account, the question at hand is raised:

Does the state's attorney when exercising his discretionary power follow a structured decision-making process like one that is explained in a system's model?

This question is important because the state's attorney has the power to determine the future of the individual. In exercising his power, the prosecutor has only one restraint: probable cause must be determined before charging the defendant (Nissman and Hagen, p. 13). In some cases, the prosecutor's decision may ruin the individual's life. Even if the individual is not convicted, his reputation may still be hurt. Without any checks on the prosecutor's discretion, the individual who is not guilty does not have a chance to regain his reputation. This power of the prosecutor is unlimited. The problem here is that the individual's right of due process may be denied.

The question at hand is also important, ^{because} discretion may breed corruption. In the system, the prosecutor is a public official. His position is one that the people elect. In his campaign, he may be endorsed by a particular group of citizens. Once he is elected office, he may represent the interests of these individuals. These interests may include the strict enforcement of a certain offense. If the prosecutor endorses these same interests, he may focus particularly on the certain offense. The defendant will not be afforded

individual treatment. In basing his decisions on the public's interests, he may not look at all the facts of the case. Because the prosecutor's main duty is to practice the law, he is not suppose to single out the interests of a certain group. This practice is corrupted. The individual has a right of due process but because the prosecutor has the sole discretion to initiate the charge, the rights of the individual may be violated.

This question is also important because the prosecutor's discretion may also effect the criminal system. The police officer, the defense attorney, and the judge are all involved in the criminal process. These three individuals may rely on the prosecutor's actions when structuring their opinions. If the prosecutor makes his decisions arbitrarily, then the criminal process is upset. The police officer may base his arrests on the charging behavior of the prosecutor. He does not want to waste the time of the individuals in the process, if the prosecutor does not follow through. The defense attorney also plans his strategy on the behavior of the prosecutor. If the prosecutor enforces certain offenses rigidly, the defense attorney needs to adjust his tactics in order to best represent his client. The judge may also take into account the prosecutor's charging habits when making his decisions. If the prosecutor tends to charge certain offenses rigidly, the judge may conclude that the prosecutor is not preparing the case on its merits. Thus, the judge may determine a lighter sentence or find the defendant not guilty. Hence, the actors in the process rely on the prosecutor's actions when making their decisions.

When the state's attorney exercises his discretion, he must follow the legal standards of due process. Due process is defined in the Fourteenth Amendment of the Constitution: "nor shall any State deprive any person of life, liberty, or property without due process of law." The prosecutor is under the obligation to follow procedures. If the prosecutor charges arbitrarily, the individual's right of due process may be violated. The question at hand suggests that the prosecutor follow a structured decision-making process. It is especially important because the prosecutor has control of an individual's liberty. If the prosecutor follows a process like that of the system's model, the individual will have a better chance at being afforded his rights.

THEORETICAL FRAMEWORK

The major purpose of this study is to determine if the prosecutor follows a decision-making process like that which is set up in a system's model. This study will be placed within the context of an exchange system. The purpose of the exchange system study is to link the actors together in the whole decision-making process. The traditional assumption is that the agencies are run solely on statutory authority. This view recognizes the fact that the organization consists of many clients who interact with each other. These organizations depend on this interaction for certain resources. As units within the larger system, the organization and its clients participate in exchanges across the limits of the departments (Cole, p. 332).

Long defines the legal system "as a set of interorganizational

exchange relationships" (p. 142). The actors in the system interact because their position demands that they have contact with the others in the process. This interaction between the actors may have an influence on the decision-making process (Cole, p. 332). Taking into consideration the interaction between the organizations, it is obvious that these other agencies have an effect on the decision process.

These exchanges within the system occur in various forms. Some of the exchanges occur directly between the clients. They exchange information openly in hopes of persuading the other actors to comply. Other exchanges are handled in a nondirect manner. These exchanges occur when the clients observe the behavior of the other actors in the system. In both means of exchange, vital information is passed along to the actors in their process of decision-making. Within the individual organizations, the actors utilize the information in order to achieve the best results.

When determining the actors and their relationships within the exchange system, it is important to the question at hand because it sets up a means of comparison between the actual practice of the prosecutor and the system's model. The relationships between the actors determine a basis for which the the prosecutor uses discretion within the system.

In the exchange system, "power is largely dependant on the ability of an organization to create client relationships which will support and enhance the needs of the agency" (Cole, p. 333). When applying this exchange system to the actors in the criminal process, the state's attorney emerges as the authority figure.

He has the power to decide what to charge, who to charge, whether to charge, whether to drop charges, and whether to recommend a change in the charge. However, as explained in the exchange system, the prosecutor also depends on the other actors in the system.

The actors that effect the prosecutor's decision to charge are the police officer, the judge, and the defense attorney. These actors are involved within the criminal system. However, the prosecutor may also be effected by the community.

First, the procecutor is dependant on the police. The police provide inputs into the system in the form of cases and evidence (Cole, p. 334). Before direct interaction begins between the two agencies, the police act as the initial screening body. The police also exercise a certain amount of discretion in their decision to arrest. The need for the police to maintain order is justification for their use of discretion (Friedman and Percival, p. 25). The police do not necessarily have to make an arrest in order to enforce the law. Under some circumstances, justice can be reached without making the arrest. On the other hand, although the arrest is made, the police have the discretion to decide whether or not to turn the case over to the prosecutor. This discretion that the police have in deciding to arrest may also involve the prosecutor indirectly. When making the arrest, the police may take into consideration how the prosecutor treated similar cases. If the prosecutor charged the individual, the police may conclude that he will also charge in this instance. In the decision-making process of arrests, the police may develop a

particular method of screening cases. Not all police departments develop the same criteria. Basically, the police when deciding to arrest consider five factors:

1. External Characteristics
This factor includes the type of area the station is located--middle class, lower class, rural, or urban.
2. Police Characteristics
This factor includes the training and experience of the officer and the way he perceived the situation. For example, the officer looks at the suspiciousness of the suspect.
3. Nature of the Offense
This factor is representative of the seriousness of the offense--misdemeanor or felony.
4. Attributes of the Suspects
This factor includes the background of the suspect and his behavior toward the police.
5. Complainant's Characteristics
This factor includes the behavior of the complainant and his willingness to cooperate with the police. (Goldman and Sarat, p. 51)

Another instance in which the prosecutor and the police officer exchange information is in the obtaining of warrants. The police officer directly contacts the prosecutor in order to secure a search or an arrest warrant (Kah Zemans, p. 45). Upon the receiving of the information, the prosecutor reviews the evidence that is available and decides whether this information is sufficient to initiate the process. At this point, the prosecutor either returns the case for review if he feels that the case is not strong enough or he refuses to continue with the case at all (Cole, 334). In this stage, this exchange of information is vital because an arrest without probable cause

is a violation of the individual's right of due process. However, the prosecutor is under no obligation, no matter what he decides, to reveal the reasoning behind his decision. Therefore, under this system, the prosecutor and the police officer exchange information in order to continue with the charging process.

Although the police play an important role in the apprehension of a criminal, they have little or no influence in the charging process. The prosecutor uses his own discretion when deciding to prosecute. In this process, he may take into consideration the advice of the police, but he is under no obligation to respond to their opinion (Cole, p. 335). Although the prosecutor and the police officer use the same penal statutes, each can apply these statutes to the case in a different manner (Stanko, p. 396). In most situations, the prosecutor fails to charge an individual for three reasons. First, the prosecutor is a regulator of cases not only for his jurisdiction but also for the rest of the legal system. Because of the way the legal system was established, the prosecutor has the power to move the cases through the court and into the next level of review. If the system backs up at this entry level, the other courts will also be effected. Second, the prosecutor also looks at his public exposure. He does not want to charge an individual when the case will leave him in a compromising position. Third, the prosecutor may return the case to the police as a check on the quality of the police work (Cole, 335). In these three situations, the prosecutor acts as a regulator for the criminal system. His job as a public officer includes

maintaining the reputation of the office.

Because of the nature of the exchange between the police and the prosecutor, the prosecutor's discretion still is the authority. The only restraint on the prosecutor in this exchange between the two agencies is the fact that the police have the initial decision to arrest. The prosecutor controls the rest of the process.

The second agent that exchanges information with the prosecutor is the judge. The judge also has an important function in the criminal process. The judge applies the "established legal standards to particular cases" (Goldman and Sarat, p. 111).

The exchange between the prosecutor and the judge is important in the legal process. The initial exchange is usually indirect. The judge's prior decisions act as signals to the prosecutor. The prosecutor looks at the sentencing history of the judge. The judge's behavior may indicate how the prosecutor must charge in order to obtain a conviction. If the judge's behavior is consistent, the prosecutor adjusts his charging techniques to accommodate the judge's biases (Cole, 337).

The prosecutor and the judge do not have formal interaction in which they discuss the initial charge that is imposed on the defendant. However, when the prosecutor files for a warrant, he may observe the behavior of the judge at this time. The prosecutor may also discuss possible alternatives with the judge. Any indication of how the judge perceives the case may alter the prosecutor's decision to charge.

This informal contact between the judge and the prosecutor is continuous. Basically, both agents are housed in the same building. They both frequent the courtroom each day. In casual conversation, either party may mention the case. The prosecutor notes certain biases and opinions of the judge. These indications of the judge's behavior may influence the prosecutor's decision.

Although the judge and prosecutor are both trying to "maintain existing order," they are two separate branches in the criminal process (Goldman and Sarat, p. 111). The judge in administering the rules in the criminal process is supposed to be a nonbias arbiter (Goldman and Sarat, p. 117). If their interests become similar, then the process becomes predictable. Basically, this interaction between the judge and the prosecutor is a way for the prosecutor to predict the judge's behavior in order to decide what charges to file.

The third actor in the criminal process that interacts with the prosecutor is the defense attorney. This relationship may be beneficial to both parties. Cole determines that the "exchange relationship between the defense attorney and the prosecutor is based on their need for cooperation in the discharge of their responsibilities" (p. 340). Most of their interaction occurs in the plea-bargain stage. This exchange usually occurs at the informal level. The two attorneys may meet in passing and either party strikes up a conversation about the case. In this confrontation, if they reach an agreement, both parties are relieved of the case work. The prosecutor and the defense attorney benefit from the outcome.

The prosecutor gains a conviction and the defense attorney establishes a relationship for using successful bargaining tactics (Cole, p. 339).

Corruption may develop from this relationship between the two agents. The defense attorney may rely on his friendship with the prosecutor in order to strike bargains or reduce charges. This type of interaction flaws the exchange system. A free flow of information characterizes the exchange system and biased actions by any of the actors will cause a breakdown in the flow of information.

A fourth factor that may have an influence on the prosecutor is the public pressure. The community may voice their opinion about how the office should be run. The prosecutor as a public officer must be responsive to the people but his first duty is to uphold the law. Basically, two groups of citizens interact with the prosecutor. First, the general public tend to voice their opinion on the value of law enforcement within the community. Second, the leaders who have interest in the politics of the office also try to influence the prosecutor (Cole, 341). The prosecutor must screen these opinions and first represent those interests which are within the law. Because the role of the prosecutor includes public official, he is in constant contact with the people. Therefore, his decision to prosecute is more than likely a reflection of some of the public's interests.

FOCUS ON THE PROSECUTOR

For our purposes, the focus in the system's model will be the prosecutor. His role is the most important in the criminal process because by law, he is under the authority to enforce the law by prosecuting the offender. The prosecutor is given a wide discretionary power within the criminal process. In Illinois, the court has confirmed the discretionary power of the prosecutor. At first, the role of the prosecutor was established in Wilson v. County of Marshall 1930, 257 Ill. App. 220. The court declared that the state's attorney has absolute control of criminal prosecutions. Because this ruling gave a vague interpretation of the prosecutor's role, other cases developed. In People v. Goltz 1977, 11 Ill. Dec. 461, the court ruled that the prosecutor has a broad range of discretion and it is a necessary and proper function of the office in the criminal system. This power was expanded when the court declared in People v. Brynes 1975, 34 Ill. App. 3d 983, that the prosecutor has the authority to dismiss the charges prior to the trial. Under People ex. rel. Carey v. Cousins 1979, 34 Ill. Dec. 137, the court again more narrowly defined the prosecutor's power of discretion when declaring that the prosecutor has the right to choose the charges brought against the offender. In People v. Lewis 1979, 25 Ill. Dec. 436, the court reviewed the power that the prosecutor has to charge the defendant. They ruled that the state's attorney has the sole discretion when deciding whether or not to prosecute the offender. Again, in People v. White 1980, 41 Ill. Dec. 74, the court confirmed their decision that the state's attorney has the discretion to prosecute.

The question raised in White was whether or not the jury should share in the responsibility of charging the offender. The court determined that the prosecutor has the sole discretion to prosecute. In summarizing the opinions of the court, one may conclude that the prosecutor is given the power to exercise discretion in order to carry out the functions of his office.

Because of the role the prosecutor plays in the criminal system, it is necessary that the prosecutor use discretion. Discretion has been defined as the power of "free decision" (Lundquist, 486). The prosecutor uses this discretion when deciding to prosecute an offender. There are several reasons why this use of discretion is important to the prosecutor. First, it is unreasonable to believe that all criminal laws are to be enforced through criminal prosecution. There are too many cases that occur. Second, full enforcement of criminal laws would put an enormous strain on the criminal system. The cost of full enforcement would be too large for taxpayers to finance. These would be a need for outside funding. The process of expanding the system would include the hiring of more lawyers, judges, and personnel and the enlarging of office and building space (Goldman and Sarat, 50). Third, the demand for the services are growing because crime is on the increase. There is no sign of the crime rate leveling off (Goldstein, 146). On the other hand, discretion may also cause problems within the system. It is a basic assumption that "discretion breeds corruption" (Goldstein, p. 144). This misuse of discretion stems from the authority's desires for personal gain. Because the state's :

attorney is a public officer, he must be in some way responsive to the public if he wants to continue in office. Many times, the prosecutor is under the intense pressure to process a large number of cases. However, he is also compelled by this duty to provide a system of "due process" (Nardulli, p. 104). Another problem with discretion is that boundaries are hard to mold. If criteria was written, an expert draftsman would be needed in order to develop all the concepts of discretion. This remedy does not guarantee that the prosecutor will limit his discretion because the prosecutor may interpret a separate meaning from the criteria. Hence, discretion would almost be impossible to control even if the prosecutor's discretion was bridled.

As already established, the state's attorney has the power to use discretion in the charging procedures. The prosecutor applies this discretion in many ways. He usually first intercepts a case after an arrest has already been made. The exception to this procedure occurs when a more serious felony is under investigation by the police. The posecutor may be contacted before the arrest for the purpose of approving a warrant or obtaining legal advice. Basically, he follows a series of decision patterns. Because there is no statutory guidelines, the prosecutor determines his own criteria for deciding to charge. Many prosecutors follow a similar pattern in their decision-making. A model of this process follows:

1. Police forward the report of the arrest to the state's attorney.

2. The state's attorney screens the case for possible prosecution.
3. Most often, a criminal investigator will be sent to gather more information.
4. The state's attorney will decide to follow-up the case or dismiss it.
5. The state's attorney tries to gather more information.
6. The state's attorney will decide if there is enough information for an arraignment.
7. If the arraignment is successful, the prosecutor will proceed with prosecuting the offender. (Rauma, p. 325)

The screening process requires the prosecutor to utilize his power of discretion. First, he must consider whether defendant is guilty (Lundquist, p. 495). After reviewing the facts, the prosecutor may be able to determine whether the defendant is guilty or not. But, if he can not tell by looking at the facts, then he may determine this after more information is available. Either way, the prosecutor has to determine if he has enough information to convict the defendant. Therefore, when deciding to prosecute the case, the prosecutor looks at the information that is available and determines if it is adequate to prepare a case for trial.

A standard of criteria that may be helpful in deciding to prosecute has been developed by the President's Commission on Law Enforcement and Administration of Justice. This task force has developed several factors that may be weighed when deciding to prosecute (Lundquist, p. 492). These factors include:

1. the seriousness of the crime;

2. the effect upon the public sense of security and justice if the offender were to be treated without criminal conviction;
3. the place of the case in effective law enforcement policy where deterrent factors may loom large, e.g., tax invasion, white collar crime, first conviction juvenile offenses;
4. whether the offender has medical, psychiatric, family, or vocational difficulties;
5. whether there are agencies in the community capable of dealing with his problem;
6. whether there is reason to believe that the offender will benefit from the cooperate with a treatment program;
7. what the impact of criminal charges would be upon the witnesses, the offender, and his family. (President's Commission, pp. 25-41)

These factors along with the offender's past criminal record come into play when the prosecutor selects the appropriate charge, decides to plea bargain, and recommends a sentence (Vennard, p. 22). However, these factors do not necessarily determine if the offender is to be charged (Lundquist, 492). The prosecutor decides to prosecute because of several factors. He weighs these factors before making a final decision.

In making his decision, the prosecutor may also keep in mind several questions;

1. Is there sufficient evidence to win the case?
2. Is there sufficient evidence to prove the case beyond a reasonable doubt that the defendant committed the crime charged?
3. Will the witness be available and cooperative?
4. What is the strength of the defendant's case?
5. What will be the probable result based on the knowledge of or expectation of the judge or jury?

6. Are there alternative remedies available?
(Lundquist, 493)

This pattern of decision-making is important to the screening stage of the case.

In continuing to screen the case, the prosecutor must also take into consideration the behavior of the judges, the juries, and the defense attorneys (Lundquist, 495). This behavior may help the prosecutor to decide what offense to charge the offender. The prosecutor may devise a preliminary standard and test this against the attitudes of the defense attorney and judge. He may informally bring up the case in conversation with either or both of the parties. This situation may develop into a bargaining process. Even if it does not, the prosecutor has insight into the problem. This information will help him to decide how to charge the offender.

At this point, one may conclude that the prosecutor bases his decision on a number of factors. Also, this decision-making process is characterized by unbridled discretion. Nissman and Hagen stress that unbridled discretion is afforded to the prosecutor because "no other branch has the power to charge or review the decision to charge" (p. 2). They also state that this decision to charge is "perhaps the single greatest factor the prosecutor performs" (p. 2). Thus, the prosecutor should take special care to see that the appropriate charge is given to the offender. Because of the prosecutor's unbridled discretion, there is a potential for an abuse of powers. He must keep into consideration that he has an ethical duty when charging the offender. He is never to overcharge to obtain a favorable

plea bargaining position. An abuse of powers would also occur if the prosecutor undercharged the offender. However, the prosecutor is under no obligation to present all charges that might be supported by the evidence. Although the prosecutor is an elected official, he must never make political considerations as an important factor in his decision process. If the prosecutor fails to remain objective, he does not live up to his duty to uphold all the principles in law.

It is in the hands of the prosecutor to use his discretion in the best interests of the parties involved. Because there is no set guidelines for the prosecutor to use, he must use his own ethics and morals in deciding to prosecute. Although this power is manifested in the law, the prosecutor utilizes his discretion as he sees that it is necessary.

PREDICTIONS ON THE INVESTIGATION

A basic assumption is drawn between the systems model and the investigation. This assumption is that the system's model is the preferred way of handling the decision to charge. Thus, the investigation results can be compared to the model.

In comparing these two entities, one may determine three basic predictions on the outcome of the investigation. First, the prosecutor is influenced in his decision-making process by the actors in the system--the defense attorney, the police officer, and the judge--and the public's interests. Second, the prosecutor has a certain number of biases that cause him to charge cases with certain prejudices in mind. Third, the prosecutor effects

the behavior of the other actors in the system in such a way that they alter their decision-making processes to accommodate the prosecutor's charging habits. These three predictions outline the basic purpose of an exchange system. The focus of this investigation is to determine if the prosecutor actually follows the system's model when deciding to prosecute.

METHOD

This paper is based on a study of the Office of the State's Attorney, DeKalb County (Sycamore), Illinois. This investigation has involved interviews, observations, and research. These three components of the investigation are used by the author to determine a method by which the state's attorney decides to prosecute.

The interviews were conducted with various individuals in the criminal process who may have an effect on the prosecutor's decision to prosecute. The key interview was with the DeKalb County State's Attorney, Phil DeMarzio. This interview was used as a resource in determining who else within the system has an effect on the prosecutor's decision to prosecute. These individuals are also involved with the various stages of the process. There were three purposes to the conducting of the interviews. First, the interview was to determine what interaction occurred between the individual and the prosecutor. Second, the interview was to determine if the individual has an effect on the prosecutor's decision to prosecute. Third, the interview was used for comparison purposes with DeMarzio's interview. The interviews were held with Randy Cook, first assistant to the state's attorney; Lt. Richard

Moudy, DeKalb Police Force; Judge Leifheit, DeKalb County Circuit Court; Sheriff Roger Scott, DeKalb County Sheriff's Police; and Francis C. Mays, defense attorney and public defender. These five interviews are important to the investigation because they help to determine what kind of exchange system occurs in DeKalb County.

This investigation also included observations of the day-to-day operations of the criminal process. These observations include court watching and the observing of the flow of work coming into the offices of the actors. The purpose of these observations was to determine if the interview data was accurate.

The research portion of the investigation had several phases. First, background material was gathered from journals, books, and law reviews. The purpose of using these sources was to develop the model of the exchange system. Second, the offenses that were charged in DeKalb County were tallied. This information is important in determining if the prosecutor has biases in charging. Third, the number of arrests for certain offense was gathered from the Annual Reports of the DeKalb Police Force and the Sheriff's Police. This purpose of gathering this information was to compare it with the charges that were filed in DeKalb County. This information helped to determine if the prosecutor has biases and if the police adjust their arresting procedure to accommodate these biases. Fourth, data was gathered from the Uniform Crime Reports. This information was used to compare the arrests in DeKalb with the rest of Illinois. This data also determined the biases of the prosecutor.

In this investigation, the data that has been compiled on

structure of the DeKalb exchange system should reflect that of the system's model. The accuracy of this data is reliable only to a certain extent. The interviews contain biases opinions of the actors. The observations only tell the surface of the interaction. The numerical data is accurate in the case of the Annual Report's of the two police departments and in the case of the Uniform Crime Reports. However, the data of the charges is only a hand-tallied attempt at gathering the data. The DeKalb County Clerk does not keep statistics on the charges within the county.

DATA

THE INTERVIEWS

The first interview with Phil DeMarzio was the key to the exchange system in DeKalb County. In this interview, DeMarzio layed out the key factors that he uses when charging the defendant. DeMarzio stated that this decision process in certain instances may begin before the actual arrest. He said that in cases of serious felonies, the police are encouraged to contact the prosecutor for advice. In misdemeanor offenses, the prosecutor is contacted through a copy of the police report that is forwarded within a few days after the arrest. In felony cases, the prosecutor is contacted immediately because a bond hearing is held as soon as possible.

Once the prosecutor is contacted about the offense, he looks at the facts as the police know them. He matches the facts to the elements of the offense that are outlined in the Illinois Criminal Code. If the elements are missing, the prosecutor will return the case to the police for further investigation. Second, the prose-

cuter takes a look at the evidence to see whether it is admissable in trial. This step also forces the prosecutor to reexamine the elements of the offense and determine if a sound case can be developed. Third, the prosecutor determines what are the possible defenses. He examines the events in the incident and decides if possible aternative explanations are available. This step also acts as a check on the police work. In these next three steps, DeMarzio contended that ^{the} decision-process was based on the idea that these factors distinguish borderline cases. The fourth step in the decision process is when the prosecutor takes into account the age of the offender. Fifth, the prosecutor may look at the prior criminal record of the offender when deciding to prosecute. Sixth, the prosecutor may consider the nature of the offense when determining the charge that is to be filed. Finally, the prosecutor looks at all the factors in the offense and uses his discretion to decide whether to file charges.

DeMarzio stated that the prosecutor uses his discretion most in borderline cases. At this point, the prosecutor weighs the information that is provided and makes his decision based on the facts. DeMarzio declared that he believes outside influences should not interfere with the prosecutor's decision. He declared that the prosecutor should not always go for the high conviction rate. He felt that the charge should reflect the elements of the offense. The prosecutor should charge accordingly.

In continuing this prosecution process, DeMarzio stated that the prosecutor has to always keep the important factors of the case in mind. He suggested that the prosecutor take into account whether or not the crime is a violent act or a sex offense.

