

THE EFFECTIVE ADMINISTRATION OF POLICE AND PROSECUTION IN THE UNITED STATES

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I. POLICE

A. The Police Role

The role of the police in the U.S. is popularly known as “to protect and serve,” a phrase which adorns the sides of many police cars. While perhaps effective for public relations purposes, this phrase greatly oversimplifies the police role. Scholars have divided the police role into two components: order maintenance and law enforcement.¹ But this, too, is oversimplified. In reality the police play many roles, including those listed above. They are frequently the first agency called for a variety of problems faced by citizens, from lost children to disputes with neighbors over property lines. They have significant responsibilities with respect to traffic control. In short, they interact with the public far more frequently with respect to non-criminal matters than with criminal matters. While much of the actual police function involves service rather than law enforcement, and the average police officer never fires his weapon in the line of duty, the most important function of the police officer in the U.S. is law enforcement. It is through enforcement of the law that criminals are apprehended, evidence is collected, criminals prosecuted, order maintained, and the public served.

B. Control over the Police

Law enforcement in the U.S. is traditionally and historically a local function. The vast majority of cities, towns, and villages in the U.S. have their own law enforcement agencies, most often called a “police department.”² Rural, or unincorporated,³ areas are patrolled by sheriffs’ departments, while major highways usually come under the jurisdiction of a state highway patrol. All of these agencies are autonomous and are under the control of the jurisdiction they serve. It might be useful to examine Los Angeles County as an example. The county has a population of almost 10 million, making it the most populous county in the U.S.; it has a population larger than all but eight states.⁴ Most of the 88 cities in the county have their own police departments. Areas of the county not incorporated as cities fall under the responsibility of the Los Angeles County Sheriff’s Department. Approximately 65% of Los Angeles County consists of unincorporated areas, which contain about 12% of the population.⁵ Freeways in Los Angeles County are patrolled by the California Highway Patrol, while rural highways may be patrolled both by the Highway Patrol and the Sheriff. To complicate matters even further, some incorporated cities in Los Angeles County contract with the Sheriff for law enforcement protection. And sheriffs in Los Angeles, and much of the rest of the nation, are also responsible for management of county jails and security in courtrooms, among other functions. As we can see, then, even within one county in the U.S. there may be multiple, overlapping police jurisdictions and functions.

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¹ James Q. Wilson, *VARIETIES OF POLICE BEHAVIOR*, Mass: Harvard University Press, 1968.

² There are many different terms for law enforcement officers in the U.S., but for purposes of simplicity the term “police” will be used here for all law enforcement officers at the state and local level.

³ “Unincorporated” refers to those areas which do not have their own government or city limits, even though they are named and recognized as cities or towns by virtually everybody.

⁴ www.co.la.ca.us/overview.htm

⁵ Data from Los Angeles County web site: <http://www.co.la.ca.us/>.

Neither state governments nor the federal government exercise direct control over local law enforcement agencies, although state law may establish minimum training standards for law enforcement and both state and federal governments may provide subsidies for special programmes. Because state and local law enforcement agencies are autonomous, they are funded primarily by the jurisdiction they protect. Funding of local governmental functions in the U.S. comes primarily from property taxes, resulting in wealthy communities having a great deal more to spend on law enforcement than poor communities. These disparities may be made up to some extent by state subsidies, but there are nevertheless significant differences among agencies in salaries, equipment, and other resources. Regional cooperation, however, is common, so that every law enforcement agency need not need, for example, a sophisticated forensic laboratory but instead would pay nominal fees to have forensic examinations take place at a large agency nearby, at a state agency, or by the FBI. Nevertheless, small law enforcement agencies are at a distinct disadvantage compared to their large counterparts.

C. Diversity and Multiplicity of Law Enforcement Agencies in the U.S.

In 1999 there were 16,661 state and local law enforcement agencies in the U.S., employing almost 700,000 sworn personnel.⁶ In addition to these agencies, there are over 1,000 specialized law enforcement agencies in the U.S., such as university police, public school district police, housing authority police, transit police, game wardens, alcoholic beverage control officers, and park police, all of which have limited law enforcement authority.⁷

At the national level there are numerous federal agencies, employing over 74,000 sworn personnel, which enforce federal laws and regulations. These agencies include the Immigration and Naturalization Service, U.S. Marshals Service, Federal Bureau of Prisons, Drug Enforcement Administration, Internal Revenue Service, and the best known, the Federal Bureau of Investigation.⁸ In some cases, federal and state criminal law jurisdictions overlap, such as drug trafficking or bank robbery, which are both state and federal crimes, but for the most part federal law enforcement agencies have separate jurisdictions from state and local agencies. Federal offenses constitute a relatively small proportion of all crimes committed in the U.S. – fewer than 1% of all arrests are for federal crimes.

The size of local law enforcement agencies in the U.S. varies considerably, ranging from 2,245 agencies with only one sworn officer, to New York City, with almost 37,000 sworn officers.⁹ Given the great range in size of agencies, it is natural that the organizational structures of the agencies vary, although most use the military model. In every police department at the local level in the U.S., however, the primary operational function is motor patrol, almost exclusively in marked vehicles. Nationally, approximately 70% of sworn personnel are assigned to uniformed patrol, while about 16% are assigned to investigation (detectives).¹⁰

D. Selection and Training of Law Enforcement Personnel

Only about 1% of police and sheriffs' departments require a 4-year college degree, and less than 10% require a 2-year degree for initial employment, although some agencies offer incentive pay for those with degrees. It is also becoming more common for police agencies to require a degree for promotion to higher ranks. Federal law enforcement agencies require a minimum of a bachelor's degree, with some exceptions, and pay is accordingly higher than in most local agencies. Local police departments in the U.S. require an average of 1,100 hours of training, while sheriffs averaged 900. Minimum training standards are established by the state and generally referred to as POST (Peace Officer Standards and Training), but individual law enforcement agencies may exceed the minimum requirements. Training takes place in classroom settings and after graduation from the police academy, in the field by a field training officer (FTO).

While there may be a considerable amount of time involved in training new law enforcement officers, the time devoted to their various responsibilities varies greatly. Of the 576 hours required by the Texas Commission on Law Enforcement, for example, only 45 are devoted to criminal investigation, including protection and search of the crime scene, interviewing techniques, and courtroom demeanor and testimony. Another 40 hours are devoted to arrest, search, and seizure, and only 8 hours to professionalism and ethics.¹¹ Texas standards are typical. The new police officer in the U.S., then, is not well-versed in either professional ethics or in preparing a case for prosecution.

⁶ Bureau of Justice Statistics (BJS), LOCAL POLICE DEPARTMENTS, 1999. *May 2001*, p. 1. "Sworn personnel" refers to officers with the power of arrest.

⁷ *Ibid.*, p. 12.

⁸ BJS, FEDERAL LAW ENFORCEMENT OFFICERS, 1996. January 1998, pp 1-2.

⁹ A sworn officer is authorized by law to make arrests.

¹⁰ *Census*, *op. cit.*, p. 6.

¹¹ Texas Commission on Law Enforcement, via WWW:
<http://www.tcleose.state.tx.us/BPOC.htm>.

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It is normally the responsibility of the detective to prepare a case for prosecution, so the success or failure of a case often depends upon detectives. Detectives, however, are often dependent upon the patrol officer for initial information from a crime scene, including statements of witnesses and suspects, collection of physical evidence, and crime scene protection. Mistakes made by the patrol officer may not be subject to correction - failure to adequately warn a suspect of his or her rights (the *Miranda* warning) is rarely subject to correction, and any admissions or confessions made without such warnings may be declared inadmissible. Detectives generally learn their skills through a combination of experience and formal training, but the amount of experience and formal training depends to a large extent upon the agency. Small agencies are seriously handicapped in this regard; in 1999, 6,285 agencies served populations of fewer than 2,500 persons and employed an average of only 3 sworn personnel per department.¹² Officers in small departments such as these must perform all law enforcement tasks, usually without formal training for the more advanced tasks such as crime scene investigation.

The nature of the law enforcement profession requires frequent in-service training. Technological advances and new appellate court opinions make this training necessary, but the amount of in-service training given to law enforcement personnel varies widely from agency to agency. Smaller agencies lack both the funds and the personnel to provide such training, while scheduling is a problem for all agencies – training takes time, and it may be difficult to find replacements for those who must be away from their regular assignment to receive such training. Of particular concern is the problem of keeping law enforcement personnel abreast of developments in procedural law. In common law systems, such as the U.S., appellate court decisions mandate how police may act in specific situations. Most of us are familiar with the *Miranda* warning that must be read to suspects who are in custody and are to be interrogated. The case of *Miranda v. Arizona*¹³ changed police procedure in every law enforcement agency in the U.S.. A typical state or local law enforcement agency will be affected by opinions handed down by state intermediate and supreme courts, federal circuit courts of appeal, and the U.S. Supreme Court, necessitating constant reviewing of decisions coming from these courts. Few law enforcement agencies have legally trained personnel solely devoted to this task, but instead rely on local prosecutors, the state attorney general's office, or legal reference services for periodic updates on procedural law. But the process is not always efficient nor is the manner in which this information is passed to officers consistent. Failure to abide by rules established in these decisions may result in cases being dismissed and convictions voided, so the stakes are high.

Pay for police officers is usually related to size of department, with larger departments paying more than smaller departments, although there are many exceptions to this. As noted above, financing of law enforcement agencies depends to a significant extent upon the wealth of the community served by that agency.¹⁴ Annual police entry level salaries may be as low as \$21,000 or as high as \$40,000. Disparities such as these cause morale problems in departments with low pay and make it difficult to recruit qualified personnel. These problems, combined with inadequate training, leadership, and employment standards are prime contributors to police corruption.¹⁵

E. Politics and the Police

Police chiefs in the U.S. are usually appointed, either by a commission, by a city or town council, or by a local chief executive, while sheriffs are usually elected by the citizens of the county they serve. Sheriffs usually have a set term of office, such as four years, while police chiefs usually serve at the pleasure of the appointing body or official. In both cases, of course, politics plays a major role. In smaller agencies, the chief is usually selected from within the department itself, while larger agencies normally conduct a national search. The job of police chief or sheriff is a difficult one, requiring the person holding the position to not only be the top law enforcement officer in the agency but also part politician, part administrator, and focal point for problems in the department and in the community as well. When crime rates rise, criticism is directed at law enforcement and ends up on the desk of the chief or sheriff. The turnover rate of police chiefs in large departments in the U.S. tends to be high.

The political aspects of police administration frequently lead to problems in effective law enforcement. Historically, in cities such as New York, Philadelphia, and Chicago, appointments to law enforcement positions from patrolman to chief, as well as promotions, were based on political patronage. Loyalty and allegiance to a politician were far more important factors than honesty and integrity, and working for a politician's reelection campaign brought with it a virtual

¹² LOCAL POLICE DEPARTMENTS 1999, op.cit., p. 3.

¹³ 384 U.S. 439 (1966).

¹⁴ See Joseph E. Pascarella, *Municipal Police Salaries as a Function of Community Home Values, Household Incomes, and Physical Housing Characteristics*, in JSTICE RESEARCH AND POLICY, Vol. 1 (Fall 1999) http://www.jrsainfo.org/pubs/journal/past_issues/Fall1999/police_salaries.htm.

¹⁵ Frank L. Perry, *Repairing Broken Windows: Preventing Police Corruption with Our Ranks*, FBI LAW ENFORCEMENT BULLETIN, Vol. 70 (February 2001), pp. 23 - 26.

guarantee of a job, often on the police department. While this practice has diminished considerably in most large agencies, it is still found in smaller departments across the country, where hiring and promotion are based on whom you know, not what you know. When a law enforcement officer is beholden to a politician or other community influential for his or her position, it is highly unlikely that the administration of justice can be administered impartially. Police enforcement can be and is affected significantly by political concerns.

F. Corruption and Deviance in Law Enforcement

One must first define “corruption” in the law enforcement context before discussing the concept. For purposes of this paper, “police corruption” refers to police officers accepting money or goods in return for engaging in activities they are obliged to do under terms of their employment, for activities that are prohibited under the terms of their employment, or for improper exercise of legitimate discretion.¹⁶ It does not include acts that are criminal, such as burglary or theft, nor does it include deviant acts performed within the law enforcement environment.

Corruption in law enforcement was widespread during certain periods in U.S. history, especially among larger agencies in the East and Midwest. Such corruption reached its peak during prohibition, that period in U.S. history extending from 1919 through 1933, during which time the manufacture, sale, importation, and transportation of intoxicating liquors was illegal.¹⁷ The same period saw the rise of organized crime in the U.S., another factor which increased corruption in law enforcement. Many police officers were paid to ignore violations of the laws relating to alcohol, and some even provided armed escorts for those transporting illegal alcohol.

As a result of public outrage and resulting reform movements, however, law enforcement corruption in recent years has been significantly reduced. In 1997, for example, the FBI, often in cooperation with local agencies, opened 190 cases of law enforcement corruption, 48% of which were drug-related. During the same year, 150 law enforcement officers were convicted of corruption-related offenses, 53% of which involved drugs.¹⁸ It is very likely that there were more cases than these figures indicate, as some could have been classified as theft or perjury, and many cases of corruption were dealt with at the local level rather than by the FBI. It is safe to say, however, that law enforcement corruption in the U.S., while not widespread, is still of great concern to the public. It should be noted, however, that one form of corruption – “gratuities” – is still widespread among law enforcement personnel. These gratuities include free or discounted food in restaurants, discount prices for cleaning uniforms, and other discounts given by local businesses to law enforcement personnel. While most, if not all, law enforcement agencies have rules prohibiting the acceptance of gratuities, few officers are disciplined for violation of the rules, primarily because there are very few complaints from the public. Debate continues on whether acceptance of gratuities constitutes corruption.

Police deviance and criminal activity are difficult to measure, as no national or state records are kept of such activity specifically involving police officers. When a police officer commits a crime which is not job-related, such as armed robbery, theft, or murder, it is newsworthy because of the occupation of the perpetrator. And sentences may be harsher for police officers than for civilians charged with the same offense, as most judges feel that police officers are held to a higher standard of conduct than the average citizen. But judging by news accounts, such offenses are rare, even taking into consideration such widespread corruption and criminal activity as took place in the gang unit of the Los Angeles Police Department several years ago. Crimes committed by police officers that are job-related, such as assaulting another officer, stealing money from funds to pay informants, or assaulting suspects in custody, are punished internally and, usually, externally as well. Again, however, statistics on such offenses are difficult, if not impossible, to obtain, as internal discipline is usually protected administratively from being released to the media, while prosecutions of officers who committed job-related offenses are not listed separately from such offenses committed by civilians.

Police deviance, or occupational deviance,¹⁹ may be defined as acts that contravene agency rules and regulations. They may be divided into two sub-categories: simple rule violations and violations involving due process. The first category includes such violations as rude behavior toward citizens, improper wearing of the uniform, use of a police vehicle for personal purposes, while the second category involves such due process violations as planting evidence, writing false reports, or perjury. While some of these activities may constitute criminal behavior, they are not included in that category because they are not for self-gain but rather are motivated by a misguided effort to enforce the law. This

¹⁶ This is a variation of the definition used by M. McMullen, “A Theory of Corruption,” *SOCIOLOGICAL REVIEW*, vol. 9 (1961), pp. 181-201.

¹⁷ Amendment XVIII to the U.S. Constitution.

¹⁸ FBI figures.

¹⁹ See Victor E. Kappeler, et al., *FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING*. Prospect Heights, IL: Waveland Press, 1998, p. 22.

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form of deviance is particularly troubling because it may result in the conviction of innocent citizens. And while there is no collected source of statistics on this form of deviance, newspaper report would lead one to believe that it is not rare.²⁰

A recent example of planting or falsifying evidence illustrates this type of deviance. At least 18 narcotics cases filed by the Dallas (Texas) police department were dismissed in January 2002 because what police alleged to be cocaine, based on field tests, turned out to be powdered sheetrock, a substance used in wallboards which, when ground up, resembles powdered cocaine. Almost 700 pounds (320 kilos) of crushed sheetrock was involved, and all of those arrested were Mexican immigrants. Most of the arrests were made by two narcotics officers, using an informant who was paid over \$200,000 during the past two years for information provided in at least 70 cases. The two officers were suspended pending an investigation into the cases.²¹

Most law enforcement agencies in the U.S. have individuals or a unit responsible for internal discipline. Such units are commonly called "internal affairs," and have the responsibility of investigating violations of policy and law by police officers. Virtually all U.S. law enforcement agencies have written "general orders," which describe the structure and function of the organization as well as specific policies on administrative and operational matters. Operational policies frequently deal with such issues as vehicle pursuits, use of force, handling of domestic abuse cases and juveniles, and patrol procedures. Violations of these policies are dealt with by internal affairs, even if the conduct in question may be of a criminal nature, as administrative sanctions may be imposed regardless of the outcome of a criminal investigation. It is quite possible to be fired for violation of department regulations even though there is no criminal liability. Officers who are questioned by internal affairs have no right to silence – they must answer questions – but their answers cannot be used against them in criminal prosecutions.²² Some larger cities utilize civilian review commissions or boards to perform the same function, as many citizens do not trust law enforcement agencies to police themselves, but such boards or commissions are not substitutes for internal procedures.

An especially difficult problem in law enforcement is obtaining evidence from one officer against another. There is a well-known "code of silence" in law enforcement, much like that found in prisons, which is part of the police culture, and which requires that law enforcement officers always back each other and never report deviant acts to supervisors. This code is based on trust, which is essential to survival in the law enforcement environment. Inasmuch as most officers do not work with partners, at least in all but very large agencies, one's safety is often a function of the closest officer to the potentially dangerous situation. When an officer finds himself or herself in a situation which might be dangerous – making a traffic stop on a stolen car full of young males in a poor area of town, for example – the officer will normally call for a back-up (the assistance of the closest officer to the scene). The speed with which the second officer responds may often make the difference between life and death for the first officer. Thus, trust is essential. It is not unheard of for officers who violate the code of silence, or who do not accept the law enforcement culture, to call for backup and receive no response. In other words, their fellow officers will not protect them because they have violated the informal code of ethics of that particular agency.

What is frequently lacking in law enforcement agencies with problems of corruption or widespread violations of rules and regulations is leadership. Law enforcement agencies in the U.S. are structured much like the military, and use many of the same terms for ranks (i.e., sergeant, lieutenant, captain, etc.). Under such an organizational structure, there is theoretically a clear chain of command, with each level of leadership responsible for those at the next lower level and reporting to the next higher level. Sergeants, therefore, are responsible for patrolmen, and sergeants report to lieutenants, who report to captains, with the pattern repeating itself all the way to the top, which is usually the police chief, police commissioner, or sheriff. The major difference between law enforcement agencies and the military, however, is that while the military works in groups, such as platoons, squadrons, and companies, police usually work alone (even though they may be assigned to a platoon, squad, or company for organizational purposes). This means that police administrators in leadership positions rarely observe or work directly with those under them. The first police officer on the scene of a crime is almost always the patrolman, who may have to make important decisions without any supervision. Cases can be won or lost and lives saved or lost based on these decisions.

The lack of immediate supervision makes it difficult for leaders to effectively evaluate and guide their subordinates. Police officers are usually evaluated by their written reports and the number of traffic citations issued rather than on how they interact with the public, how they deal with suspects, and how they gather evidence. Sergeants are considered

²⁰ Kappeler, *supra.*, p. 24.

²¹ Paul Duggan, "'Sheetrock Scandal' hits Dallas Police," THE WASHINGTON POST, Friday, January 18, 2002, p. A12.

²² See *Garrity v. New Jersey*, 385 U.S. 493 (1967).

effective if their officers make enough arrests, issue enough citations, and generally stay out of trouble. And so the pattern goes throughout the ranks. Leadership skills are often learned on the job, and while this may work in some departments it does not work in all. Leadership must also be taught, and leaders must be held accountable for their subordinates. Promotion to leadership positions must be based on more than passing an examination, the primary criterion in most agencies, including some objective measures of leadership and effectiveness.

G. How to Fix the Problems

The most obvious way to deal with many of the problems affecting law enforcement in the U.S. is to consolidate agencies under some form of centralized control, probably at the state level. It is virtually impossible to bring about federal control of law enforcement due to the principle of federalism, which is deeply engrained in both the Constitution of the U.S. as well as history and tradition. But it may be possible to establish state control over hiring, training, pay, and major policies. This would eliminate the disparities between and among departments that seriously hamper effective law enforcement and breed corruption. A state commission would set hiring, training, and promotion standards, as well as being responsible for hiring regional law enforcement commanders. Existing facilities would very likely remain, and all existing personnel would be transitioned into the new agency.

Minimum standards for employment of police officers should be raised. While it is not clear that college-educated police officers are more effective than those without such an education, it is clear that the four years of college required for a bachelor's degree would produce a more mature person with a broader perspective. In 1967 the President's Commission on Law Enforcement and the Administration of Justice recommended that "police departments should take immediate steps to establish a minimum requirement of a baccalaureate degree for all supervisory and executive positions."²³ To date, as we have seen above, very few law enforcement agencies have established that standard.

It would be politically impossible to establish federal minimum standards for training of law enforcement officers, but the federal government could make accreditation a requirement for federal funds, and license agencies who accredit, much as is now the case with respect to accreditation of institutions of higher education. Accreditation would include minimum hiring and training standards and establish deadlines for compliance as well as frequent monitoring. Those agencies who did not apply for accreditation or who applied but did not meet the standards would not be eligible for federal funds. While police departments, as noted above, are primarily funded by the city, county, or state, there are many federal grants available as well, allowing agencies to purchase equipment or hire personnel they would not ordinarily be able to afford. At present, the primary accrediting agency is CALEA (Commission on Accreditation for Law Enforcement Agency), which is not licensed by the federal government but is an independent organization. As of early 2001, CALEA had accredited about 600 law enforcement agencies.²⁴ CALEA requirements list 439 standards, some of which are mandatory and some of which are "other than mandatory." In order to be accredited, the agency must meet all mandatory standards and 80% of the "other than mandatory" standards. Standards vary by size of department.²⁵ The fact that fewer than 4% of law enforcement agencies in the U.S. are accredited by CALEA is an indication that there is little incentive at present to achieve this status. Making federal funding dependent upon accreditation may provide the needed incentive for many agencies, but those most in need of upgrading – small departments and agencies in poor communities – rarely apply for federal grants and are therefore not likely to be affected.

Accreditation and federal funding will not solve all of the problems of policing, but they are a start. There are many political and economic obstacles to overcome. The history and traditions of law enforcement in the U.S. point to political solutions to most of the problems in law, which places the burden for solving problems on the electorate, which must demand improvement in law enforcement, hold politicians accountable, and be willing to pay additional taxes to bring about that improvement. At the same time, law enforcement must be removed from politics. Heads of law enforcement agencies should not be elected, nor should they be appointed by political figures or bodies, but instead by non-partisan commissions whose members are representative of the community served by the law enforcement agency. The commissions should make use of professional organizations to recruit new police chiefs and sheriffs, and focus on management skills rather than law enforcement experience. What is being said here is not new. A great deal has been

²³ President's Commission on Law Enforcement and the Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*. Washington, D.C., 1967, p. 110.

²⁴ "Police Professionalism and Accreditation," <http://www.faculty.newc.edu/toconnor/417/417lect08.htm> (North Carolina Wesleyan College).

²⁵ CALEA standards – <http://www.calea.org/newweb/accreditation%20Info/standards.htm>

written about reform in law enforcement but it seemingly has had little effect. Only a major restructuring of law enforcement can bring about the needed changes, and that will come only when the public wants it badly enough.

II. PROSECUTION

A. The Prosecutorial Function

The function of the prosecutor is essentially the same throughout the modern world: to represent the people by prosecuting those who have committed crimes. In the U.S., prosecutors are either elected or appointed. As elected or appointed officials, chief prosecutors play an important role in the community, a role that often extends beyond their primary function of prosecution. They are often spokespersons on issues involving crime, lobbyists before legislatures on a variety of matters involving criminal justice, and administrators who make important policy decisions with very little, if any, oversight. Prosecutorial decision-making as a whole is generally of low visibility; only crimes which receive a great deal of publicity are of interest to the general public. There is, therefore, no practical way for the public to have knowledge of or to evaluate a prosecutor's decision-making.

B. Becoming a Prosecutor

Prior to graduation from a U.S. law school one must look for work. The best students at the best schools will have been recruited by major firms before graduation, but the rest will have to actively seek employment. If one wants to become a prosecutor one will have to apply for that position. It should be noted that in the U.S., criminal law is one of the least respected areas in the legal profession; most law school graduates aspire to working in large, prestigious private firms, where starting salaries can be in the \$70,000 to \$80,000 range. New prosecutors in the U.S. rarely start at salaries over \$35,000 per year. Therefore, the top graduates of better law schools rarely end up in prosecutor's offices.

In the U.S., the appointment of a new deputy or assistant prosecutor will depend on local requirements. The vast majority of prosecutors in the U.S., over 71,000, work for counties. They are almost always appointed by the head or chief prosecutor, although some qualify through a civil service system. Over 95% of head prosecutors are elected. There were 2,343 separate prosecutors' offices in the U.S. in 1996, most of them serving only one county.²⁶

In the U.S., newly graduated attorneys rarely join a prosecutor's office with the intention of making prosecution a career but instead use the job as a stepping stone into private practice or the judiciary. In 1996, the median length of service for chief prosecutors was 6 years, with 25% having served 12 years or longer; data for assistant or deputy prosecutors are not available.²⁷ Almost all training of prosecutors in the U.S. is done on-the-job. One is not prepared to practice in any area of law upon graduation from a law school, primarily because law schools tend to focus more on theory than on practice, and because law schools generally do not teach the law of the states in which they are located, since their students will have come from many different states. There is usually some form of in-service training for prosecutors, and may be local or regional seminars for prosecutors of various levels or experience, but it is not always possible to send prosecutors to training due to budget or operational constraints. So prosecutors in the U.S. learn their profession primarily by working with more experienced prosecutors, and by starting with relatively simple cases under close supervision. Large offices will normally have a formal training programme, while smaller offices will not.

C. Working as a Prosecutor

As might be expected, prosecutors in small offices must be generalists, handling all kinds of criminal cases, whereas prosecutors in large offices may specialize in specific types of crimes, such as sexual assault or homicide. While it is generally true that smaller jurisdictions do not have as much crime or as complicated cases as larger jurisdictions, this is not always true, as may be seen in the widely-publicized 1996 murder of JonBonet Ramsey, which occurred in Boulder, Colorado, a town with a low crime rate and few homicides. It has been widely alleged that neither the police nor the prosecutors had sufficient experience to handle such a case. In situations such as this, an agency will usually request assistance in both the investigative and prosecutorial phases of a case, either from the county within which the city is located, or from the state. To do so, however, is to admit that one's own jurisdiction cannot deal with such cases. This, of course, has political implications.

It is possible for a prosecutors office to hire a private attorney with prosecutorial experience to take the lead, or to assist, in an important case, but this is expensive and done infrequently. Offices need a core of experienced prosecutors, which means that they must carefully recruit prosecutors and provide incentives for them to stay. This may be difficult

²⁶ All figures from Bureau of Justice Statistics, PROSECUTORS IN STATE COURTS, 1996. Document NCJ 170092, July 1998.

²⁷ Ibid., p. 3.

or impossible for some jurisdictions due to budget constraints, resulting in a rather steady turnover of new prosecutors. Large jurisdictions rarely have such problems, as they have depth of experience and competitive pay. Effectiveness, therefore, may be strongly related to size.

D. The Decision to Charge

The decision to charge an individual is one of the most important decisions made by a prosecutor in any country. In the U.S., the process is often complicated. Prosecutors must make an initial determination regarding sufficiency of evidence and desirability of prosecution. They are not necessarily the same, as sufficiency of evidence alone does not always result in prosecution. But assuming that mitigating factors are either weak or absent, and a decision is made to prosecute, the prosecutor in the U.S. must then decide what the charges will be.

Most crimes in the U.S. have degrees of seriousness. In Hawaii, for example, there five degrees of sexual assault, and under the general label of criminal homicide there are two degrees of murder, three degrees of negligent homicide, and the offense of manslaughter. The elements of each degree of a crime differ. And where the same act establishes an element of more than one offense, the defendant may be prosecuted for each offense.²⁸ A defendant may also convicted of a lesser included offense, so if a prosecutor charges a defendant with second degree sexual assault, the jury may find the person guilty of third, fourth, or fifth degree sexual assault instead. Another factor complicating the charging decision is plea bargaining, which will be discussed in more detail below. Prosecutors may charge defendants with as many offenses arising out of the same act as possible, or may charge a person with a more serious degree of an offense than is justified by the evidence, for plea bargaining purposes. Overcharging, however, carries with it the risk that the charge will not survive the grand jury or preliminary hearing processes.

E. The Grand Jury

About one-half of the states, and the federal government, require indictment by a grand jury, whereas other states allow a person to be charged through a preliminary hearing. Some states use both the grand jury and the preliminary hearing. The grand jury had its origins in medieval England, where it was developed to counter the almost absolute power of the King. Then and now, it consists of citizens who are charged with examining the evidence against an accused to determine whether such evidence is sufficient for the case to go to trial. Most grand juries in the U.S. have an investigative function as well. Investigative grand juries have the power to subpoena witnesses, and are frequently used to investigate suspected cases of official corruption. Here, however, we will focus on the power of the grand jury to indict. Grand jury composition varies from state to state and from the states to the federal government, but in general a grand jury is composed of from 16 to 23 citizens who have the same qualifications as those selected for trial juries: U.S. citizenship, adult, reside in the jurisdiction, have no felony convictions, read and speak English, etc. As is the case for trial juries, grand jurors must have no conflicts of interest that would interfere with their ability to be impartial, but grand juries are not subject to the same rigorous requirements regarding being a cross-section of the community as apply to trial juries.

Evidence is presented to the grand jury by the prosecutor. The evidence may be in form of physical evidence (i.e., the murder weapon) or testimony by witnesses, but grand jury proceedings are all one-sided and non-adversarial, in that neither attorneys for the accused nor for witnesses may appear before the grand jury. The proceedings are secret, and not open to the press or the public. In some jurisdictions, grand jurors may question witnesses directly, while in others they must ask questions through the prosecutor. After all of the evidence has been presented, the grand jury is given an indictment form by the prosecutor. It may return a “true bill” of indictment, or it may refuse to do so (no-bill). As should be obvious from the composition of the grand jury and its domination by the prosecutor, the vast majority of cases presented result in indictments. Once the indictment is handed down by the grand jury, the prosecutor is free to proceed with the case.

F. The Preliminary Hearing

The preliminary hearing is similar to a trial, in that it is adversarial in nature and is open to the press and the public. Evidence is presented by the prosecution, and may be challenged by the defense. The goal of the prosecution is to convince the judge (preliminary hearings do not involve juries) that there is sufficient evidence to bind the case over for trial. Courts generally adhere to the standard of “probable cause” in determining whether the evidence is sufficient: probable cause that a crime was committed and that the accused committed it. If the case is bound over for trial, the prosecutor prepares an “information,” which is roughly equivalent to an indictment. Preliminary hearings are not as formal as trials, especially as regards evidence. Since there is no right to a preliminary hearing under the U.S. Constitution, the rules of evidence are relaxed in many states, allowing evidence to be presented that would not be admissible at trial. In those

²⁸ Hawaii Revised Statutes (HRS) §701-109.

states where the state constitution provides such a right, however, the rules of evidence tend to be more strictly interpreted. Regardless of whether the preliminary hearing itself is a right or not, there is a right to counsel at a preliminary hearing.

The preliminary hearing not only determines whether there is sufficient evidence for a case to go to trial, but also allows the defense access to the prosecution's evidence before the official discovery process takes place. This can be very beneficial for the defendant, as it allows the defense attorney to hear and to cross-examine, and possibly impeach, prosecution witnesses. Finally, the preliminary hearing may act to narrow the issues to be dealt with at trial, or to reduce the likelihood of a trial taking place by facilitating plea bargaining, which will be discussed below. The function of the grand jury and/or preliminary hearing, then, is to make sure that prosecutors have sufficient evidence to bring a case to trial. It allows judicial oversight in the case of the preliminary hearing and citizen oversight in the case of the grand jury, and by so doing is supposed to prevent abuse of authority by prosecutors. These additional steps that are required of U.S. prosecutors may also have the effect of lengthening the time period between arrest and trial, although the constitutional guarantee of a speedy trial is vigorously applied.

G. Checks on Prosecutorial Discretion

In the U.S. the grand jury and/or preliminary hearing does exercise some oversight on the charging decision. The fact that some decisions to charge are not agreed to by a grand jury, or judge in a preliminary hearing, means that prosecutors do consider such oversight when making a charging decision, although political concerns may on occasion outweigh legal concerns. And while there are safeguards against overcharging or charging with insufficient evidence, there are virtually no procedural safeguards against a failure to charge. Nobody, including a judge, may require a prosecutor to charge a defendant. While there is recourse for citizens who are adversely affected by a decision not to charge in some countries, the only recourse a citizen in the U.S. has is political – bringing political pressure to bear on the prosecutor. This is rarely effective. Even though there is sufficient evidence to charge and to convict, there may be reasons that the prosecutor feels that prosecution is not appropriate, and the law and tradition leave that decision solely to the prosecutor.

There are important constitutional issues involved in decisions to charge as well. Most crimes have a statute of limitations that requires charges to be brought within a specified period of time after commission of the offense. Charging a person before there is sufficient evidence to convict, however, may result in losing the case, which precludes further prosecution of that defendant for that offense.²⁹ In the case of murder, which has no statute of limitations, prosecution may take place years after the commission of the offense, often helped by technology not available at the time the crime was committed. In most cases, however, charges either take place within months after the commission of the offense or not at all.

H. Plea Bargaining

Very few defendants in the U.S. initially plead guilty to felony offenses. Defense attorneys will virtually always tell defendants to plead not guilty even if there is overwhelming evidence against them. The burden, of course, is on the government to prove a defendant guilty beyond a reasonable doubt, and defense attorneys try to use that burden to their advantage. More importantly, however, both defense counsel and prosecutors try to avoid trials if possible. Trials are time-consuming and therefore expensive, and juries are often unpredictable. Judges, too, dislike trials for the same reasons. In the U.S., only about 10% of criminal cases go to trial, so trials are the exception rather than the rule.

Trials are avoided through plea bargaining. There are essentially two types of bargaining: charge bargaining and sentence bargaining. In charge bargaining, the prosecutor will drop a charge or charges, or reduce charges, in return for a guilty plea. Since most defendants are charged with more than one offense, there is usually room for negotiation. The bargain might be the dropping of the most serious count of a multiple count indictment, or dropping one offense arising out of the same act. Should this be mutually agreed to, the defense attorney will file a motion to withdraw the not guilty plea and the defendant will go before the judge to plead guilty to the agreed upon charges. The judge will make sure that the defendant understands the implication of the change of plea before accepting it.

Sentence bargaining involves a guilty plea in return for a reduced sentence, or the prosecutor's recommendation for a reduced sentence. In some jurisdictions judges are part of the plea bargaining process, and can guarantee a specific sentence in return for a guilty plea, while in others they are not and the prosecutor cannot promise the judge will accept the sentence recommendation (although they almost always do in such situations). The process of plea bargaining varies from jurisdiction to jurisdiction, but plea bargaining itself is the norm in the U.S. criminal justice system.

²⁹ Subsequent prosecution is barred by the double jeopardy provisions of the Fifth Amendment to the U.S. Constitution.

The problems associated with plea bargaining are obvious. Because there is no trial, the facts of a case may not become public. One of the most well-known examples of this was the plea bargain made by James Earl Ray, the killer of Martin Luther King, Jr. Because there was no opportunity for the public to hear evidence in the case, rumors have persisted about conspiracies at high levels of government. From the perspective of the Constitution and the defendant, a serious problem with plea bargaining is that there is substantial pressure to plead guilty, even in cases where a trial might result in an acquittal. With a plea bargain the outcome is usually certain, so there is a great deal of temptation to engage in that practice. If one goes to trial, one may be exonerated or one may face a more serious penalty than would be the case in a plea bargain. A defendant must waive the right to a public trial by a jury – basic constitutional guarantees – because that defendant’s attorney feels that the plea bargain is the best outcome. Plea bargaining might be considered a necessary evil. Necessary because the system is based on it – the criminal justice system could not guarantee all defendants a speedy trial. It is evil for the reasons stated above.

1. How to Solve the Problems

Just as is the case with law enforcement, there is no standard for hiring or training of prosecutors. For the same reasons discussed above with respect to law enforcement, however, it is highly unlikely that any national standards could be established for prosecutors. In theory, the democratic process maintains standards. Head prosecutors who are ineffective or who have ineffective subordinates can be voted out of office or not reappointed. In practice, however, prosecutorial decision-making is of such low visibility that the general public has very little knowledge of what takes place in the prosecutor’s office. In addition, prosecutorial statistics with regard to cases won may be misleading if most cases are plea bargained for greatly reduced charges or sentences and there is no accounting of how many defendants are not charged due to lack of evidence that might well be available if enough effort is expended.

Political influence over prosecution is a problem of unknown dimensions. Because most prosecutors must run for office every 4 years, money must be expended for campaigns. For those who are appointed rather than elected, political alliances are important. In both cases, incumbent head prosecutors and prospective head prosecutors are indebted to those with money or influence or both. How likely is it that a prosecutor will file charges against a key campaign contributor? Or if filing of charges cannot be avoided, how likely is it that the maximum number and severity of charges will be made?

How much influence will a major campaign contributor have on decisions to file charges against a relative or a friend? This is not to suggest that many prosecutors are corrupt but simply that as long as becoming a head prosecutor is a political process, there will be political influence on prosecutorial decision-making. So one obvious to the question of how to fix the problems would be to eliminate politics from prosecution.

Politics cannot be eliminated altogether from prosecution because the prosecutor represents the public and the prosecutor must depend upon the political process for funding, but running for office requires that money be raised, which in turn makes a prosecutor beholden to those who financed his or her campaign. A prosecutor should not be beholden to anyone. There is no reason that prosecutor could not be appointed in the same manner suggested for police chiefs – by non-partisan commission of qualified citizens.

III. POLICE-PROSECUTOR RELATIONS

A. Mutual Dependence

The relationship between law enforcement and prosecution is mutually dependent – police are dependent upon the prosecutor to prosecute, and the prosecutor is dependent upon the police for evidence. While it is true that many prosecutors have their own investigators, their primary source of evidence is the police. County prosecutors in the U.S. do not play a significant investigative role, rarely personally engaging in investigation and using their investigators largely to supplement police investigations. This relationship is made difficult by the differences in educational level between police and prosecutors and by the fact that a county prosecutor will work with many different law enforcement agencies; as we have seen above, the Los Angeles County Prosecutor must work with over 80 individual police agencies.

Despite these obstacles, most law enforcement agencies have functional relationships with the prosecutors with whom they work. There is mutual trust and both focus on convicting criminals. Prosecutors often work closely with their law enforcement counterparts from the very beginning of an investigation, offering advice and researching the law to ensure that all evidence will be admissible. If a case comes to trial, prosecutors and officers work together closely with regard to testimony. Prosecutors may not tell officers what to say, but they may and do tell officers how to say what they are going to say. They will also coach them with regard to cross-examination, preparing them for the difficult questions that may be asked by defense attorneys. These working relationships make both police and prosecution operate more efficiently.

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Law enforcement knowledge of prosecutorial policies allows and encourages effective law enforcement screening of cases, for example.

B. Problems in the Relationship

One of the major problems facing the administration of justice in the U.S. is perhaps too much trust between police and prosecutors. Prosecutors may not thoroughly review cases forwarded to them by law enforcement agencies because they have developed mutual trust over time, and this may result in wasted effort by prosecutors or even worse, the conviction of the innocent. As of the end of January 2002, 100 convictions in the U.S. had been overturned as a result of DNA testing which proved that the convicted person could not have committed the crime for which they were found guilty. A number of these individuals had been sentenced to death, and many had served decades in prison.

Miscarriages of justice occur for many reasons. Eyewitnesses are notoriously unreliable, yet many defendants are convicted primarily, if not solely, on the basis of such identification.³⁰ False confessions are also major problems. Some individuals with psychological problems will confess to crimes they had nothing they had to do with, while others will confess as a result of relentless questioning by police. Forensic evidence can be fabricated, such as the sheetrock that was represented as cocaine in Dallas recently. The Dallas case also points to the dangers of relying on informants; such reliance is common in the U.S., but requires police and prosecutors to deal with known criminals who may inform in return for leniency in their own criminal activity. Recent examples of forensic laboratory technicians who falsified evidence, including fingerprints, hair samples, blood types, and paint samples, may indicate a problem that is more widespread than thought. The "Innocence Project" of the Cardozo School of Law of Yeshiva University is well known in the U.S. for addressing these problems, especially those involving DNA. Professors and students from Cardozo have filed appeals on behalf of many individuals who have been wrongly convicted and won reversals of most of those convictions. Their efforts have given rise to similar programmes at other law schools.³¹

C. Resolving the Conflicts in Prosecution

Conviction of the innocent is the prosecutor's worst nightmare, yet there is ample evidence that this does occur, as we have seen above. One of the reasons that this may occur is that the role of the prosecutor is a complex one. The prosecutor must zealously represent the people in convicting criminals, while at the same time, as an officer of the court, act in the interests of justice. It is because of this dual role that prosecutors are given so much discretion. Without substantial discretion they would be unable to dismiss cases and reduce charges in the "interests of justice" nor would they be able to plea bargain. So prosecutors must be on guard against over zealotry. And they must be on guard against complacency in reviewing evidence. The miscarriage of justice in Dallas occurred because prosecutors accepted the alleged results of a police field test on what was purported to be cocaine. When prosecutors accept confessions given to police, eyewitness testimony given to police, information from police informants, and police field tests of substances without independent verification, they risk both conviction of the innocent and loss of a good case.

The prosecutor must, therefore, rigorously screen all cases, not just for sufficiency of evidence but for validity and truthfulness of evidence as well. No case should go forward based on a police field test; tests must be conducted by a certified laboratory. This may take more time and money, but it is the only way to guarantee that the substance is what it is purported to be. Prosecutors must be especially vigilant in reading police reports and alleged confessions to determine if there are inconsistencies, evidence of coercion, or other factors that could lead to a miscarriage of justice. Prosecutors in the U.S. are handicapped by rarely being able to talk to defendants,³² so they must try to understand the defendant based on reports rather than direct contact. Prosecutors must also be certain to talk to all potential witnesses before charges are filed, a practice that does not always take place due to time constraints.

Finally, the practice of placing new, inexperienced, prosecutors in a screening capacity so that the more experienced prosecutors are free to prepare and try cases should end. Screening should be done by, or under the close supervision of, experienced prosecutors. Strong arguments can be made for eliminating the separation of functions in a prosecutors office so that experienced prosecutors take a case from initial screening through to trial with assistance from more inexperienced prosecutors rather than screening, preparation, and trial being separate functions carried out by different prosecutors.

³⁰ See B. L. Cutler and S. D. Penrod, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW*. New York: Cambridge University Press, 1995.

³¹ Eric Slater, "DNA Proves What Man Long Insisted," *LOS ANGELES TIMES*, January 21, 2002, via [www. http://www.latimes.com/news/nationworld/nation/la-000005490jan21_story](http://www.latimes.com/news/nationworld/nation/la-000005490jan21_story)

³² This is the case for two reasons: defense attorneys will rarely allow their clients to talk to prosecutors, and if the defendant is not represented by counsel when the conversation takes place the prosecutor may end up being a defense witness to a statement made by the defendant.

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Prosecutors are the most important figures in the criminal justice system – the system cannot work effectively or fairly if prosecutors are not rigorous in their practices – so the burden of policing the police as well as convicting the guilty falls to them. The burden is heavy but it is a burden that must be met.