

A man in a dark suit and patterned tie is pointing his right index finger towards a table. On the table is a clear plastic bag containing evidence, with a small white card that reads "EVIDENCE" and "FBI LABORATORY". The background is a blurred courtroom scene with other people. The entire image has a teal-blue tint.

# The Changing Role of the American Prosecutor

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# The Changing Role of the American Prosecutor

*Edited by*

John L. Worrall  
and  
M. Elaine Nugent-Borakove

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## PART I

# Background

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## Chapter One

# Prosecution in America

### *A Historical and Comparative Account*

JOHN L. WORRALL

## Introduction

Prosecutors are important officials within the American criminal justice system. They (mostly district attorneys, their equivalents, and their deputies) respond to various crime problems through the efficient processing of criminal cases. They decide, based on police reports, who is charged and ultimately whether a case will go to trial or be pled out. For the most part, the image of the American prosecutor is one of a diligent professional who represents the government in criminal trials for serious felonies. Indeed, many (perhaps most) aspiring prosecutors have ambitions of arguing high-profile cases before juries and removing dangerous felons from the streets. But there is much more to prosecution than the prosecution of criminal cases.

Prosecutors have received relatively little attention by social scientists. The sheer number of studies dealing with policing issues, for instance, dwarfs those aimed at prosecution. This may be because of the visibility of the policing profession; cops are without a doubt the gatekeepers to the criminal justice system. Another reason prosecutors have received scant attention by researchers is perhaps a misguided assumption that they are little more than case processors. A view that prosecutors only charge criminals may lead researchers to believe that there is little to learn about prosecutors; they do one

thing. Nothing could be further from the truth, however. American prosecutors are part of a rich, interesting progression in criminal justice, and the dominant prosecution paradigm is starting to shift.

The goal of this introductory chapter is to place the American prosecutor in both a historical and comparative context. Prosecution represents one of the few criminal justice institutions the United States did not import from Europe. In many respects, the American prosecutor is a unique actor on the world's criminal justice landscape. What is more, the case-processing conception of prosecution is becoming inadequate. The American prosecutor is changing in response to emerging crime problems, political pressures, and other developments in crime control and prevention.

## The Prosecutor

The American prosecutor has no equal throughout the world. This is especially true of local district attorneys. They straddle a line that separates courts from politics. As Jacoby (1980, p. xv) put it, "[t]he prosecutor is established as the representative of the state in criminal litigation, but either constitutional or statutory mandate, and yet is directly answerable to the local electorate at the ballot box." District attorneys' subordinates do not directly answer to the voters, but they nonetheless serve at the pleasure of the elected district attorney (DA). Likewise, U.S. attorneys are political appointees with certain loyalties and ideological connections to the president, who is responsible for their status. State attorneys general, while not considered prosecutors in the traditional sense, also are elected officials.

American prosecutors also are somewhat unique in the sense that they perform a number of different functions. The most obvious role is representing the government in court, executing the law, and upholding the federal and state constitutions. On top of that, though, prosecutors have the potential to influence law enforcement activity as a result of their screening function. They can alter both the quality and nature of law enforcement investigations by deciding not to press charges against offenders. Prosecutors, and particularly their interest groups (such as the National District Attorneys Association), also work to change procedures and legislation to work in their favor. The electorate also influences prosecutors, as will be evidenced by this book, such that trials are but one part of the story.

Despite their unique position and many hats, prosecutors are largely unknown. Davidson's (1971, p. vii) observation rings true today:

The Prosecutor, reviled, unloved, unknown—except for the occasional Tom Dewey or Frank Hogan. On television and in fiction generally he's the ruthless Cromwell to the defense attorney's dashing King Charles. In

the movies most often he's the plodding Watson to the super-detective Holmes. In the press, the F. Lee Baileys and the Edward Bennett Williamses outscore him ten to one in paragraph space. . . . Yet though he and legions of experts he commands are the cornerstone of the democratic American system of justice and law enforcement—what the prosecutor does and how he does it are almost totally unknown to the vast majority of the American public.

### *Roots*

There is no one wellspring of American prosecution. Instead, most historical accounts paint American prosecutors as having arisen from three separate European predecessors (Kress, 1976). Like the Dutch *schout*, the prosecutor is an official of local government. Like the French *procureur publique*, the prosecutor has total authority to file criminal charges. And like the English attorney general, the prosecutor has the power to terminate a criminal prosecution at any time. But there also are profound differences between American prosecutors today and those from whom they appear to have descended. For example, neither the *procureur* nor the *schout* was a primary law enforcement official within a specific jurisdiction but instead worked underneath a higher-level centralized official. Also, the discretion enjoyed by American prosecutors is unmatched.

Prosecutors' current authority was not always in place, however. Throughout American history, the prosecutor "evolved" through several stages, from a weak figurehead to a powerful political figure. Jacoby (1980, p. 6) has identified four forces that have contributed to this progression. The first was political; Americans chose a system of public instead of private prosecution. The second was legal; Americans' pursuit of democracy begat local government systems. The third was an outgrowth of the second; prosecutors became elected (as opposed to appointed) officials out of popular sentiment—consistent with democratic ideals. Finally, a desire to separate judicial and executive functions all but guaranteed an executive branch function for prosecutors.

*From private to public prosecution.* Perhaps the most unique feature of American prosecution is that it is public. Public prosecution is not a result of our British common law heritage. As Kress (1976, p. 100) put it, the district attorney seems to be "a distinctive and uniquely American contribution . . . whereas Americans typically describe their legal system as based upon English common law, in terms of both its procedural attributes and substantive state penal codes, the public prosecutor is a figure virtually unknown to the English system, which is primarily one of private prosecution to this day." Others have

called public prosecution “largely an American invention” (Miller, 1969). While England has moved toward a system of public prosecution (e.g., in 1879 the office of the director of public prosecutions was formed), that was not the case at the time prosecution emerged on the American landscape. Kress (1976, p. 100) described the practice of private prosecution at common law:

In common law [in England], a crime was viewed not as an act against the state, but rather as a wrong inflicted upon a victim. The aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or a tortuous injury.

More recently, police officers have stepped in to initiate prosecutions, but even then the officer acts with a mind-set that the crime is an offense against a victim, not the state. The tension between private and public prosecution has long flourished in English history, but it was not as much of an issue in the American colonies. Private prosecution ran counter to the democratic process. By 1704, Connecticut adopted a system of public prosecution, and other colonies soon followed. To be sure, there are some traces of private prosecution in the United States. An example is the grand jury, but even grand juries are intimately tied to public prosecutors (prosecutors present evidence to the grand jury). The logic behind having a public prosecutor was laid out in a 1921 Connecticut court decision:

In all criminal cases in Connecticut, the state is the prosecutor. The offenses are against the state. The victim of the offense is not a party to the prosecution, nor does he occupy any relation to it other than that of a witness, an interested witness mayhaps, but none the less, only a witness. . . . It is not necessary for the injured party to make complaint nor is he required to give bond to prosecute. He is in no sense a relator. He cannot in any way control the prosecution and whether reluctant or not, he can be compelled like any other witness to appear and testify. (*Mallery v. Lane*, 1921, p. 138)

*From centralized to decentralized prosecution.* The American colonists shunned all aspects of centralized British government. The desire to place government authority in the hands of locals, coupled with the geography of the early colonies, and ultimately the United States, gave rise to decentralized prosecution, another unique feature of the American system of prosecution. Add to that the distance between population centers and the relative isolation people enjoyed in a largely unpopulous land and decentralized government

was critical. The legal system and many of its functions bore close resemblance to English common law traditions, but similarities ended there. Yet another explanation for this is the relative neglect by the British government of the colonies:

The British government claimed the sole right to create courts, and the early courts except in the charter and proprietary colonies, were created by executive action. However, after the initial settlement, the judiciary received little attention from the King, and colonial courts were left to evolve without much thought, or consideration. England never tried to make the judicial system in the colonies uniform. (Surrency, 1967, p. 253)

Given the isolation of the colonies, several experiments with prosecution began and flourished throughout the 1600s, many of which retained some element of private prosecution. Interestingly, Connecticut became the first colony to use county attorneys as prosecutors. And in 1704, it became the first colony to totally abandon private prosecution. The statute providing for public prosecution stated that "Henceforth there shall be in every county a sober discreet and religious person appointed by the county court to be attorney for the Queen to prosecute and implead in the law all criminals and to do all other things necessary or convenient as an attorney to suppress vice and immorality" (Van Alstyne, 1952). The American revolution solidified the progression from private to public prosecution.

*From appointed to elected status.* Public prosecutors were first appointed. This continued in the postrevolutionary era when the first Congress created the office of the attorney general and the U.S. Attorneys, both uniquely American creations. The role of the U.S. Attorney, for example, was spelled out in the Judiciary Act of 1789 statute "to prosecute and conduct all suits within the Supreme Court of the United States in which the United States might be concerned" and to give advice and opinion on legal matters for the president and other officials of the executive departments. U.S. Attorneys' offices also were created as a result of the act. The attorney general and U.S. Attorneys enjoyed relatively little power in following the revolution. Primary control over prosecution continued to remain in the hands of local prosecutors. Beginning around 1820, though, during Andrew Jackson's presidency, there was a push for increased democratization, including a push for elections rather than political appointments:

In the colonial period, and for some decades thereafter, the prosecutor's office was in fact an appointive one, appointive being in some cases by the governor and in others by the judges. . . . As with judicial offices, however,



appointment almost everywhere gave way to popular election in the democratic upsurge of the nineteenth century; and it became the universal pattern of the new states. (Mayers, 1964, p. 413)

Closely tied to the emergence of elected prosecutors was the judicial election process, because while prosecutors are now considered executive officials, they often were defined as judicial figures. In fact, many states had prosecutors listed in the judicial articles of their constitutions. Leading up to and following the Civil War, however, prosecutors increasingly found their way into the executive articles of state constitutions. As judges started to see themselves elected, then, so too did prosecutors, because both officials were regarded as closely tied to one another. By 1821, the first prosecutor was elected in Ohio and served Cuyahoga County. In 1832, Mississippi became the first state to include a constitutional provision providing for the election of prosecutors. "By 1859 the trend was clear and irreversible—the prosecutor was a locally elected position" (Jacoby, 1980, p. 38).

*From limited to almost limitless power.* While prosecutors were relegated to the judicial articles of states' constitutions, their powers were somewhat secondary to those of the courts. They were not listed as executive officials, or even as local government officials. The prosecutor was, "in the eyes of the earliest Americans, clearly a minor actor in the court's structure" (Jacoby, 1980, p. 23). Instead, the sheriff and coroner were given greatest deference (they also were the first judicial officers to gain independence and elective status). As the prosecutorial function shifted to the executive branch, however, and as prosecutors saw themselves being elected, their powers increased. They went from having very limited power to almost limitless power. This signaled the fourth step in the emergence of the American prosecutor.

By the early 1900s the prosecutor became perhaps the most powerful figure with respect to criminal law. While perhaps not as visible as the police, the prosecutor was regarded as having significant, if not total, power over the ultimate enforcement of the law: "In every way the Prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power. We have been jealous of the power of the trial judge, but careless of the continual growth of the power of the prosecuting attorney" (National Commission on Law Observance and Enforcement, 1931a, p. 11). More recently, the National Association for Attorneys General reported that "there is little probability that the basic pattern (of increased power and prestige for local prosecutors) will be changed; there is every indication that it will be strengthened" (National Association of Attorneys General, 1971, p. 103).

Courts even began to recognize the surge in prosecutorial power. The Illinois Court of Appeals reached this conclusion: The prosecutor ". . . is

charged by law with large discretion in prosecuting offenders against the law. He may commence public prosecution in his capacity by information and he may discontinue them when, in his judgment the ends of justice are satisfied" (*People v. Wabash, St. Louis and Pacific Railway*, 1883, p. 263). In several important historical cases, courts have gone so far as to compel the prosecutor to pursue charges, but none have succeeded. The court in *Wilson v. County of Marshall* (1930) said, for instance, that the prosecutor has "absolute control of the criminal prosecution." Another declared that "[t]he remedy for the inactivity of the prosecutor is with the executive and ultimately with the people" (*Milliken v. Stone*, 1925, p. 399).

At about the same time, prosecutors started to draw the attention of legal scholars and, importantly, crime commissions. We will take up the issue of crime commissions, particularly their influence on prosecutorial evolution, later, but for now it is clear that the American prosecutor reached a certain "level" in the 1920s. At that point, prosecution in America was quite unlike anything else in the world. So unique and powerful has the American prosecutor become that certain commentators have expressed concern. Baker (1932, p. 934) made this observation: "The people of the United States have traditionally feared concentration of great power in the hands of one person and it is surprising that the power of the prosecuting attorney has been left intact as it is today." In the end, though, the courts have spoken most vocally; countless decisions have upheld prosecutors' control over life and liberty (e.g., *People v. Berlin*, 1974; *State v. LeVien*, 1965; *People v. Adams*, 1974). As Jacoby (1980, p. 38) pointed out,

The final authority was conferred by the courts, which upheld his discretionary power. This completed his development because it made him the chief law enforcement official in his community. As a local official he was free to apply the laws of his jurisdiction as he felt best served his constituency. As an elected official given discretionary power by the constitution or by state statutes, his decisions were virtually unreviewable. This freedom of choice was, in the end, what truly set him apart from all other members of the criminal justice system.

### *Defense Developments*

One of the most significant developments in American history with implications for prosecution is a string of Supreme Court decisions granting rights to criminal defendants. As early as 1932, in *Powell v. Alabama* (1932), the Court called attention to the constitutional basis for a defendant's right to counsel. The watershed decision, though, was *Gideon v. Wainwright* (1963), where the Supreme Court incorporated the Sixth Amendment right to counsel, ensuring

that criminal defendants are to be represented by counsel in state criminal trials—not just federal trials. *Gideon* dealt with felonies, however. In *Argersinger v. Hamlin* (1972), the Court extended the right to counsel to defendants who, if found guilty, faced prison terms. Other decisions, such as *Miranda v. Arizona* (1966), extended the right to counsel to police interrogation.

These cases significantly altered the prosecutorial workload. In particular, the Supreme Court's decisions meant that prosecutors suddenly needed to be present at many more stages of the criminal process. More accurately, prosecutors felt compelled to be present at these important stages due to the Supreme Court's decisions requiring the presence of counsel at critical stages (e.g., the preliminary hearing). Prosecutors now must prepare themselves to deal with defense attorneys from initial processing all the way through to the appellate stage. Concerning the Supreme Court's defense counsel decisions, Jacoby points out that they make ". . . the average criminal case longer and procedurally more complex. Defendants [are] more likely to file motions, to demand rather than waive preliminary hearing, and to institute postconviction proceedings and appeals" (1980, p. 101).

A parallel development was the passage of various speedy trial laws at both the federal and state levels. These laws added additional pressures, making the prosecution function all the more difficult:

Greater care had to be taken to provide prompt and suitable protection of the rights of indigent defendants, both by informing them of their rights at all stages of the process and by insuring that the state's case was instituted before proper deadlines. Having defense counsel in all cases would now exert pressure on the police and prosecution to perform to the letter of the law. (Jacoby, 1980, p. 101)

In sum, today's prosecutor looks a great deal different than the prosecutor of old. Population growth and the prominent role of the criminal defense bar (due to the Supreme Court's many defense decisions) have made prosecution difficult. For the typical urban prosecutor, more work needs to be done in less time. There is most certainly more to the current state of prosecution than population growth and defense attorneys though. What prosecution looks like today owes a great deal to important developments early in our nation's history. Foremost among those were democracy and decentralizing, which gave birth to a uniquely American form of prosecution.

### Evolution in the Prosecution Role

Thus far we have summarized the history of prosecution in America, about how it came to pass. All along we have assumed that the prosecutorial func-

tion is one of processing criminal cases. To be sure, prosecutors continue to prosecute criminal cases, but there is more to the story. The prosecution role has changed over time, especially recently. Early understandings of the prosecutorial role were naïve and largely uninformed concerning the realities of processing criminal cases. Then researchers “discovered discretion.” Now we are arguably on the cusp of a new prosecution paradigm.

### *Progressive Naïveté*

The Cleveland Survey of Criminal Justice (1922), the Wickersham Commission (National Commission, 1931b), and early 20th-century commission reports (e.g., Illinois Association for Criminal Justice, 1929; Missouri Crime Survey, 1926; see also Walker, 1980, pp. 169–180) provided the basis for what has been called the “progressive era” of criminal justice. The authors of these reports were reformers intent on removing corruption and political influence from criminal justice operations. The reports sought to learn how criminal justice was operating at the time, and the authors offered up a number of recommendations for improvements intended to professionalize the administration of justice. The problem, though, was that they failed to dig deeply into the real-world operations of the criminal justice system, especially prosecution. For example, the crime commission investigators relied only on official data and did not directly observe criminal justice operations:

The treatment of prosecution demonstrates most clearly how methodology and conclusions about the administration of justice were shaped by an a priori set of ideological assumptions. All of the crime commissions expressed alarm over the “mortality” of cases, noting that few arrests ever resulted in prosecution, trial, conviction, or imprisonment. . . . The crime commissions assumed that the “mortality” of cases was evidence of a “failure” to punish wrongdoers. (Walker, 1992, p. 53)

The “ideological assumptions” to which Walker referred were beliefs on the reformers’ part that the criminal justice system consisted of several semiautonomous agencies whose employees applied the law in a neutral, impersonal, and evenhanded fashion. Quite simply, reformers felt the law could be followed to the letter, and that anything less was evidence of failure. As Walker (1992, p. 54) later observed, “. . . this reform strategy seems hopelessly naïve. It shows no awareness of the phenomenon of discretion, or of its underlying dynamics.” In other words, the commissions totally ignored day-to-day operations and pressures facing criminal justice officials. Heavy workloads, case backlogs, public pressures, turf wars, self-serving interests, and other “realities” of criminal justice administration were totally ignored. Nevertheless, the progressive era paradigm

was one of “textbook” criminal justice—a fully functional, competent, and effective “system.” Reformers felt prosecutors should enforce the law by prosecuting all cases and taking all offenders to court. Anything less was regarded as a failure. This view was quickly dispensed once discretion was discovered.

### *Discovering Discretion*

The progressive “systems” paradigm was quickly replaced following Frank Remington’s 1956 comment that “[t]o a large extent, the administration of criminal justice can be characterized as a series of important decisions from the time a crime is committed until the offender is finally released from supervision” (cited in Walker, 1992, p. 47). This seems obvious today, but at the time it was a novel observation. What is more, it ran quite counter to the progressive conception of a system removed from human faults and frailties. Remington was one of the lead researchers behind the American Bar Foundation’s (ABF) Survey of the Administration of Criminal Justice (Remington, 1956; see also Dawson, 1969; LaFave, 1965; McIntyre, 1967; Miller, 1969; Newman 1966; Remington et al., 1969). Unlike the work of the crime commissions before it, the ABF survey included field observations of criminal justice agencies in action.

The ABF survey came at the request of Supreme Court Justice Robert H. Jackson in 1953. In a speech before the American Bar Association (ABA) he expressed alarm over the delay and ineffectiveness of the criminal justice system, but he also pointed out how little was known about its day-to-day operations. He urged the ABA to start researching criminal justice. Once funding for the research was secured, the ABA hired Wisconsin law professor Frank Remington to direct the field observation. Remington worked closely with Lloyd Ohlin, and both researchers shaped the survey and eventual research plan. The survey provided significant insight into real-world criminal justice operations. First, it highlighted the complexity of the criminal justice system. Whereas the progressive view was one of strict law enforcement, the ABF survey “. . . revealed a very different picture, in which the criminal process was used routinely to handle a broad range of social problems including alcohol abuse, mental illness, family difficulties, petty financial disputes, and other miscellaneous matters” (Walker, 1992, p. 67).

The survey also cleared up some misunderstandings concerning the police role. LaFave’s (1965) study, which was based on the ABF survey, revealed that policing was more about peacekeeping than crime control. The researchers also discovered pervasive discretionary decision making, both in policing and beyond. In fact, some researchers (e.g., Walker, 1992) feel that the ABF survey’s discovery of discretion is its most significant contribution. Decisions by police officers, prosecutors, and other officials appeared to be

guided by anything but legal guidelines and organizational controls. Donald Newman's (1966) study on plea bargaining cast light on a phenomenon that progressive reformers totally ignored. The survey also revealed rampant lawlessness on the part of police at the time. The researchers "... were struck less by the illegality of so much police behavior than by the sheer fact that so much decision making had so little relationship to law on the books" (Walker, 1992, p. 68).

### *History Repeats Itself*

The ABF survey painted an image of prosecution that was quite different from that envisioned by progressive reformers. For the first time prosecutors were seen as more than just blind enforcers of the law. They weighed the consequences of proceeding with criminal charges, considered alternatives to traditional adjudication, and plea-bargained extensively with the defense. This image was largely replaced, though, with a more contemporary version of the progressive ideal as a result of the 1967 President's Commission on Law Enforcement and the Administration of Justice (1967). The commission identified three prosecutorial functions: "[first] . . . to determine whether an alleged offender should be charged to obtain convictions through guilty plea negotiations . . . [second] the prosecutor has the responsibility of presenting [the] government's case in court . . . [and third] . . . the prosecutor is often an investigator and instigator of the criminal process (President's Commission, 1967, p. 72). In short, prosecutors were regarded as case processors, as enforcers of the law.

There was a measure of overlap between the ABF survey findings and the work of the President's Commission. Remington and his colleagues highlighted the "systemic" nature of criminal justice operations, just as the President's Commission did. Most readers are probably familiar with the commission's diagram depicting the flow of cases through the criminal process. Even so, prosecutors continued to be regarded as processors of criminal cases. The discretion they enjoyed and regularly exercised was played down to some extent as a result of the commission's work. It also is important to recall that the President's Commission was appointed during something of a national crisis over crime and justice. The 1960s saw a surge in crime and attention to it. The Law Enforcement Assistance Administration (LEAA) was formed, and for the first time significant federal funding was dispensed in the name of crime control. These developments added some fuel to the ABF survey fire (e.g., the survey revealed evidence of discrimination in criminal justice administration, which civil rights advocates of the 1960s picked up on), but the image of prosecution presented by the ABF was largely overshadowed by the politics of crime control in the 1960s.

*The New Prosecution Paradigm*

During the 1960s and 1970s the police came under significant public and legal scrutiny. Citizens were unhappy with the so-called “professional” model of policing, and the Supreme Court reigned in police investigative practices as a result of several important civil rights decisions. Also, policing research during the 1970s revealed that many traditional law enforcement strategies (e.g., reactive patrol) were largely ineffective. Together these developments encouraged the police to find a new strategy (Kelling & Moore, 1988). By the mid-1980s, police had honed in on a crime prevention and problem-solving focus. Decentralization became the word of the day, officers drew extensively on citizens for support and suggestions, and new patrol strategies were put into effect. Prior to the 1980s, police were in the throes of a crisis of legitimacy. The community-policing movement of the 1980s sought to restore a favorable police image.

One may conclude that prosecutors observed what police were up to and then followed suit. While certain prosecutors may have emulated police, there is more behind the emergence of a new prosecution paradigm. For one thing, prosecutors did not face the same threats to their legitimacy that police did; they were not compelled to “change their ways” just to appease the public. To some extent, though, as elected officials, prosecutors became familiar with voters’ concerns over crime, especially the crack epidemic of the 1980s. Prosecutors—like the police—also began to learn that traditional case-processing strategies did not work well for all crime types; prosecutors were all too familiar with the “revolving door” concept and set out to identify effective strategies that would help them target seemingly intractable problems. Prosecutors also came to realize that getting tough on crime was not always the most effective approach, that problems were rarely solved by throwing the book at offenders.

Together these reforms signaled a shift toward “strategic” prosecution, emphasizing creative problem solving and collaboration not just with citizens but with other public agencies (an example is “community prosecution,” touched upon in two chapters later in this book). Strategic prosecution occurs when the prosecutor views himself or herself as one piece in a larger crime control puzzle. It emphasizes awareness of crime trends, communication, creativity, and cooperation.

Whether the new prosecution paradigm will take hold remains to be seen. Most prosecutors remain case processors. Most aspiring prosecutors still want to litigate cases and send serious criminals to prison. Significantly fewer prosecutors have stepped out of this mold in favor of a new approach. There can be no denying, though, that prosecution is changing. The pressures that prosecutors face today are not necessarily the same as they have always been.

Novel crime problems also pose significant difficulty for prosecutors. Citizens are increasingly clamoring for prosecutors' attention. Organizational pressures, pressures from other governmental entities, and the like are ushering in a number of changes in American prosecution. These changes—more than just community prosecution and problem solving—are the focus of this book.

### Prosecution in the International Context

This section offers a brief overview of how prosecution in the United States compares to prosecution abroad. It draws largely on the work of Minoru Shikita (Shikita, 1996), who presented on the subject at the ancillary meeting held at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Cairo, in 1995. We begin with the structure and organization of prosecution and then consider prosecutorial functions, the public-private prosecution distinction, and differences in prosecutorial discretion across the world.

#### *Structure and Organization*

In many countries, the chief prosecutor falls under the ministry of justice or the attorney general. In Thailand, however, the Prosecution Department of the Ministry of the Interior became independent from the attorney general in 1991. It is now directly under the prime minister. And just because a prosecutor's office falls under the ministry of justice does not mean it always answers to the office above it. In Japan, for example, the prosecutor's office comes under the Criminal Affairs Bureau of the ministry of justice, but prosecution is generally in the hands of the prosecutor-general, who leads the Supreme Public Prosecutor's Office, a Cabinet-level agency.

While district attorneys in the United States are elected, prosecutors in many countries are appointed. Throughout Europe and in most Asian countries, prosecutors usually are designated as such by the minister of justice or the president. Of course, the attorney general in the United States is appointed, but prosecutorial appointments are the exception in this country. Interestingly, some countries have started to move away from elections as a means of selecting prosecutors. Some East European countries have abandoned elections in favor of presidential or legislative prosecutorial appointments.

While elected prosecutors in the United States are to serve the constituents who put them there (or, at the least, the "public interest"), prosecutors in European countries most often serve the interests of the state. For example, the crown prosecution system in England and Wales falls under the director of public prosecutions yet operates at the local level with a measure of independence. There are also differences across countries in terms of education and legal qualification requirements for prosecutors. All prosecutors in



the United States must be members of the bar in their respective states (or the federal bar), but Germany, England, and some Scandinavian countries permit prosecution by police or police-educated prosecutors, individuals with less than full legal credentials.

It also is important to note that while U.S. prosecutors have gained considerable power over the years, some countries have drastically restricted prosecutorial power. "This is the case particularly in Russia and other former CIS countries (including the Asian republics) where the Prokuratura played an all-powerful role under the Communist system. With its official passage (though bureaucratic vestiges persist)—the adoption of new constitutions, establishment of constitutional courts and major justice reforms—the authority of the Prokuratura has been considerably diminished and efforts are being made to curtail the virtual impunity it enjoyed" (Shikita, 1996, p. 55).

### *Prosecutorial Functions*

The best way to grasp the prosecutorial function between various countries is to compare prosecutorial authority to police authority. In some countries, such as Germany and Korea, prosecutors exercise total control over criminal investigations. In others, such as Japan and the United States, prosecutors enjoy a prominent role in criminal investigation. In fact, district attorneys in the United States often have their own investigators. Still other countries completely separate prosecution from investigation. Examples include England, Indonesia, and Thailand. Police usually are responsible for making arrests, but in some countries prosecutors do so.

Rules of evidence and prosecutors' roles during trial also vary across the world. Prosecutors in the United States can of course subpoena and question witnesses. In other countries, they cannot. In some European systems, for example, written transcripts of testimony can replace oral interrogations. There also are significant differences between countries in terms of prosecutors' say during sentencing proceedings. In most countries, the United States included, prosecutors "advise" judges on sentences. In Japan, however, their recommendations almost always stand. There also are variations in terms of the prosecutor's role in sentence execution. In the United States prosecutors usually wash their hands of sentencing once a recommendation is made to the judge, but that is changing in some areas (as the chapter in this book on Brooklyn's DTAP program attests).

### *More on Public and Private Prosecution*

We have already discussed the movement from private to public prosecution that has played out in this country. For the most part, private prosecution has given way to public prosecution across the globe, but there are exceptions. For

example, public prosecutors may waive prosecution in certain cases, perhaps due to a lack of evidence, paving the way for private prosecution. Thailand permits private prosecutions, but only following an intense preliminary hearing on the matter. In other countries, when a prosecutor declines to pursue charges, victims, family members of victims, and other concerned citizens can lodge a complaint in court. Other jurisdictions maintain hybrid models of private and public prosecution. In Finland, for instance, the right to prosecute is shared by a prosecutor and the person harmed. Both individuals assume a prominent role in prosecution, quite opposite of what occurs in the United States.

Despite something of a move away from them, private prosecutions still occur in some European nations.

In England, every citizen is entitled to initiate criminal proceedings, though it is rarely exercised in practice, and private prosecution occurs mostly in minor cases (e.g., shoplifting) where the police have declined to bring a charge. The French model restricts private prosecution to injured persons, and can combine an 'action civile' for damages with an 'action publique' that initiates criminal prosecution which the prosecutor is required to take over. In the majority of European countries, the injured party may not only initiate public prosecution but may also become a private prosecutor, who investigates a case, brings a charge and participates in the trial. In Sweden and Finland, the injured party may initiate private prosecution whenever the prosecutor declines to bring a charge, but in most others private prosecution is allowed only in the case of a petty offence [*sic*] affecting personal rather than pecuniary interest. (Shikita, 1996, p. 58)

### *Discretion*

American prosecutors exercise enormous discretion in terms of who gets charged. This discretion, or something closely akin to it, is something prosecutors in many other countries enjoy. While in Japan, for instance, prosecutors cannot offer favorable treatment in return for guilty pleas, they can decide not to go forward with criminal charges. Their decisions are rarely challenged because they are signed off on by a superior. Japan also maintains legislation that can provide compensation for people wrongfully arrested and detained who, in the prosecutor's view, did not commit the crime. Other countries are more restrictive, however. In Korea, suspended prosecution with probation is only found in cases involving juveniles. Thailand and Indonesia have always limited prosecutorial discretion, but case overload and prison crowding have caused them to consider other alternatives. In

short, prosecutors are increasingly moving from a “legality” principle of prosecution (charging all violators) to an “opportunity” or “expediency” principle, the latter of which addresses the realities of crime volume in the 21st century (Shikita, 2006).

## The Changing Prosecutor

Earlier in this chapter we looked at the evolution of *prosecution*. That is, we examined how prosecution has begun a shift from case processing to problem solving and strategic thinking. We will continue to give attention to changing prosecution throughout this book, particularly in chapter 9. But *prosecutors* also are changing. Indeed, this book’s title suggests a focus more on prosecutors than on the act of prosecution.

On one level, it is difficult to separate prosecutors from prosecution. Prosecution could not occur without prosecutors, and prosecutors certainly spend the bulk of their time involved in prosecution (or, more recently, trying to avoid it). At the same time, though, it is critical to view the prosecutor as more than a person who engages in prosecution. Elected district attorneys, for instance, worry about more mundane issues of securing funding and gaining reelection, each of which is only indirectly connected to the actual act of prosecution.

We have assembled a diverse collection of chapters for the reader. At a glance, some of the chapters may seem only remotely connected to each other. Upon closer examination, though, each tells a similar story. That story is the focus of this section. We argue that prosecutors have moved from running a largely “closed shop” to ensuring openness and accountability in their operations.

### *A Closed Shop*

We mentioned that prosecution, in comparison to policing, has received little scholarly attention. This may be due to the visibility of policing vis-à-vis prosecution. It also may be due to an impression that prosecutors have traditionally run “closed shops.” For example, there is a sentiment among at least some researchers that prosecutors have not been particularly receptive to sharing their records with members of the academic community. Even if this belief is wrong, it is safe to assume that prosecutors have historically isolated themselves from the environment around them. Up until recently, for example, there was little to no cooperation between police and prosecutors. If police brought prosecutors weak cases, then the cases were dismissed. Recent shifts toward community prosecution, however, reveal that prosecutors are learning about the benefits associated with outreach and cooperation.

To put the “closed shop” view in the context of organizational theory, prosecution has traditionally operated as a “closed system” (see, e.g., Katz &

Kahn, 1978, for an introduction to systems theory). This view of organizations regards a system as independent of external environmental influences (e.g., citizen preferences). Rather, closed systems concern themselves with internal operations and functioning, particularly with an eye toward reducing uncertainty. This view was expressed, for example, in Albonetti's (1986, 1987) work on prosecutors' charging decisions. Her argument was that prosecutors avoid uncertainty in their charging decisions by pursuing charges in cases where the odds of securing a conviction are favorable. Traditional performance measures in prosecution also reflect a concern over internal operations (e.g., conviction rates) rather than external pressures and influences.

### *Toward Openness and Accountability*

The open systems view places organizations within a complex environment by which they are affected and with which they must interact. As Katz and Kahn (1978) observed:

The open-system approach begins by identifying and mapping the repeated cycles of inputs, transformation, output and renewed inputs which comprise organizational patterns. Organizations as a special class of open systems have properties of their own, but they share other properties in common with all open systems. These include the *importation of energy from the environment* [italics added], the through-put or transformation of the imported energy into some product form . . . the exporting of that product into the environment, and the re-energizing of the systems from sources in the environment. (p. 33)

Of particular importance here is the "importation of energy," as well as the transformation and subsequent output of that energy. This is exactly what is happening in prosecution today, on a number of fronts. In the context of public organizations, environmental pressures often are construed to mean those emanating from citizens. Citizens clearly exert pressure on public organizations—and prosecutors' offices. Elected district attorneys, of course, must answer to the voters, but there are numerous other sources of environmental pressure and influence. Sentencing reforms have placed enormous discretionary power in the hands of prosecutors. The specter of terrorism has prompted prosecutors, at the urging of a number of sources, to get "creative" in targeting known and suspected offenders. Prosecutors' frustrations with seeing some of the same offenders (e.g., drug addicts) over and over again have prompted them to identify and implement creative solutions to problems. The pursuit of grants to fund various innovative programs has forced prosecutors to turn their attention outward (e.g., to financial support from

community and corporate foundations). The list goes on, but the point is that these reforms would not be taking place but for the increased awareness on prosecutors' parts of what is transpiring *outside* of the courtroom and their office spaces.

Throughout criminal justice, there also is increasing concern with accountability. The move began, arguably, with policing. The civil rights era, coupled with police abuses and scandal, during the 1960s saw the emergence of citizen review commissions, law enforcement accreditation, a number of Supreme Court decisions providing due process protections for suspected criminals, and other reforms. Recently, prosecutors have followed suit, but not necessarily for the same reasons. Strained relations between the police and the public arguably prompted the former to change. Prosecutors have instead begun responding to a growing concern over accountability—particularly financial accountability—that has been evidenced *throughout* government. In an era of concern over runaway government spending and ensuring that taxpayers' dollars are well spent, prosecutors are taking heed. This move also is consistent with an open systems perspective, as it reflects concern with what outsiders prefer.

### *Connecting the Themes*

This book began as a community prosecution book, but then it became apparent that the changing prosecutorial role is much more than a shift from case processing to problem solving and promoting accountability. Case processing remains perhaps the most significant prosecutorial function. Problem solving and accountability are important issues as well. Both must exist in tandem. But there is more. Prosecutors face numerous organizational, political, and legal pressures. They must continually adapt and respond to these. Add to that novel crime problems, collaboration, and stepping outside of the traditional mold of evaluating cases brought to them by the police and the picture becomes even more complex. Accordingly, this book contains several unique chapters providing a *comprehensive* overview of the changing face of prosecution in America. Moreover, in sticking with the closed- versus open-systems view of prosecution just laid out, each chapter provides an example of how environmental pressures are coming to shape the new prosecution.

*The new prosecutorial environment.* Part 2 introduces readers to what we call the "new prosecutorial environment." It begins with Kay Levine's chapter on the state's role in prosecutorial politics. Levine observes that two seemingly opposing movements have been afoot throughout criminal justice: federalization and community justice. The former is concerned with federal laws increasingly

being used to target local criminal problems. Community justice, in contrast, is inherently at the local level and seeks to divorce crime control from sources other than local constituents and stakeholders. Levine, though, highlights another as yet largely ignored source of influence over local prosecution—state government. She concludes that the state, more than prosecutors' constituents or the federal government, shapes office priorities. Her chapter clearly highlights the influence of external factors on prosecutors' activities.

Brian Forst then calls attention to errors of justice, wrongful convictions and wrongful *nonconvictions*. He also discusses the effect that various case screening strategies can have on such errors. On the one hand, Forst couches errors of justice in performance measurement terms by arguing that they are something that should be of as much interest to prosecutors as conviction rates and case processing time. On the other hand, he also points out that egregious errors of justice are sensational, capture headlines, and cause people to cry for reform. This latter view is what prompts Forst to argue that prosecutors should not ignore the potential for justice errors in their pursuits to convict criminals; pressures to mitigate against wrongful convictions (and nonconvictions) emanate, for the most part, from the environment, from observers who regard them as miscarriages of justice.

Rodney L. Engen then takes up sentencing reform and its effects on prosecutorial discretion. Perhaps no other chapter in this book better calls attention to the environment of prosecution. He discusses how sentencing guidelines, mandatory minimums, and habitual offender statutes have removed sentencing discretion from judges and thereby enhanced prosecutors' *charging* discretion. Engen concludes, for example, that prosecutors often reduce the severity of charges in an effort to maintain the status quo. Whether prosecutors influence *sentencing* decisions any more or less than before sentencing reforms, however, remains unclear. In any case, the issues would be effectively moot but for the fact that external reforms have basically forced prosecutors to pick up where judges must now leave off.

M. Elaine Nugent-Borakove then discusses performance measurement, particularly the need for a broader conception of prosecutorial effectiveness. Her argument is that the traditional means of evaluating prosecution performance fails to adequately capture the nature of the prosecutorial role in the 21st century. She argues that prosecutors, besides securing convictions and dispensing justice, also must work toward promoting safe communities, maintaining their integrity, and improving their coordination with other criminal justice agencies. In short, prosecutors need to look beyond convictions. Nugent-Borakove calls for prosecutorial goals that probably would not be of much concern but for public pressure for prosecutors to reduce crime, act responsibly and professionally, run efficient and fiscally responsible offices, and coordinate their enforcement efforts.