LEGALITY AND EQUALITY: PLEA BARGAINING IN THE PROSECUTION OF WHITE-COLLAR AND COMMON CRIMES

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On the basis of a case study of a U.S. Attorney's office, I sketch differences in the prosecution of white-collar and common crime in order to draw out implications for equality in current proposals to reform plea bargaining. The extent to which the powers of investigation and prosecution are empirically distinct differs with the two categories of crime. Because of greater social distance between prosecutor and investigator in the enforcement of laws against common crimes, formal records give a misleading impression that legitimate prosecutorial power is being bargained away. Because there is relatively little social distance between the prosecutorial and investigative functions in the prosecution of white-collar crime, the formal record greatly underrepresents the exercise of the power not to prosecute. Reforms that would make bargaining over formal dispositions more consistent with legality or "due" process appear likely to discourage lenience in the prosecution of common crimes while leaving largely unaffected the low visibility exercise of the power not to prosecute white-collar crime.

Unarticulated images of the typical crime and law enforcement process underlie the discussion of many criminal justice issues. In the case of plea bargaining, proposals for reform have tacitly been aimed at a subset of crimes and their corresponding enforcement roles. Some commentators appear to presuppose that crimes have readily identifiable victims. Citing the problem of "excessively routine treatment," Rosett and Cressey (1976:174) argue that

> officials could no longer depend on mechanical routines if they were confronted more directly with the need to persuade the victim to recognize the offender as another human being and the offender to recognize the humanity of the victim he has wronged. [See also Morris and Hawkins, 1977:58]

To make a case for his favored reform, White (1971) explicitly assumes that the investigative stage essentially has been completed by the time a case reaches the prosecutor. In order to increase consistency in plea bargaining, he calls for centralizing authority in the prosecutor's office by appointing an "executive prosecutor" who would evaluate the facts, decide on

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sentence recommendations, and determine the extent to which a guilty plea will reduce punishment. He reassures us that

> the executive prosecutor's failure to meet with witnesses will not substantially impede evaluation of his cases. Investigation reports prepared by the police generally give a full description of the evidence which can be produced against the defendant. [1971:453-55]

A *Harvard Law Review* Note (1977:587) also makes assumptions about events and roles in the plea bargaining process when proposing a more aggressive "magistrate" who would interview "the arresting officer," review "police methods used in obtaining evidence," and examine "alibi witnesses." One of the most common criticisms of plea bargaining, that charges are unaccountably reduced between arrest and final disposition, assumes that plea bargaining takes place against a background of formal charges that have already been filed.

None of these perspectives appears to apply to plea bargaining in cases where there is no arrest, no alibi defense, no "police report," no readily identifiable victim, and where understandings are reached before any charges are filed, as exemplified in the deals struck by "executive prosecutors" with Spiro Agnew, Richard Kleindienst, and Richard Helms. Current analyses of the problems of plea bargaining and proposals for reform by and large ignore the prosecution of white-collar crime.

I am presently studying the U.S. Attorney's office for the Eastern District of New York, an office that has dramatically increased its prosecution of white-collar crime in the last five years. By interviewing the prosecutors, reading files, and occasionally observing investigative interaction, I am testing for differences between white-collar and common crime that relate systematically to differences in the enforcement process. The field research is still in progress and space permits only an outline here. But a tentative sketch of differences in the prosecution of white-collar and common crime may raise some neglected issues about plea bargaining.

In order to clarify the meaning of "white-collar" crime, I begin with a discussion of the relationship of social class position and criminal behavior. Then I examine the process of prosecuting common crimes, noting the relatively sharp division between investigative and prosecutive roles. I argue that as a result of this social distance, the formal public record overrepresents decisions not to prosecute, giving an exaggerated impression of the extent to which legitimate prosecutorial power is bargained away. I argue the inverse about plea bargaining in the prosecution of white-collar crime: because there is relatively less social distance between the investigative and

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prosecutive functions, the formal public record greatly underrepresents the exercise of the power not to prosecute. Even the prosecutor may not recognize his passivity, much less the public.

The conclusion draws out some implications of this analysis for the movement to reform plea bargaining. Reforms that would make bargaining over formal dispositions more consistent with "due" process, more careful, more publicly reviewable, and more responsive to victims, might discourage leniency in the prosecution of common crimes, while leaving largely unaffected the low visibility exercise of the power not to prosecute white-collar crime. Greater "legality" in plea bargaining may be inconsistent with more "evenhanded" treatment of defendants regardless of socioeconomic position.

I. THE CONSTRUCTION OF WHITE-COLLAR CRIME

Definitions of white-collar crime have been notoriously unsatisfactory (Shapiro, 1976). The term is fraught with political overtones—it seems inevitably to imply "unequal treatment." Various inconsistent meanings have been advocated, from Sutherland's (1949) indiscriminate portrait of widespread civil and criminal illegality by the nation's largest corporations to recent suggestions in the Justice Department that an integrated attack on employee theft would be a significant response to white-collar crime (Gibson and Zunno, 1978). Before presenting a new definition, some prefatory ground clearing seems unavoidable.

Many of the difficulties with current definitions fall into three categories. The first is a failure to separate analytically the criminal's social class position from the criminal behavior. There are relatively few crimes that can be committed only by those in white-collar occupations, among them price fixing, political contributions by corporations, and extortion under color of official right. And most common crimes can be committed by members of both "white-collar" and "blue-collar" classes. A Patty Hearst could commit a bank robbery; a Dr. Shepard could be a murderer.

If the social class of the criminal is not sufficient to define the category, neither is the structure of criminal behavior. "Nonviolent crimes of deception or abuse of trust," a common definition in the literature, do not require white-collar social status; they include circus grifters, narcotics addicts who forge stolen welfare checks, and bank tellers earning $150 a week who "embezzle" small amounts of cash. There is no reason to

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expect any homogeneity of social psychology, impact, or method of detection and prosecution in this aggregation. Moreover, if white-collar crime referred only to a behavioral tactic, the concept would lack social class content and thus utility for critical social analysis.

In order to avoid these problems, the classification should depend on *use* of the perquisites or routines of a white-collar occupational status in constructing a crime. A bank president who unlawfully borrows money from his own bank would be committing a white-collar crime, but not an unemployed individual who obtains a bank loan by falsifying his job status.[1]

A second set of definitional difficulties comes from the common assumption that "white-collar" crime should be understood unidimensionally in dichotomous contrast to "blue-collar" crime or some other antonym. If the concept is to be applied with any degree of thoroughness to the extremely rich world of criminal behavior, it is essential to go beyond judgments that crimes are or are not "white-collar" and recognize that some crimes are more white collar than others or white-collar only in some respects. For example, we need an analytic framework that will allow us to distinguish among the "blue-collar" truck driver who hijacks a load of stereos, the *somewhat* white-collar businessman whose main business is fencing these stolen goods, and the *still more* white-collar corporate official who defrauds investors and creditors in the annual financial statement by knowingly using an inappropriate accounting method to underrepresent the company's loss from the theft.

In pursuit of a multidimensional approach, I will shortly describe three features of crimes, the construction of which is distinctively facilitated by the use of white-collar occupational status. We might also distinguish multiple dimensions in the definition of white-collar occupational position but, given the generality of the analysis to follow, such refinements would be gratuitous here. By "white-collar" social class position I mean the bourgeois professions (doctor, lawyer, accountant, cleric), the managerial ranks of private and public companies, public officials with significant discretionary powers (i.e., not mailmen), and owners of substantial capital. I will not use

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[1] This may be a departure from the common understanding of "white-collar" crime, but popular usage is vague, nostalgic, and politically freighted. In industrialized, social welfare societies, there are many nonviolent crimes against collective victims that are not specific to social positions. Even tax fraud is not necessarily tied to occupational status. A person can commit a tax crime by claiming a nonexistent child as a dependent regardless of his source of income, indeed whether he is trying to reduce a tax bite or enlarge an "earned income" credit.

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"blue-collar crime" as the other pole but rather "common crime," because I wish to refer to crimes that can be committed by persons from many different occupational statuses, if not by everyone.[2]

A third set of difficulties with definitions of "white-collar" crime is that they are often divorced from considerations of pragmatic value. The literature is filled with controversies over definition detached from explanatory purpose (see Geis and Meier, 1977). The meaning I give the concept is intended to help explain differences in the law enforcement process, but it may well serve a wide variety of research goals, for the following reason. If there is a concern common to criminals, a theme in their behavior that draws them together into one field of study, it is that they don't want to get caught. Put another way, the most "natural" distinctions to draw among crimes relate to the ways people attempt to beat the enforcement system. Therefore an analysis that compares crimes in terms of the problems they create for the enforcement process should generate categories that are also useful for a sociology of work, social psychology, ethnography, and social philosophy.

In the purest "white-collar" crimes, white-collar social class position is used (1) to diffuse criminal intent into ordinary occupational routines so that it escapes unambiguous expression in any specific, discrete behavior; (2) to accomplish the crime without incidents or effects that furnish presumptive evidence of its occurrence before the criminal has been identified; and (3) to cover up the culpable knowledge of participants through concerted action that allows each to claim ignorance. This can be stated alternatively in a way that avoids assumptions of guilt and more accurately reflects my research perspective, which concentrates on the features prosecutors must construct to produce a successfully proven crime. In order to convict someone of a "pure" white-collar crime, prosecutors must build a case that a crime has been disguised in each of three ways. It was so thoroughly embedded in legitimate business (or philanthropic or political) practices that outsiders can only perceive criminal intent by grasping the overall scheme. It was designed

[2] There are few if any crimes that can be committed only by occupants of "blue-collar" jobs. Even criminal contempt of labor injunctions may be committed by unionized poverty lawyers, doctors employed by public hospitals, and school teachers. Some of the more frequently prosecuted crimes in the Eastern District are specific to low level jobs—embezzlement of the mail by a letter carrier, baggage theft by an airport employee—and these might be labeled "blue-collar." But these jobs are so low, the degree of trust invested in them so minimal, that they are quite widely accessible. In that sense the crimes they facilitate may be considered "common."

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so that neither its means nor its consequences would reveal that a crime had occurred. And it was strategically shaped around boundaries between occupational roles so that culpable insiders might protect themselves by maintaining silence or professing ignorance should there be an investigation. I will illustrate each of these elements.

A. Situationally Specific Crime

Crimes may or may not be fully realized in one specific situation. In some, act or intent are joined culpably within a relatively narrowly bounded time and place; others depend upon a criminal design that integrates acts widely dispersed over time and place. A dramatic and not uncommon example of the situationally specific crime is captured by the frame of film in a bank camera that has frozen a robbery into a graphic instant. A similar record of the instantaneous commission of crime may be made on tape by a cooperating insider who has been "wired up" in anticipation of an attempted bribery or sale of contraband. The evidentiary weight to be given to the few seconds of tape may be hotly contested and ultimately discounted in any given case. But prosecution and defense will often agree on confining the issue to whether a crime occurred there and then.[3]

Compare crimes that are built up over a series of concrete events, each of which, if recorded on film or tape, would appear to be part of ordinary occupational routines. Over a period of years, without any direct, explicit discussion of the quid pro quo, engineering and architectural firms make contributions to the locally dominant political party in amounts equivalent to 5 percent of the contracts they receive from local government agencies. A wholesale hospital supplier consistently bills the government on the basis of costs it did not incur for sales to third-party vendees under a social welfare program; but any given bill can be justified as innocent mistake, incompetence, or compensation for uniquely priced intangibles like professional labor. These crimes are qualitatively different from such situationally specific analogues as bribery of public officials by

[3] More precisely, there will be typically a minimum of two situations. Unlike the continuously operating bank camera, an agent would only be wired up to record a bribe offer in one situation if he had been put on notice at a prior meeting. The arguments about what happened at the taped session, who was soliciting or threatening whom, are usually based on contradictory accounts of the unrecorded, set-up meeting. The typical "street" crime that transpires in a single situation is at the extreme of a continuum.

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aliens at border crossings and the fraudulent certification of dependents by welfare recipients. The former employ a technique of covering up criminality that is facilitated by social class position. The more established and widespread the public contracts of the engineering firm, the more easily a kickback for a given deal can be concealed in political contributions. The greater the volume of business done by the hospital supplier, the easier it is to bury a given amount of overcharging in the legitimate percentage of mistakes.

B. Presumptive Evidence of Crime

Crimes may or may not have incidents or effects that can be treated officially as presumptive evidence of their occurrence. People can claim authoritatively that they are victims or witnesses of certain types of crimes even though they cannot identify the criminal. Some crimes actually depend for their success on the production of authoritative victims or witnesses. Bank robbers, kidnappers, and airplane hijackers often use unembroidered notes to define the situation as criminal and socialize victims into self-consciousness about their new roles: this is a robbery; your child has been kidnapped; this plane is hijacked. Many other crimes require for their success that the victim be unaware of his new status only temporarily. Burglaries and check forgeries typically aim only for a slight delay before their respective victims return to find signs of forced entry or gain possession of the forged instrument.

Even when crimes are "victimless" they still often create telltale signs that they have occurred. Various statutes authorize enforcement agents to presume the occurrence of a crime whenever they detect contraband: untaxed liquor and unregistered firearms; "scheduled" drugs; counterfeit cash and securities; crates of alligator skins; even people, when they are undocumented aliens. Often these are seized as evidence of crime before anyone is identified as buying, selling, transporting, possessing, or harboring them.

Many white-collar jobs offer distinctive opportunities to cover up the commission of crime by virtue of the social distance between their occupants and victims or outside witnesses. The organizational barriers between price fixer and consumer, stock manipulator and investor, prevent the latter from perceiving his victimization. Victims of large-scale consumer fraud typically are so removed from the inner workings

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of the firm, dealing only with salesmen on the fourth or fifth organizational tier, that they have no basis to discount explanations that nondelivery is due to mistake, incompetence, or bankruptcy.

Of course, it is not necessary to hold a white-collar occupational position in order to commit a crime that produces no evidence of itself. Anyone can try to design murder or arson so that it looks like an accident. But if crimes of violence may be crafted skillfully to appear as natural events, many everyday white-collar occupational environments provide natural covers.

C. Concerted Ignorance

Crimes may be committed in ways that enable insiders who have culpable knowledge to profess ignorance. White-collar positions are not necessary to a conspiracy of silence. The threat of force may be used to secure the cover-up of crime. But that is itself a crime. In contrast, white-collar occupational culture provides techniques that, rather than coercing silence, make it defensible. These techniques employ occupational routines that are legitimate in themselves. An important example is the lawyer-client privilege. Instead of hiring an accountant, the taxpayer hires a lawyer who hires an accountant. Incriminating communications between taxpayer and accountant that might reveal schemes for tax evasion may then be covered up by traveling through the black box of the lawyer-client privilege. Another major example makes use of the principles of organizational hierachy. A boss, instead of threatening subordinates into silence, may induce their cooperation in a companywide fraud by assuring them they will be given only bit parts they can play behind masks of ignorance that are natural in hierarchical organization.

In order to abbreviate my discussion of the implications of these distinctions for plea bargaining, I will consider only those rare instances that fall at the extremes of all dimensions. Cases of this sort are not "ideal-types;" they are perfectly real, if statistically unrepresentative.[4] A further caveat is that

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[4] I will ignore the following complexities:

Defendants are often charged with crimes that are white-collar on one but not all dimensions. A common example is fencing stolen goods. Typically by the time a case reaches the prosecutor, there will be no dispute that the goods were stolen. The controversy will be whether the defendant knew it and the proof required will be more elaborate the larger the volume of defendant's legitimate business.

In many cases, the charges against one defendant will be more "white-collar" than those against other defendants. "George the Torch," who set the debtor's warehouse on fire, may be named in the same indictment as Schwartz,

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though different strategies for escaping punishment require different tasks of prosecutors, they do not necessarily relate to differences in the success of prosecution. I am not contending that arson is easier to smell out than political corruption or bank robbers easier to convict than price fixers. But different enforcement problems are created by the robber who hides his identity behind a mask and the businessman who is insulated by his social distance from victims. The one depends on physical flight to get away from the scene of the crime, the other builds metaphysical escapes into legitimate occupational routines. Quite generally my point will be that common crimes make "street" work for "blue-collar" enforcement officials, while white-collar crimes make documentary work for white-collar professionals—accountants and lawyers.

II. PLEA BARGAINING IN THE PROSECUTION OF COMMON CRIMES

Prosecutors typically become involved at different stages in the enforcement careers of white-collar and common crimes. In making a white-collar case, the prosecutor often begins interacting with potential defendants long before a "case" formally appears anywhere on the public record. Prosecutors start to interact with people suspected of common crimes much further down the road, typically at about the time formal charges are first filed. The prosecutor's later entrance into the enforcement process makes for a relatively sharp distinction between investigative and prosecutive functions. Investigator and prosecutor

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his boss, who says he routinely told George to get fired up on his collection rounds, but only figuratively.

Each of these dimensions is a continuum. For example, fencing may be conducted as a more or less situationally specific crime. Compare the health food store owner who gives 50 percent of face value—a "deep discount"—for stolen government welfare checks brought in by street addicts, with the credit union president who charges the store owner's very active account the usual fee to place deposited checks into further banking channels, while ignoring recurrent signs that the checks are bouncing as forgeries.

Another example of the continuous nature of these variables is that it is often a matter of probability whether a crime will produce presumptive evidence that it has occurred. Where a crime falls on this continuum has more significance for the success of the enforcement system as a whole than it does for the specific work of the prosecutor. In many embezzlement crimes, for example, the criminal plays squarely against a risk of unambiguous discovery. If the audit is made before the money can be replaced, the game will be up. Here the probability that the enforcement system will fail to detect depends upon variables essentially outside the prosecutor's world, and therefore I ignore it.

I will also gloss over the further complexity that the character of a case changes over time. Prosecutors often set out after crimes that are "white-collar" on all dimensions but settle for convictions on less "white-collar" crimes after discovering an admittedly forged document or provoking a perjurious statement.

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are different people who play different roles at different periods in the natural history of the case.

Although the following accounts are not explicitly concerned with describing the prosecutor's role in common crime cases, they do illustrate several key features. At the initial charging stage, state prosecutors react passively to investigating agents:

> A detailed consideration [by the prosecutor before the initial charge] is not customary in any of the jurisdictions studied [Kansas, Michigan, Wisconsin]. In each of them the source of information most relied on is the police officer and his report of the case that he brings with him when he requests a warrant. [Miller 1969:16]

Rosett and Cressey draw on their observations in several jurisdictions, especially California, to portray Joe Carbo, the paradigmatic prosecutor, as he works on the paradigmatic burglary:

> Joe Carbo regards himself primarily as a trial lawyer. . . . This . . . viewpoint characterizes Joe's approach to his work with the police, whom he considers clients. Like any private attorney, Joe sits in his office waiting for clients who have legal burdens, in this instance arrest reports. His duty, he knows, is to prosecute these cases for the police just as a private lawyer works for his clients. [1976:88]

A similar picture of the prosecutor's passive posture toward the police emerges from studies of plea bargaining in other "common-law" jurisdictions (Toronto: Klein 1976; Birmingham, England: Baldwin and McConville, 1977) and even in "inquisitorial" Continental systems.[5]

In order to summarize the reasons behind the prosecutor's relatively late entrance into the enforcement process against common crimes, we can examine an extreme case—an arrest made by an agent before (or just shortly after) a prosecutor is aware that the case exists. As stipulated in my definition earlier, common crimes often produce authoritative witnesses. Huge numbers of arrests are officially warranted by complaints, drafted approximately contemporaneously by prosecutors in reliance upon claims by citizens that they have witnessed or been victimized by crime.[6] In contrast, the organizational barriers between criminal and victim inherent in crimes of price fixing, securities manipulation, and tax evasion virtually rule

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[5] Despite an ideology that directs European judges and prosecutors to play a more active role, the paradox is that they

> are in fact more passive and reactive than in the United States. Trial judges depend on prosecutors or examining magistrates to take initiatives in investigating and charging, and prosecutors, though not regarding themselves as truly "judicial," accept enough of the myth to prevent themselves from adopting what they see as the partisan stance of their American counterparts. . . . Overall, the result is that both judges and prosecutors deny the choices with which they are inevitably faced, leaving the police to emerge as the dominant force in the process. [Goldstein and Marcus, 1977:282]

[6] The dominant role of the authoritative witness in arrests for common crimes has been widely documented. For example:

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out the possibility that reports of victimization could provide the warrant for an arrest.

It might be thought that prosecutors enter late into cases of common crime because they see them as unimportant. But even in cases of homicide, when police and prosecutors expect unusual public and judicial scrutiny, there is typically little overlap between investigating and prosecuting roles. Murder cases routinely start from a citizen's discovery of presumptive evidence of the crime (the corpse) and proceed as police follow leads to people who might have been at the scene of the crime. The police summon the prosecutor only at the last investigative step, to record an inculpating statement from a suspect or make a deal for the cooperation of a key witness who is somewhat implicated.[7]

Prosecutors often do play a role in the making of cases of common crime prior to an arrest, but usually only a limited one. For example, they may assist in getting a search warrant, which agents commonly seek near the end of an investigation, after surveillance and informants have led them to the location of contraband or other artifacts of crime[8] and they are prepared to make arrests. In the early stages of an investigation agents may seek advice on whether they "have enough" for a warrant or on how they might question a suspect or conduct a lawful search without a warrant, but such requests invite the prosecutor to play only the essentially ministerial role of ensuring that the case will "stand up" when it gets to court. The questions are much like those in a law school classroom: presuming a static fact situation, they focus analytically on elements that might be important to an appellate court. These are rarely occasions for a full-scale review of the origins and potential of the investigation.

> In an analysis of a large sample of combined (FBI index) crime types, it was determined that the perpetrator's identity became immediately known in more than one-half of the cases that were eventually cleared (read, on which arrests were made), chiefly because (1) the offender was arrested at the scene; (2) the victim or other witness identified him by name and address even though he was not arrested at the scene; or (3) he was identifiable by some unique evidence apparent at the crime scene, for example, a witness observed the license plate on the perpetrator's car or his employee badge number. [Greenwood *et al.*, 1975:ix; see also *ibid*: 66-68]

[7] See Gelb (1975) for an observational account of a Manhattan police homicide squad. There is no rule that prosecutors must not allocate their time and personnel to the investigation of common crimes. When the publicity interest is extraordinarily high, prosecutors may make extraordinary investments in investigation, see, e.g., Bugliosi (1974) (the Charles Manson case).

[8] That is, when they have probable cause. At the beginning of an investigation, if agents do not have probable cause and decide to make searches anyway, they are not likely to ask for the prosecutor's opinion.

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Separation of enforcement roles in the careers of most common crimes is not only legally and practically possible but mutually desired. This agreement on role specialization is implicit in the dualistic relations between police and prosecutors. Organizationally, prosecutors are law enforcement specialists; their efforts are devoted almost exclusively to criminal case development and disposition. Yet prosecutors are rarely headed for law enforcement careers. They see themselves as lawyers, usually trial lawyers, looking for intensive experience before transferring to private, often civil, practice. Inversely, local police, as well as many federal agents, are law enforcement personnel in their career perspectives, but not in the everyday organization of their work.

Given their self-concept as lawyers rather than as criminal law enforcement officials, prosecutors will be concerned primarily that they are not embarrassed when presenting a case on evidence warranted by agents, but they will have little ego investment in the wisdom of most police investigative decisions, particularly since no case may ultimately develop. And they will view "blue-collar" investigative tasks, especially "street" work, as properly the province of agents: gathering physical evidence from the scene of a crime, tracing suspects by following clues left at the scene, interviewing victims for the first time, maintaining ongoing relations with informants, conducting surveillance of targets, monitoring the movement of contraband, setting up buys. Agents, for their part, will expect prosecutors to accept as an adequate basis for arrest or search warrants, agent characterizations of the scene of common crimes (e.g., that a lot where goods were transferred from a large truck to several small vans was suspicicusly out-of-the-way—"just the type of lot hijackers would use") and agent perceptions of telltale artifacts of crime (e.g., the nature of the "powdery substance" found in a cellophane bag).

Ironically, the fact that prosecutors work exclusively on criminal cases, while agents often have other responsibilities, limits the ability of the former to control case development. Agents come across scenes and presumptive evidence of crime in the performance of duties not focused upon case development, before the prosecutor even learns of them. Police occasionally happen upon crimes in progress while maintaining a "peace keeping" presence;[9] customs agents discover undeclared currency in the course of routine tax inspections;

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[9] Patrolling by local police is only very loosely related to the development of criminal cases. According to one rough estimate, "99 percent of the

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Coast Guard boats run into yachts full of marijuana during safety patrols.

Plea bargaining over common crimes must be inderstood in light of the ways in which the work routines of agents and prosecutors intersect (see Rosett and Cressey, 1976:95-98). The separation of investigative and prosecutive functions and the social distance between prosecutor and police or investigating agent routinely lead to overcharging and a false appearance of prosecutorial lenience.

The prosecutor often has not had the opportunity to review a case of common crime intimately before it enters the system formally through an arrest. When the prosecutor drafts a complaint for an agent at the initial appearance, the circumstances often severely limit his or her ability to evaluate the case. The arresting agent, having acted in haste, may be confused as to basic facts; time constraints often preclude further inquiry. As a result the prosecutor, in drafting the complaint, will be less interested in giving a full account of what he regards as the charge or charges worth prosecuting than in paring down the agent's assertions to a minimum so that they will not come back to haunt him by contradicting evidence subsequently developed. The prosecutor's later dismissal or reduction of charges will often reflect how the charge would have been handled initially had he controlled the entrance of the case into the system.

In many cases neither the prosecutor nor the agent will wish to carry the matter beyond the initial charge. Police frequently make arrests in response to situational pressures, for example to break up a domestic or barroom fight, with little or no thought to treatment by later stages of the criminal enforcement process. Even when agents specifically set out to construct cases that can be prosecuted, they frequently make ill-considered arrests under emergency conditions. A drug sale may be "going down" in an apartment that contains numerous people with varying degrees of involvement in the transaction, such as the girlfriend, child, or neighbor of the principals. If someone identifies an undercover agent inside or detects surveillance outside and "all hell breaks loose," everyone who can be fitted into the agents' cars may be arrested.

By the time the case reaches the prosecutor, no one in the criminal justice system may want to devote further time or resources to pursuing it. Prosecutors routinely find matters to be

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time in preventive patrol nets no criminal or non-criminal incidents" (Reiss, 1971:95).

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less serious than the initial charges—invoked under time pressures or to justify emergency intervention—make them appear. Even in many cases charged as felonies, prosecutor and police will see the process as the proper punishment and be content with a nolo contendere plea to a misdemeanor or a dismissal accompanied by a warning (Feeley, 1979).

III. PLEA BARGAINING IN THE PROSECUTION OF WHITE-COLLAR CRIME

Although general statements in the academic literature depict the prosecutor as relatively passive, "exercising discretion" whether to prosecute cases already defined as ripe by police or federal enforcement agents,[10] specialized works on white-collar crime show prosecutors actively "making" cases through lengthy investigations.[11] Prosecutors in the Antitrust Division of the Justice Department characterize an investigation completed in ten months as "quick" (Weaver, 1977:69). Two alumni of the U.S. Attorney's Office for the Southern District of New York have described how prosecutors investigate securities fraud, tax evasion, and currency crimes by examining permanent files that cross-index people, companies, and foreign banks with the calendar. With this type of intelligence and

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[10] Writings on the federal criminal justice system, as well as the state, fail to show the prosecutor as an investigator:

> Where the matter, like most, was handled entirely by the U.S. Attorney's Office (rather than by the Department of Justice in Washington), the request for authorization of prosecution would generally come to the Assistant U.S. Attorney . . . from an officer of the federal agency in whose jurisdiction the alleged crime fell. . . . Typically the case would have been fully investigated by the agent who presented it, but it was not uncommon for an Assistant U.S. Attorney to request that any loose ends be tied up before he made his decision. [Kaplan, 1965:177]

> U.S. attorneys enjoy substantial discretion in their interactions with the agencies that investigate and bring violations of federal criminal law to their offices for prosecution. The discussion that follows first examines the interaction between agency personnel who conduct investigations and the assistant U.S. attorneys who authorize prosecutions and handle the cases. . . . The most significant and frequent interaction between assistants and agents occurs when investigators bring cases to the U.S. attorney's office for prosecutive decisions. [Eisenstein, 1978:150]

Both of these studies reflect the operations of U.S. Attorneys' offices in the 1960s, and indicate by their limitations how rapidly priorities in federal prosecution have shifted toward white-collar crime.

[11] Edelhertz's generally useful overall treatment of the investigation and prosecution of white collar crime is unfortunately inapplicable here. His definition of white-collar crime as "an illegal act . . . committed by nonphysical means and by concealment or guile" (1970:3) is so broad as to wash out variations in the investigative stage. Such a concept would lump together allegations of recipient frauds that the Social Security Administration neatly packages and prosecutors routinely decline at first sight, and political corruption investigations that originate in the prosecutor's office.

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monitoring tool, investigation may identify a suspect whose name came up years before but was not then targeted (Clarke and Tigue, 1975:81-82). Several books on U.S. Attorney's offices that have recently been exceptionally successful in prosecuting corrupt public officials describe wide-ranging preliminary investigations into records of public contracts and political contributions (Hoffman, 1974; Cohen and Witcover, 1974).

Resource allocation policies in prosecutors' offices indicate the investigative investment necessary for making white-collar cases. Offices that put substantial resources into white-collar prosecution do so by placing assistants in specialized sections in order to keep their trial caseloads light. In the U.S. Attorney's office in Brooklyn, about one-third of the assistants are assigned to either the Fraud or the Corruption section. Within the office, assignment from General Crimes to one of these sections is taken as a mark of prestige, but also means that opportunity for trial experience will be severely limited. Assistants in the Fraud and Corruption sections complain that their specialized caseloads may produce only one trial in a year, or even none, while those in the General Crimes and Narcotics sections can expect half a dozen or more.[12] The staff member with the highest court caseload is a law student-paraprofessional who annually processes scores of postal theft and check forgery cases to misdemeanor guilty pleas.

Each of the three features of white-collar crime, as defined earlier, contributes to the creation of an investigative role for the prosecutor in the enforcement process. Because the crime is not discrete and bounded, but rather designed into ongoing occupational routines, it will be necessary to investigate a series of events or transactions in order to make out a prima facie case. This itself does not require the prosecutor's involvement. And with all but the most sensitive charges, such as political corruption, there usually will have been an agency investigation before the case reaches the prosecutor's office. But the agency is often stymied for lack of an effective means to obtain

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[12] Statistics on caseloads give a *very* rough indication of the greater investigative demands upon prosecutors in white-collar cases. In July 1977, the 14 assistants in the Fraud and Corruption sections of the U.S. Attorney's office for the Eastern District of New York had a mean of 9.9 and a median of 9 pending cases per assistant. (The figures for each section considered separately were similar.) Assistants in the General Crimes and Narcotics sections had a mean of 25.3 and a median of 25 cases. (Again the figures for the two sections were comparable.) These statistics do not include lawyers in executive and administrative positions, nor do they cover new assistants in the Trial unit. Caseload statistics can be seriously misleading, because white-collar cases (e.g., tax prosecutions) are often assigned to General Crimes and vice versa (a Frauds assistant may take a few narcotics cases to get trial experience), and because they are confounded by the case-closing habits of individual assistants.

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business records. After interviewing numerous, related consumer fraud complainants, postal inspectors come to the U.S. Attorney's office to get direct access to the company's books. The U.S. Attorney may receive a complaint of bankruptcy fraud from a district court referee and ask the FBI to investigate; but the latter may quickly return to the prosecutor if banks refuse to reveal the records of the target's commercial transactions on the grounds that "voluntary" disclosure might violate the privacy of their depositors. Grand jury subpoena powers, under the exclusive control of the prosecutor, will usually be necessary to document the crime. In contrast to the prosecutor's role in obtaining search warrants for agents who have been investigating common crimes, the prosecutor's initial use of grand jury subpoena powers will generally occur long before the case is prepared for formal charging.

Because white-collar crimes leave no telltale signs on victims and produce no concrete artifacts that embody the crime, the search for documentary proof will not start with precise directives. Even if "smoking guns," busted locks, caches of drugs and injured victims do not tell agents whom to look for, they usually define the crime being investigated. In white-collar crime investigations, the behavioral components and even the existence of the crime will often be unclear. Edelhertz (1970:47-48) describes "specific questions which are quite common in representative white-collar criminal cases." They are issues of criminal intent, such as whether stock promoters "were in a position to have had access to the kind of information which would have been disclosed in the course of registration"; whether a homeowner borrowing money guaranteed by the FHA initially or subsequently formed the intent to use the money for a purpose other than that stated in his application; whether a road contractor's failure to supply all the truckloads of fill for which he was paid expressed his intent, that of his employees, or mismanagement; whether a corporate officer responsible for a deliberately misleading promotional blurb was "only 'puffing' " to increase sales or was attempting to affect the price of the corporation's shares (*ibid*). The determination that "sufficient" proof has been accumulated to resolve such questions calls for a lawyer's expertise in applying substantive theory and evidentiary rules and in planning trial strategy.

The third feature I used to define white-collar crime is concerted ignorance. Because participants will be able to profess ignorance of the overall criminal scheme, it will be necessary to choose a "target" and then "turn" one or more insiders in order

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to generate evidence of inculpating understandings. Often a prosecutor will not understand what the crime was (how it occurred, who made money how) without the guidance of an insider. A preliminary effort may be necessary to build pressure sufficient to turn an insider, perhaps even by inducing perjury or investigating an unrelated set of transactions in order to create the "exposure" that will give the prosecutor effective "leverage." Grants of immunity, formally within the exclusive authority of the prosecutor, typically will be necessary to obtain essential cooperation.

As a consequence of these characteristics of the prosecution of white-collar crime, the defense lawyer will also be involved long before the investigation has reached the stage when formal charges might be filed. The prosecutor's entry into the enforcement process triggers and is triggered by the entry of lawyers for targets and witnesses. At the extreme, the defendant in a case of common crime will often get legal assistance for the first time after his arrest, when counsel is assigned at the initial appearance before a magistrate; while the target of a white-collar crime investigation typically will be represented by counsel at least as soon as his company is served with a subpoena.[13]

In part this variation in the mobilization of the defense function is due to differences in the legal frameworks governing investigative techniques in cases of white-collar and common crime. The subpoena for documents is characteristic of the former; the search for contraband and other concrete traces of crime is peculiar to the latter. There are significant differences in the point in time within the criminal investigation at which citizens who are brought within its reach can litigate the propriety of these two tools. A motion to quash may be made by anyone served with a subpoena, whether or not a target, before the government has the evidence it seeks. The legality of a search can only be contested effectively after it has occurred, when the government holds the evidence seized as well as its indirect "fruits." Even then the challenge is limited to a motion to suppress evidence that the government attempts to introduce at trial and can only be made by the defendant.[14]

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[13] Ken Mann, a research associate at Yale Law School, is studying the white-collar defense bar in the New York area. After 25 interviews he reports that "getting in early" is a universal concern and that "tracking the investigation" is a major activity. Lawyers specializing in the defense of white-collar clients evaluate themselves less by victory at trial than by success in avoiding indictment.

[14] This generally uncontroversial generalization could be qualified and documented to treatise length. The most recent major Supreme Court decision

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A motion to quash a subpoena not only litigates investigative decisions earlier in the enforcement process but is also directed more specifically at the prosecutor. When a defendant challenges a search, the objection typically will be that the agent exceeded the scope of the warrant, failed to obtain a warrant when one was necessary, or obtained a warrant by misleading the court as to its basis. When a witness moves to quash a subpoena, he is objecting to the prosecutor's behavior. Indeed the objection may be specifically that the prosecutor, by handing the agent a subpoena in blank, was deficient in his duties of of supervision and guilty of "abuse of grand jury powers."

I have been suggesting ways in which prosecutors become investigators in the process of enforcing laws against white-collar crimes. It should be noted that investigative and prosecutive functions also blend in the other direction: there are some types of white-collar cases in which investigators virtually monopolize the powers of prosecutorial discretion. The IRS and the SEC provide two major examples. Because they possess subpoena powers and retain legal expertise in-house, these agencies share an exceptional capacity for investigative autonomy. But rather then negate the general pattern, they are exceptions that prove the rule that investigative and prosecutive functions merge in the making of white-collar cases.

> The Security and Exchange Commission is a unique agency, with both civil and criminal investigative jurisdiction, and with the rare power to make a criminal evaluation as to whether or not it should refer a case to a prosecutor for criminal action. Because it has prosecutive discretion to separate the wheat from the chaff, because it exercises this discretion with sophistication and provides extraordinary assistance to prosecutors, and because it polices its case directly and by liaisons with the Department of Justice in Washington, cases it refers are almost invariably prosecuted. [Edelhertz, 1970:40]

Similarly, the decision to prosecute has been made effectively in those tax cases the IRS recommends to the Department of Justice.

> [I]n only 57 cases in 1972 and 47 in 1971 did the Department of Justice decline prosecution. In 1972, 1,085 indictments were returned and in 1971, 956. . . . [Thereafter] the case is forwarded to the appropriate

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rejecting pretrial constraints on the prosecutor's use of evidence tainted by an illegal search is *United States* v. *Calandra* (414 U.S. 338, 1974), holding that the victim of an unlawful search who has not yet been indicted may not avoid contempt by refusing to answer questions before the grand jury on the grounds that they are products of government illegality. On the uncertain state of a motion to recover property as a means of preventing the government from effectively using illegally seized evidence in an investigation, see Kamisar *et al.* (1974:730-31). An extensive analysis of the law governing searches and subpoenas as it affects white-collar ("economic crime") prosecutions is contained in Wilson and Matz (1977): "Search warrants are generally less attractive and have therefore been utilized far less in economic crime investigations than summonses or subpoenas" (*ibid.*: 690).

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> United States Attorney's office usually with instructions to secure an indictment. . . . The U.S. Attorney's office usually has no authority to stop the criminal cases in advance of the indictment, but will on occasion return the matter to IRS or Justice for further investigation, or present it to a grand jury for examination of unreliable or inconsistent witnesses. [Crowley, 1975:160]

In short, in white-collar cases where prosecutors do not play a major investigative role, investigators appear to take over the prosecutorial power and there is little effective discretion not to prosecute once the case reaches the prosecutor's office. In any case, there is relatively little social distance between the prosecutorial and investigating functions. As a result the power not to prosecute will often be exercised with particular subtlety in white-collar cases—so subtly, in fact, that an investigating prosecutor (to take that form of the blend) will often exercise the power of passivity without consciously "exercising discretion" or making a "decision."

When prosecutors dismiss complaints that have warranted an arrest, and when they decline to prosecute matters referred by outside agencies, they shape their power into the "exercise of discretion." As an upshot of their social distance from the agents who worked on the earlier stages of the case, prosecutors make what they experience as "decisions" on the basis of what they take to be "reasons" (even if they do not formally record explanations for their inaction). But when, in the course of investigating, prosecutors simultaneously shape the factual context and respond to it, they may exercise their power not to enforce without making "decisions." They may not even recognize that they are exercising the power not to prosecute.

For example: in an investigation of fraud in a government program, the principal in a particular "sponsor" organization has been targeted. Sponsors receive public money to contract with vendors who sell goods and services to the poor. The assistant U.S. Attorney responsible for the investigation pauses over an enigmatic set of transactions that appear on subpoenaed corporate books and bank account statements. A vendor obtained a crucial $200,000 loan just before its eligibility for a particular contracting period would have ended. The assistant suspects that the sponsor first undermined the vendor's credit by secretly communicating with the vendor's bank and then personally but indirectly supplied the loan, effectively buying into the vendor. There would be a conflict of interest if the sponsor owns the vendor, because the sponsor is responsible to

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the government for certifying vendor claims for reimbursement. Proof of the interrelationship would add to the assistant's cases against both for fraud against the government and tax fraud because vendor and sponsor describe their relation as independent on their organizational tax returns and in their applications to the government for reimbursement. But the prosecutor cannot trace the money received by the vendor to loans made by the sponsor. The assistant feels he may eventually be able to show that two brothers-in-law, one of whom is a sometime business associate of the sponsor, each put up $100,000 for the vendor. But even then he would have to document that the sponsor put the money up for them. He plans to investigate further the creditors of the vendor's creditors and the sponsor's financial involvements.

This is but one of the innumerable enigmas the assistant has encountered. Several hundred subpoenas have gone out to dozens of organizations controlled by or doing business with the sponsor-target. It has not yet become clear what the crime is. If there is a major fraud by the sponsor, auditing has indicated it is not what news accounts suggested—massive falsification of documents to get reimbursement for expenses vendors did not incur. But the sponsor has grown unaccountably rich in an amazingly short period of time.

Various ways of gaining leverage over insiders are being developed. Another assistant is working on a "spinoff": a vendor appears to have committed a simple, relatively minor fraud by forging signatures on receipts and manufacturing evidence of delivery to nonexistent recipients. A prosecutor in another district has convicted the mother of another vendor of lying before a grand jury. An insider is coming in for an informal interview later in the morning, but he appears "flakey" and the target might be offering him as a sacrificial lamb. Across the country, an aide to a Congressman has pleaded guilty to a tax offense. The aide is currently supplying West Coast prosecutors with information about payments made by the target to the Congressman to buy influence over the federal bureaucracy responsible for the relevant poverty programs. In addition, the assistant has found evidence of a minor crime by the target. He apparently defrauded banks by misrepresenting the purpose of loans taken out to finance massage parlors, in violation of rules prohibiting such use.

The assistant may never reach an understanding that resolves his doubts about the $200,000 loan. If that enigma is not

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resolved now, the loan may subsequently be revealed as an ordinary business transaction through other investigative avenues already being pursued. Or continued pursuit of the suspicious loan might lead the assistant to a new cast of "vulnerable players" who themselves merit prosecution or could at least be turned against the sponsor. Whenever the assistant stops working on the investigation—he has been on it for over a year and a half now—there will be innumerable loose ends, which other assistants may or may not pursue.

In this context, a "decision" usually will be required if the assistant is to follow a suspicion to new evidence and new suspects. But *not* expanding the investigation often will not require a decision. "Leads" may not be perceived or, if perceived, subsequently overlooked or disregarded, in all imaginable degrees of semi- or unconsciousness.

Why will a decision be made before going ahead to a new suspect or new evidence, but not necessarily before failing to expand or deepen the investigation? Because the prosecutor implicitly realizes that action will subject his behavior to review whereas inaction may not. The "review" he anticipates is not necessarily judicial. Rather he is concerned about his visibility to a new suspect, the subpoenaed bank, or the investigative agent whose work he would direct. It is through anticipating how these others might respond that the prosecutor becomes sufficiently reflective that he comes to see his behavior as a "decision." Suspicions aroused in the prosecutor that are not backed by a victim's complaint, preceded by an arrest, or specified in a referral memorandum or presentation letter from any investigative agency, may be abandoned without being perceived by others, and thus without the necessity of a "decision."[15]

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[15] Grand jury investigation is only one area in which the power not to prosecute white-collar crime can be exercised without a "decision." Prosecutors can also shape the interorganizational demands made on them, and thus the environment against which they will be seen to "react." Consider the low social distance suggested by the following common event. The chief of the Frauds section of the U.S. Attorney's office meets with the head of regional enforcement staffs—SEC, HEW, Postal Inspectors—to discuss the prosecutor's business in the area. Each enforcement agency head describes trends and various items currently on his shelf, and urges that some be given priority for criminal action. A discusssion ensues on the relative advantages of cases and the order in which they should be taken until a couple of stand-outs are identified. By the end of the meeting there may be a "decision" to assign an assistant to one matter, but not necessarily a decision not to prosecute all the others. If time and personnel become available, the prosecutor may "request a file" on one of the others, and the agency may assign investigators to that matter. Over time, the prosecutor's office and the investigative agency shape each other's expectations as to what are and are not good candidates for prosecution. The agency rarely finds that matters referred to the prosecutor are declined. Decisions to act are reflected in visible prosecutorial behavior and become matters

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The prosecutor's shifting investigative focus may not seem to be the exercise of "discretion" because the literature on discretion has focused on "decisions."[16] Even less does it seem to be "plea bargaining," a term usually applied to discussions about charges already filed. Nevertheless, the investigating prosecutor is often trying to send "messages" about his focus and evidence, messages designed to shape the perceptions of people so that they become more amenable to discussing cooperation and guilty pleas. The signals may be transmitted indirectly through the choice of grand jury subpoenas for books and records, the sequence of summonses to testify, or the timing of formal notifications to targets about their status, and by the questions that are asked (and remain unasked) in interviews at the prosecutor's office. Likewise, those who suspect they are under investigation will often be sending messages to the prosecutor by gauging their resistance to subpoenas and interviews and by releasing seductive indications of the value of their cooperation. Like the gaming and bluffing often described in plea bargaining, each will communicate strategically, trying simultaneously to find out what the other knows and to shape his adversary's definition of his own knowledge and interest; false impressions will sometimes be designed. Like plea bargaining in common crimes, untested factual assumptions ("typifications," Sudnow, 1965), and implicit social policies are involved. The symbolic negotiation process inevitably is guided by the assistant prosecutor's common sense understanding of business and political practices, as well as by the office's set of priorities and ambiance of righteous indignation toward various forms of white-collar crime: Is this a typical method of financing for this kind of business, or is it suspect? Is it important that I find out?

The fact that such negotiations may not show up in formal

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of (at least grand jury) record, but decisions not to act disintegrate phenomenologically into the tacit understandings that develop across office boundaries. The low profile of white-collar crime facilitates this organizational interpenetration.

[16] An officer who decides what to do or not to do often (1) finds facts, (2) applies law, and (3) decides what is desirable in the circumstances after the facts and the law are known. The third of these functions is customarily called "the exercise of discretion," and it is the subject of this essay. [Davis, 1969:4]

The problem with this approach is that it insists on analytic distinctions—between finding facts, interpreting their legal significance, and evaluating them—that are especially artificial in the context of white-collar law enforcement.

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records may explain why they have been neglected by the literature on plea bargaining, but this oversight has the cost of diminishing the moral significance of the topic. For with respect to white-collar crime, the typical trigger points for judicial and public review—guilty pleas, immunity agreements, and dismissals of charges—give a biased view of the exercise of prosecutorial power. They reflect earlier decisions to prosecute, while the power not to prosecute may be exercised without creating "decisions," much less any reviewable entries on the public record. If, as argued earlier, the public record overrepresents decisions not to prosecute common crimes, it grossly underrepresents failures to prosecute white-collar crime.

Moreover, there is a converse dimension to this bias. When prosecutors *do* decide to prosecute white-collar crime, their decisions are subject to *extraordinary* scrutiny. A case in point is the most famous plea bargain of recent years, Attorney General Elliot Richardson's agreement with Spiro Agnew to accept a no-contest plea to tax evasion and to recommend no jail time. The prosecutor's decision was widely criticized, but it was subject to judicial and public review, preceded by an intensity of collective deliberation among the prosecutors, and accompanied by a quality of reasoned justification (see Cohen and Witcover, 1974:217-51, 302-28) that together appear to constitute the trappings of legality called for by proponents of plea bargaining reform.

Although an extreme example, the deliberateness of the decision-making process behind the Agnew plea agreement is systematically related to characteristics of white-collar crime prosecutions. Because disproportionate amounts of staff time are needed to make a white-collar case, the prosecutor's office as a whole will have an unusual stake in the outcome. For similar reasons, commitments may be made to the outside agencies that provide investigators. More costly to mount, the typical white-collar case becomes more costly to drop. The prosecution team can be expected to engage in an unusual degree of deliberation before settling on a formal resolution.

The initial lack of authoritative evidence establishing the existence of white-collar crimes has similar implications. Investigations will often lack the foundation of presumptive legitimacy that is typical in the prosecution of common crimes. If the defendant in a prosecution for murder, hijacking or bankrobbery is acquitted, the question often remains, who did it? But the judge or jury in a white-collar case decides not only

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whether the defendant is guilty but also whether a crime has occurred. If the defendant in a white-collar case is acquitted, the question of explaining criminal behavior will often evaporate. If the money was not taken as a bribe there was no corruption; if the officers of the corporation did not have inside information the market transactions were not manipulated; if the merchant did not intend to deceive there was no fraudulent sale. White-collar defendants can charge that the prosecution is politically motivated, or an expression of the prosecutor's personal ambitions, by claiming that there was no crime and thus no legitimate motive for any prosecution. Unless and until a guilty verdict is rendered, the question remains open.

A prosecutor who has brought white-collar crime charges will not dismiss them casually. As noted earlier, local prosecutors routinely make the process the punishment in cases of common crime, bringing charges in the expectation that they will be dismissed once the defendant has been suitably chastened. But to move against a white-collar defendant only in order to threaten prosecution would be blatantly unethical. While a prosecutor can often expect common crime defendants to express gratitude for a warning coupled with a dismissal, the prosecutor who brings charges of white-collar crime and then dismisses them renders himself singularly vulnerable to criticism from the ex-accused.

In many white-collar cases, dismissing the charges or accepting a plea to a reduced charge would expose the prosecutor to criticism from other audiences as well. It is not only defendants whose public identities are at stake in a white-collar prosecution. White-collar cases have a "smear" effect on the defendant's political or occupational affiliates—indeed, this may be an objective of those who are the defendant's adversaries and competitors. Prosecution of a public official raises questions about the integrity of his political party; prosecution of officials in a poverty program may undermine its popular and legislative support; prosecutions of lawyers, accountants, and stockbrokers have damaged the reputations of their firms and professions.

Prosecutions of common crimes often reduce the perceived magnitude of the crime problem. In plea bargaining, a bank robber or burglar may offer confessions that clear numerous other crimes already on the books (see, e.g., Klein, 1976:70-77). In contrast, the prosecutor in white-collar cases is often attempting to expand the public's perception of the extent of

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criminality. In a unique way, he or she is involved in manufacturing crime as a social phenomenon. Prosecutors are not likely to weigh lightly the controversial role they play in the moral drama of society when going public with charges of white-collar crime.

IV. LEGALITY AND EQUALITY IN PLEA BARGAINING REFORM

The social organization of the prosecution of white-collar and common crimes presents prosecutorial discretion in two very different guises. Social distance between prosecutor and police or federal agent produces a public record of law enforcement against common crimes that overrepresents decisions not to prosecute, giving an artificial impression that the prosecutor is bargaining away legitimate power. The absence of social distance between the prosecutorial and investigative functions in the mobilization of law against white-collar crimes has the opposite effect on the formal record of prosecutorial power. The exercise of the power not to prosecute is often invisible to the public eye and often only dimly sensed in the prosecutor's experience. On the other hand, decisions to file or dismiss charges, accept pleas of guilt or go to trial, will be subject to extraordinary public scrutiny and unusually deliberate decision-making in the prosecutor's office.

The implications of these processual differences for the attainment of equal justice appear to be more systematic than many of the substantive comparisons often drawn. One of Alschuler's most dramatic indictments of plea bargaining points to defense lawyers who "cop out" defendants at high rates for low fees (1975:1181-1206). The implication is that plea bargaining frustrates equal justice, since the white-collar defendant will be able to retain more effective counsel. But the quality of legal representation probably varies as much or more among white-collar defendants as it does between defendants in white-collar and common crimes. Because white-collar cases are generally more complicated for prosecutors to make, they also allow more scope for a sophisticated defense role. If plea bargaining is objectionable because it permits variation in the availability and quality of counsel to affect conviction and disposition, that objection is equally applicable to prosecutions of white-collar and common crimes.

Many substantively irrelevant factors influence plea bargaining in both categories of crime. If prosecutors with large common crime caseloads seek guilty pleas that will save time

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by avoiding trials (Alschuler, 1968:54-59), prosecutors facing long investigations of white-collar crimes have analogous incentives to accept pleas to charges lower than those they might eventually prove. They also face the prospect of lengthy trials, and judicial pressure to streamline cases by cutting down charges and cutting out defendants (see Tyler, 1965:124-28).

Many of the norms in plea bargaining are constant across both categories. The concern to create the appearance of equal justice is greater between defendants within a single case than between defendants in different cases: the prosecutor has an immediate, practical interest in convincing the jury that the deal was made with the less culpable accomplice or insider and that the more culpable party is on trial. Effort to achieve consistent treatment across unrelated cases is not unknown but it is less systematic. Prosecutions of common crime as well as white-collar crime exhibit the oft-cited paradox that the more serious the crime the greater the reward for cooperation from a culpable insider.

Finally, the use of civil and administrative remedies as alternatives to criminal charges is often said to be a form of lenience distinctively enjoyed by the white-collar criminal. Prosecutors may justify halting the preparation of criminal charges of consumer fraud against retail companies by noting that the Post Office has put the company out of business by blocking its receipt of mail. The investigation of fraudulent sales in a government welfare program may stop after the program agency has disqualified the vendor from receiving contracts. Criminal cases against a political organization for extorting contributions to the party from civil servants may be terminated when the public employees begin a major damage suit against the party. But here, too, there is an analogue in cases of common crime: pretrial diversion programs and deferred prosecution arrangements routinely figure in decisions not to prosecute. Requirements that the accused enter a drug or alcohol rehabilitation program or begin job training impose controls that may appear to satisfy the criminal law objectives of special deterrence and rehabilitation without the necessity of a conviction.

It is in relation to the prosecution process as a whole, and not to these isolated dimensions, that plea bargaining reform has major implications for the value of equality. When reformers suggest "open convenants, openly arrive at" (cf. Kaplan, 1977)—prosecution and defense bargaining over charges in open court, victims playing an active role in the negotiations,

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and dispositions being justified by judicial rationales that are recorded and publicly reviewable—they seem to assume a model of the enforcement process in application to common crimes. Such reforms would capture more fully the exercise of prosecutorial power in common crime cases and affect it more seriously. The exercise of the power not to prosecute white-collar crimes would still largely escape review; and decisions to prosecute that result in pleas and dismissals also would be affected relatively little because they are already made in anticipation of heightened public interest.

Norms of legality are already responsible for the disparities along each of these dimensions. In order not to violate fundamental rights of due process, white-collar crime prosecutors must maintain secrecy through long periods of investigation. When investigations are "sensitive," as they generally are when the object is not just the identity of a criminal but the incidence and form of criminality, prosecutors may insulate themselves for years in an intimate atmosphere guarded by stringent rules of secrecy (e.g., release of information even within the office only on a "need to know" basis) and pervaded with a sense of great "significance." Given that prosecutors privately appreciate great difficulties in mounting the case, they have cause to feel that any conviction is a major achievement. But to the public, the sudden emergence of a plea disposition is likely to raise doubts rather than remove them. And the same reasons that require secrecy before charges are filed impede a reconcilitation of public and prosecutorial perspectives upon conviction by plea. Defendants, unindicted coconspirators, and cooperating witnesses often would find their personal rights injured by public explanations of the prosecutor's position in plea bargaining.[17]

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[17] Efforts to "obligate" the prosecutor to justify his acceptance of guilty pleas misrepresent his posture which, in white-collar cases, is typically one of struggling to find legitimate outlets for his background understandings. Prosecutors in the Eastern District of New York decided not to publish grand jury reports on corporate bribery at Grumman Aerospace and malfeasance in a Bedford-Stuyvesant poverty program, despite a public demand by Judge Jack B. Weinstein that they explain why pleas had been accepted from contractors and middle managers while the highest executives at Grumman had not been prosecuted, and despite claims by poverty program leaders that they had been cleared. In the course of their research, the prosecutors could find no authority for their position more persuasive than the following restrictive statement by a Chief of the Criminal Division of the Justice Department (Thornburgh, 1976).

> If no formal charges are contemplated, it is difficult for a prosecutor ever to justify the release of the evidence which might suggest wrongdoing . . . where a conviction is obtained without trial on a plea of guilty or nolo contendere and where unique circumstances present a special need for public disclosure of the evidence underlying the conviction and plea, a disclosure of facts by the prosecutor may be appropriate. An example which comes to mind is the prosecutorial role in

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In sum, plea bargaining reform can be expected to increase the disparity in visibility between the prosecutor's exercise of power in common crime and white-collar cases. The cost of increased legality might be an increase in public cynicism about equality in criminal law enforcement. We should also expect increased inequalities in the mobilization of public pressure against prosecutorial lenience. To exaggerate the point for the sake of brevity, an office prosecuting no white-collar crime would remain secure against effective public review. At the same time, an elaborated review process might invite new pressures to treat people accused of common crimes more harshly and ill-considered initial charges might become harder to drop. Of course, these predictions are highly speculative since they require the use of an ambiguous and empirically improbable *ceteris paribus* clause. But they point to critical ways in which the values of legality and equality seem to be in tension in the movement to reform plea bargaining.

REFERENCES

ALSCHULER, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50.

——— (1975) "The Defense Attorney's Role in Plea Bargaining," 84 *Yale Law Journal* 1179.

BALDWIN, John and Michael McCONVILLE (1977) *Negotiated Justice: Pressures to Plead Guilty*. London: Martin Robertson.

BUGLIOSI, Vincent (1974) *Helter Skelter*. New York: Norton.

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the case of former Vice President Spiro T. Agnew. You will recall that a statement of the evidence of his involvement in criminal activity was made to the court by the prosecutor. . . . It is important to remember, however, that this public statement of evidence was made to the court pursuant to a plea agreement. The release of the statement and its contents were thus known to and approved by the defendant as part of the plea agreement. The interests of privacy and fairness to the defendant were thus issues which he could weigh himself.

Unfortunately, a large and uninformed sector of the public often calls for prosecutors to bring formal charges against persons involved in this or that "scandal" simply because of the belief that the matter needs public airing, or calls for prosecutors to release evidence concerning a given controversial person or matter. . . . The proper response of prosecutors to public pressures of this kind was well expressed in the report of those who carried out the investigation of the most celebrated political-criminal scandal in our nation's history. The Watergate Special Prosecution Force stated last fall:

> "This report contains no facts about alleged criminal activity not previously disclosed in a public forum. . . . It is a basic axiom of our system of justice that every man is innocent until proven guilty after judicial proceedings designed to protect his rights and to ensure the fair adjudication of the charges against him. Where no such charges are brought, it would be irresponsible and unethical for a prosecutor to issue a report suggesting criminal conduct on the part of an individual who has no effective means of challenging the allegations against him or requiring the prosecutor to establish such charges beyond a reasonable doubt."

https://doi.org/10.2307/3053262 Published online by Cambridge University Press

CLARKE, Thurston and John J. TIGUE, Jr. (1975) *Dirty Money*. New York: Simon & Schuster.
COHEN, Richard M. and Jules WITCOVER (1974) *A Heartbeat Away*. New York: Viking.
CROWLEY, George D. (1975) "The Tax Fraud Investigation," 1 *Journal of Criminal Defense* 155.
DAVIS, Kenneth Culp (1969) *Discretionary Justice* [The Edward Douglas White Lectures]. Baton Rouge: Lousiana State University Press.
EDELHERTZ, Herbert (1970) *The Nature, Impact and Prosecution of White-Collar Crime*. Washington, D.C.: Government Printing Office.
EISENSTEIN, James (1978) *Counsel for the United States*. Baltimore: Johns Hopkins University Press.
FEELEY, Malcolm (1979) *The Process is the Punishment*. New York: Russell Sage Foundation.
GEIS, Gilbert and Robert F. MEIER (1977) (eds.) *White-Collar Crime*. New York: Free Press.
GELB, Barbara (1975) *On the Track of Murder*. New York: William Morrow.
GIBSON, Larry S. and Frank A. ZUNNO (1978) *Report to the Attorney General of the National Economic Crime Project*. Washington, D.C.: U.S. Department of Justice.
GOLDSTEIN, Abraham S. and Marvin MARCUS (1977) "The Myth of Judicial Supervision in Three 'Inquistorial' Systems," 87 *Yale Law Journal* 240.
GREENWOOD, Peter W., Jan M. CHAIKEN, Joan PETERSILIA and Linda PRUSOFF (1975) *The Criminal Investigation Process, Volume III: Observations and Analysis*. Santa Monica, Calif: Rand Corporation.
HARVARD LAW REVIEW (1977) "Note: Plea Bargaining and the Transformation of the Criminal Process," 90 *Harvard Law Review* 564.
HOFFMAN, Paul (1974) *Tiger in the Court*. Chicago: Playboy.
KAMISAR, Yale, Wayne R. LAFAVE and Jerold H. ISRAEL (1974) *Modern Criminal Procedure*. St. Paul: West.
KAPLAN, John (1965) "The Prosecutorial Discretion—A Comment," 60 *Northwestern University Law Review* 174.
———(1977) "American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store," 5 *American Journal of Criminal Law* 215.
KLEIN, John F. (1976) *Let's Make a Deal*. Lexington, Mass.: Lexington Books.
MILLER, Frank W. (1969) *Prosecution: The Decision to Charge a Suspect with a Crime*. Boston: Little, Brown.
MORRIS, Norval and Gordon HAWKINS (1977) *Letter to the President on Crime Control*. Chicago: University of Chicago Press.
REISS, Albert J., Jr. (1971) *The Police and the Public*. New Haven: Yale University Press.
ROSETT, Arthur I. and Donald R. CRESSEY (1976) *Justice by Consent: Plea Bargains in the American Courthouse*. Philadelpha: Lippincott.
SHAPIRO, Susan (1976) *A Background Paper on White Collar Crime*. Unpublished manuscript, Yale University.
SUDNOW, David (1965) "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office." 12 *Social Problems* 255.
SUTHERLAND, Edwin H. (1949) *White Collar Crime*. New York: Dryden.
THORNBURGH, Richard L. (1976) "The Prosecutor's Role in the Search for 'The Truth, the Whole Truth and Nothing But the Truth.'" Remarks of the Assistant Attorney General, Criminal Division, United States Department of Justice, to the Criminal Law Section, State Bar of Wisconsin, at its Annual Meeting, Fontana, Wisconsin (June 18).
TYLER, Harold R., Jr. (1965) "The Defense of the White Collar Accused," 3 *American Criminal Law Quarterly* 124.
WEAVER, Suzanne (1977) *Decision to Prosecute: Organization and Policy in the Antitrust Division*. Cambridge, Mass.: MIT.
WHITE, Welsh S. (1971) "A Proposal for Reform of the Plea Bargaining Process," 119 *University of Pennsylvania Law Review* 439.
WILSON, Stephen V. and A. Howard MATZ (1977) "Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods," 14 *American Criminal Law Review* 651.

https://doi.org/10.2307/3053262 Published online by Cambridge University Press