

LIMITATIONS ON PROSECUTOR'S DISCRETIONARY POWER TO INITIATE CRIMINAL SUITS: MOVEMENT TOWARD A NEW ERA

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Of striking significance in the American system of criminal procedure is the immense discretionary power¹ accorded the prosecutor.² The most prominent aspects of this power are first, the power not to prosecute an individual notwithstanding sufficient evidence to meet the legal requirements for commencing a prosecution, and, second, the power to prosecute when a crime is clear, but in a situation in which criminal action is usually not initiated.

It has been the traditional American practice³ for these discretionary aspects of the prosecutor's office to be beyond the control of courts or other

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¹ As noted in LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532n.1 (1970), "discretion" is typically defined as "an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience." Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U.L. REV. 925 (1960) [hereinafter cited as Pound]. Professor Davis's statement that a "public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action," however, may more accurately characterize the actual breadth of the prosecutor's effective power. K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1969). Overall there is a recognition that the idea of discretion is largely one of morals "belonging in the twilight zone between law and morals" that the legal system has traditionally found to be both necessary and troublesome. Pound, at 926.

² The prosecutor is not alone in the exercise of discretionary power in the area outside the traditional bounds of investigation and analysis (the period immediately preceding the charging process and immediately after sentencing). There is growing recognition of exercise of similar discretionary power by police in making arrests (W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); Symposium, *The Legitimate Scope of Police Discretion to Restrict Ordinary Public Activity*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 233 (1969); Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960), and the power of parole boards in granting probations and paroles (Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Basset, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L.C. & P.S. 447 (1969).

³ Unlike the slow public recognition of the immense discretionary power of the police, the discretion belonging to the prosecutor has always been acknowledged in this country. F. REMINGTON, D. NEWMAN, E. KIMBELL, M. MELLI, & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 413 (1969) [hereinafter cited as REMINGTON, *CRIMINAL JUSTICE*]. There is some question as to which body exercises the broadest

external bodies,⁴ except in the rare case of corruption or serious overt malfeasance in office.⁵ The principal argument in favor of this has been that the prosecuting officer is a member of the executive branch of the relevant state or national government and that as such he is not open to scrutiny at that level on questions concerning the policies of his office.⁶ It is the position of this article that prosecutorial discretion, while essential to a system of ordered justice, is too extensive both in terms of its absolute breadth and in terms of the absence of effective review.⁷ The prosecutor's discretionary power as to the initiation of criminal proceedings has borne little resemblance to the mostly ministerial duties envisaged by statutes⁸ and has more closely approximated the quasi-judicial and legislative functions of an administrative agency.⁹ The discretionary power that legitimizes this authority to initiate proceedings or not, at will, should be checked, structured and confined¹⁰ so as to afford protection from this power commensurate with the

power. Compare Note, *Nonfeasance: A Threat to the Prosecutor's Discretion*, 30 IND. L.J. 74, 75-76 (1954), with LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532n.2 (1970).

⁴ See, e.g., *Newman v. United States*, 382 F.2d 479 (1967); *Peck v. Mitchell*, 419 F.2d 575 (1970); *Powell v. Katzenback*, 359 F.2d 234 (1965), cert. den., 384 U.S. 906. Some commentators have gone beyond this statement to find that the prosecutor's power as to who to prosecute is almost totally beyond the control of law (Ploscowe & Spiero, *The Prosecuting Attorney's Office and the Control of Organized Crime*, MANUAL FOR PROSECUTING ATTORNEYS 316 (M. Ploscowe ed. 1956) [hereinafter cited as Ploscowe]), which may in fact be the practical result of the unavailability of review.

⁵ See, e.g., Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955), and included sources; Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477 (1959).

⁶ See Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, at 1300 (1965). A typical case arguing along these lines is *Newman v. United States*, supra note 4. Here two individuals were indicted on the same set of facts, one was allowed to plead a lesser charge and the other was not. There was no evidence that either party assisted the government in obtaining any evidence. The district court in an opinion by the current Chief Justice, Warren Burger, upheld the prosecution of the one individual on the harsher charge stating that: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Id.* at 480.

⁷ "The basic trouble with discretion is that it is lawless in the literal sense of the term." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 290 (1968). "The American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute." K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 (Supp. 1970).

⁸ See Note, *Nonfeasance: A Threat to the Prosecutor's Discretion*, 30 IND. L.J. 74, at 81-82 (1954).

⁹ Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519 (1969); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41 (1966).

¹⁰ These terms are those of Professor Davis and are developed more fully and applied in a broader context in his book *DISCRETIONARY JUSTICE*, which is probably the definitive statement on the need for reform in this area of the law.

extent of its possible abuse.¹¹ The law may be written by legislators and interpreted by judges, but whether or not it is ever applied is determined almost exclusively by prosecutors who are responsible to no one. As pointed out by Professor Baker: "How law is applied outweighs in importance its enactment or its interpretation."¹²

This article will examine the structure and bases of the traditional prosecutorial practice, the potential abuses inherent therein and the direction for reform, and finally will indicate the first steps in the case law toward a new position permitting judicial review of abuse of the discretion.

I. TRADITIONAL EXERCISE OF PROSECUTOR'S DISCRETION

Most state and federal statutes concerning the duty of the prosecutor¹³ seems to require the prosecutor to initiate proceedings when there is reasonably clear evidence that a particular person has committed a crime. These statutes are usually silent as to his discretionary powers.¹⁴ Though the prosecutor's duty seems clear¹⁵ there has long existed the attitude, particularly in the courts,¹⁶ that the statutes' terms are not to be viewed as a mandate to act against all possible parties who could legally be brought to trial,¹⁷ and that such mechanical enforcement of all criminal law would be "undesirable and impractical."¹⁸ This leaves the prosecutor with substantially more power over the disposition of suspects within the enforcement mechanism

¹¹ See Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, at 792 (1933). Some indication of the possible scope of abuse at least at the local level is the belief that the county prosecutor is the most powerful official in American state government. Cates, *Can We Ignore Laws?—Discretion Not to Prosecute*, 14 ALA. L. REV. 1, at 2-3 (1961).

¹² Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, at 796 (1933).

¹³ Though some differences exist between the formulation of the prosecutor's office at the local, state and federal levels, their basic similarity seems to justify treating them jointly. Hobbs, *Prosecutor's Bias, An Occupational Disease*, 2 ALA. L. REV. 40 (1949). For the purpose of this Comment, unless noted otherwise the comments made are applicable at each of these levels.

¹⁴ Klein, *District Attorney's Discretion Not to Prosecute*, 32 L.A.B. BULL. 323 (1957); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957). In some instances, however, statutes specifically state that the prosecutor has no discretion as to bringing an action. This is extremely rare. See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, at 522 (1969).

¹⁵ Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770 (1933).

¹⁶ See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, at 521 (1969).

¹⁷ Lezak, *Prosecutor's Discretion—The Decision to Charge*, 2 THE PROSECUTOR'S SOURCEBOOK 421 (J. George ed. 1969) [hereinafter cited as Lezak].

¹⁸ Comment, *Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction*, 65 YALE L.J. 209 (1955). The American Bar Association in its Project on Standards For Criminal Justice specifically urges this point and includes within its proposed standards specific criteria which the prosecutor may consider in determining on clear facts whether to bring proceedings. American Bar Association Project on Standards For Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* 92-93 (tentative draft, 1970).

than can usually be implied from the relevant statute.¹⁹ He has open to him several methods of implementing this decision not to prosecute: inaction, acceptance of a compromise plea, or entry of nolle pros.²⁰

This attitude has evolved²¹ from an unstructured desire for leniency in particular cases²² and from the flexibility of procedure necessary to effectuate that end.²³ A corollary factor has been the various theories of criminal law which are aimed to some degree at societal purposes other than crime prevention.²⁴ Criminal statutes are presented not as mandates to enforce because they govern society, but rather as procedures that can be used to remove undesirable persons from society.²⁵ For this purpose, the more loosely the laws are drawn, the more use they will be to the prosecutor in correcting generally unpopular activities. Arnold points out another weapon in the prosecutor's arsenal:

The fact that there are more laws than he can ever enforce is not a handicap but an aid to the prosecutor because it gives him so many offensive weapons against any particular individual. Obsolete laws may be revived and used for purposes that their authors never dreamed of, to sink into obscurity again when the particular individual has been put behind bars.²⁶

This system would of course be dependent on a broad discretionary power of enforcement that was subject to infrequent and ineffectual review or control.²⁷ It would also, however, be subject to abuse.²⁸

¹⁹ See Nedrud, *The Role of the Prosecutor in Criminal Procedure*, 32 U.M.K.C.L. REV. 142, at 148 (1964).

²⁰ Comment, *Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction*, 65 YALE L.J. 209, at 209-10 (1955). The acceptance of a compromise plea is largely beyond the scope of this article. For a discussion of this issue see D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Rosett, *The Negotiated Guilty Plea*, 374 ANN. POL. & SOC. SCI. 70 (1967).

²¹ K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 at 189 (Supp. 1970).

²² There are two desires operating at this level. The first is a felt need on the part of the public and the courts for personalized justice, "rather than literalistic adherence" to laws. L. MILLER, *DOUBLE JEOPARDY AND THE FEDERAL SYSTEM* 118 (1968). See LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, at 534 (1970). The second desire is one by prosecutors that their function not appear to be one of "persecution" rather than "prosecution." Ploscowe at 317; F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 187 (1969) [hereinafter cited as F. Miller].

²³ Justice Breitell argues in favor of discretion to be lenient, a discretionary power that would "ameliorate or avoid the effective application of the literal criminal rule." Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, at 430 (1960).

²⁴ *Id.*

²⁵ See Lezak at 421.

²⁶ T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 154 (1935). The "weapons against any particular individual" language is typical. See, e.g., Lezak at 421.

²⁷ See text at notes 64-71 and 86-93 *infra*. Professor Davis has found that there are several more or less explicit assumptions underlying the traditional prosecuting power. First, it must be discretionary. Second, the "shall" provisions of statutes are of no consequence and can be disregarded without worry. Third, no reasons need be given for such disregard. And fourth, the decisions once made are not judicially reviewable for abuse of discretion. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 at 189 (Supp. 1970). Roger Taney, as United States Attorney General, was the first

A. *The Decision Not to Prosecute Where Evidence of Guilt is Clear*

Two broad criteria are typically listed by prosecutors in explaining their decision whether to prosecute:²⁹ first, the chances of obtaining a conviction, and second, the extent to which the crime, the suspect and the punishment coincide with the prosecutor's idea of the community interest.

The likelihood of conviction of a particular suspect is a primary consideration for a prosecutor,³⁰ if only to keep a favorable ratio of convictions to cases handled.³¹ Thus a stricter standard than that of probable cause, must be met before an action is brought.³² Another consideration is based on the feeling that initiation of prosecution in situations in which there is little or no chance of securing a verdict against the suspect will result in disrespect for law and the enforcement process.³³ Non-prosecution on clear facts is sometimes justified on the basis that the community interest demands such inaction. Included under this rubric are a wide variety of factors³⁴ that often duplicate those used in assessing the likelihood of conviction but which are viewed by most prosecutors as being independent indicators:

1. Prosecution is rarely initiated when the prosecutor perceives that the probable result will be undue harm to the suspect.³⁵ Examples of this exist when the suspect is a person of moderately high position in the community

to formulate a theory of absolute immunity of the prosecutor from accountability to the judiciary. 2 *Ops. of the Atty. Gen.* 482 (1831).

²⁸ See Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3, at 5 (1940); L. MILLER, *DOUBLE JEOPARDY AND THE FEDERAL SYSTEM* 118 (1968); Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41, at 47 (1966). See generally text at notes 94-104 *infra*. This discretionary power of enforcement, while usually exercised by the prosecutor, is sometimes exercised almost entirely at the police level. Such apparently is the case in Chicago, where the police make the charging decision and the prosecutor performs the ministerial function of managing the government's case at trial. See Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 590.

²⁹ Rarely are the reasons for prosecutor's decisions given openly to the public. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 at 196 (Supp. 1970).

³⁰ See, e.g., Ploscowe at 317; Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41, at 47 (1966). There are some commentators, however, who feel that "unconvictability" is not that crucial an indicator. There is some indication that "unconvictability" of a defendant will not halt a prosecution when the prosecutor believes that the mere initiation of the action has the proper effect on the suspect. Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, at 527 (1969).

³¹ See generally Baker & DeLong, *The Prosecuting Attorney and His Office*, 25 J. CRIM. L.C. & P.S. 695, at 699 (1935); R. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* (1929).

³² F. MILLER at 21.

³³ See Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, at 1299 (1965). This argument, however, ignores the added impetus to violations that an official's acquiescence in earlier violations provides.

³⁴ A wide variety of criteria formulations exist. The most significant of these include: F. MILLER at 174-253; American Bar Association Project For Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* 92 (tentative draft, 1970); Cates, *Can We Ignore Laws?—Discretion Not to Prosecute*, 14 ALA. L. REV. 1, at 6-8 (1961).

³⁵ See, e.g., Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, at 188-90 (1965).

and is apprehended for public drunkenness or for a minor traffic offence.³⁶ Here the damage that is likely to be done to the individual's reputation is seen as an inordinate punishment for the offence. Similarly, charges for minor offences against university students until recently were never brought unless a request was made by the university.³⁷ Another example can be seen in situations where there is a technical violation of the Mann Act although no commercial activity is involved.³⁸

The "undue harm" criterion is also brought into play when multiple prosecutions are possible (for example on both the state and federal level) on the same set of facts. One striking example of prosecutor's discretion in this area is found in *Petite v. United States*.³⁹ Here a suspect was convicted of conspiracy by a state court, and after a term of imprisonment was brought to trial in federal court for perjury on the same set of facts. After conviction for the second time an action was brought by the federal government to vacate the judgment and remand for a dismissal of the federal indictment. The Justice Department said that it was not their policy to initiate a second prosecution arising out of a single transaction, and that it was within their absolute discretion to do so.⁴⁰ The Supreme Court agreed in a per curiam opinion.⁴¹ In the Department's brief it was also argued that the government's duty to prosecute extended to "formulation and implementation of enlightened and proper prosecutorial policy,"⁴² and that their power included that of deviating from the aforementioned policy in "appropriate" cases.⁴³

2. The co-operation of a suspect in certain governmental activities is also a factor leading to non-prosecution. A typical case is that involving a suspect who supplies evidence leading to conviction of other persons.⁴⁴ Another common case arises when a suspect drops a complaint lodged against a policeman or has assisted the present administration in financial or political matters.⁴⁵

3. If a prosecutor feels that alternative disposition procedures achieve adequate results he may not initiate criminal proceedings.⁴⁶ If a suspect can be subjected to an insanity commitment,⁴⁷ sex deviate commitment,⁴⁸ or

³⁶ F. MILLER at 188.

³⁷ See Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, at 785 (1933).

³⁸ See Lezak at 422.

³⁹ 361 U.S. 529 (1960).

⁴⁰ *Id.* at 530-31.

⁴¹ *Id.*

⁴² Defendant's Brief on Motion to Vacate and Dismiss 3.

⁴³ *Id.* at 4-5.

⁴⁴ This category is discussed in F. MILLER at 255-59, where it is broken down into the sub-categories of the casual stoolpigeon, the witness against other suspects, and the witness against co-defendants.

⁴⁵ See R. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 74-95 (1929).

⁴⁶ See Snyder, *The District Attorney's Hardest Task*, 30 J. CRIM. L.C. & P.S. 167, at 173 (1939). An extensive list of these alternative procedures is given in REMINGTON, *CRIMINAL JUSTICE* at 416-22.

⁴⁷ F. MILLER at 214.

⁴⁸ *Id.* at 218.

revocation of probation or parole,⁴⁹ without formal criminal prosecution on the included offense, then this avenue is usually taken. Also when recovery of stolen goods occurs or when a warning seems sufficient to deter similar future conduct, prosecution often is not begun.⁵⁰ Similar results occur when a juvenile commitment can be made.⁵¹

4. The attitude of the victim of the crime is sometimes a governing factor.⁵² Instances when this indicator is considered include cases where the victim is also guilty of some offense, in statutory rape cases, and "negro assaults" where there is a perceived tendency of victims later not to testify.⁵³

5. One of the most frequently mentioned of the reasons for non-prosecution is the overbearing cost to the system.⁵⁴ This includes the absence of adequate resources to effectuate a policy of full prosecution,⁵⁵ and the harm to official agencies if prosecutions are made.⁵⁶ With the cost to the system in mind there is a tendency to prosecute only strategic cases.⁵⁷ This policy is exemplified by *Petite v. United States*⁵⁸ and *Redmond v. United States*.⁵⁹ In the latter case the Department of Justice was able to secure a vacated judgment and dismissal of charges against a husband and wife convicted of violating a federal obscenity statute for having nude photos of themselves developed and returned through the mail. The basis for the remand was a Departmental policy of non-prosecution of obscenity statute violators unless they were repeat offenders, or there existed aggravating circumstances.⁶⁰ The government in its brief to the Supreme Court maintained that the policy of acting only against "strategic cases" was well within its discretionary power and was not subject to review.⁶¹

Underlying all of these stated reasons may be the general belief that the relevant societal goals may be better achieved in ways other than those dictated by statute.⁶² This is an elaboration of the theory that literal enforce-

⁴⁹ *Id.* at 223.

⁵⁰ Ploscowe at 317. Typical cases concern non-support, family and neighborhood assaults, minor property offences, and censorship of obscene matter or performances. F. MILLER at 260-73.

⁵¹ F. MILLER at 233, 276. Cf. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

⁵² Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, at 180-86 (1965).

⁵³ F. MILLER at 174-77.

⁵⁴ See, e.g., Lezak, *supra* note 17, at 423; F. MILLER at 179-85, 191-206.

⁵⁵ See, e.g., Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, 786, 791 (1933); Brezner, *How the Prosecuting Attorney's Office Processes Complaints*, 27 DET. LAW. 3 (1959); Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3, 5 (1940).

⁵⁶ See generally Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1036 (1967).

⁵⁷ Snyder, *The District Attorney's Hardest Task*, 30 J. CRIM. L.C. & P.S. 167, 168 (1939).

⁵⁸ Discussed at note 39 *supra*.

⁵⁹ 384 U.S. 264, 86 S. Ct. 1415 (1966).

⁶⁰ *Id.* at 265.

⁶¹ Respondent's Brief For Certiorari at 3-4.

⁶² See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 527 (1969); F. MILLER at 164.

ment of criminal laws may not be (in the opinion of the prosecutor) what the community needs or wants.⁶³

As noted earlier,⁶⁴ control over the prosecutor's discretionary power not to prosecute is very rare and the few attempts at control that have been made have been ineffectual. Actions have been instituted requesting an order of mandamus to initiate proceedings,⁶⁵ but these are usually denied because of the prosecutor's "absolute discretion" in this area.⁶⁶ Methods of control and review that have proven equally ineffective include impeachment,⁶⁷ replacement by the state attorney general,⁶⁸ and institution of proceedings by a private prosecutor.⁶⁹ Generally the power to overturn a specific prosecutor's decision not to prosecute, once made, has existed only in cases of overt criminal collusion or corruption.⁷⁰ The feeling is that the prosecutor has been selected to use his judgment, and as long as he is doing so predictably his decisions will not be questioned.⁷¹

The absence of explicit controls is not, however, to be taken to imply that prosecutors do not feel pressure from various quarters to utilize their discretionary power in certain directions. Recognition of informal controls imposed by the private complainants, the judiciary and the police is fairly extensive.⁷² The informal control that exerts the most influence, however, is public opinion.⁷³ There is some feeling among prosecutors that overt community feeling on the status of particular crimes and suspects is the guide that should be followed in determining whether to initiate a criminal prose-

⁶³ See Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41, 47 (1966).

⁶⁴ See text at notes 3 and 4 *supra*.

⁶⁵ See, e.g., *Moses v. Katzenback*, 342 F.2d 931, 119 U.S. 352 (D.C. Cir. 1965); *Goldberg v. Hoffman*, 225 F.2d 463 (1955); *Pugach v. Klein*, 193 F. Supp. 630 (1961). *Contra*, *Commonwealth v. Whipple*, 69 Pa. 9 (1881).

⁶⁶ See cases in note 65 *supra*, and *Ferguson, Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS U.L. REV. 507, 518 (1957). Even where courts or statutes have required reasons for absence of prosecution or for *nolle pros*, the resulting judicial review in a mandamus proceeding has been a more "formality." Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 213 (1955). See F. MILLER at 46-52.

⁶⁷ See Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 212 n.13 (1955).

⁶⁸ This is allowed by some statutes, see, e.g., NEB. REV. STAT. § 84-204, but has proven to be rarely used. Lezak at 428.

⁶⁹ This is a somewhat more promising approach, where allowed, because it relies on persons outside the traditional administrative framework. See Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955). It is generally agreed, however, that such a system is not likely to be instituted here. Lezak at 428.

⁷⁰ Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 523 (1969).

⁷¹ F. MILLER at 297.

⁷² See, e.g., Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41, 63-69 (1966); F. MILLER at 337-42.

⁷³ See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 531 (1969).

cution, rather than the formal dictates of statutory formulations.⁷⁴ These informal controls occasionally become "guidelines" as to when prosecution should or should not be initiated.⁷⁵ While these "guidelines" do in some places exist, it should be emphasized that they are the exception and not the rule, that they are usually informal and not binding, and that their existence in the form of open, articulated policy standards is far from frequent.⁷⁶

B. *Discriminatory Prosecution — The Decision to Prosecute When the Normal Procedure is Non-prosecution*

The other side of the coin of prosecutor's discretionary power is his power to bring criminal charges against individuals under valid statutes when a violation is clear, but when the normal procedure of the office is not to bring such charges. A concomitant power is that of charging to the full limit of the statutory formulation rather than for some lesser crime which has the same or similar standard of proof, but less serious punishment.

The reasons given by prosecutors for resort to full enforcement or full charging techniques are parallel to a degree to those given for a decision not to initiate proceedings. Two reasons given as justification are a desire to promote a suspect's co-operation with law enforcement agencies⁷⁷ and a desire on the prosecutor's part to compensate for what he feels to have been an earlier acquittal or inadequate sentence imposed upon the particular suspect.⁷⁸ Of particular importance is a desire by prosecutors to reflect the attitudes of the public and the press.⁷⁹ There might be a campaign by a local television station or newspaper in an effort to crack down on a particular offense or on a particular group of offenders. There is also an element of conscious harrassment of persons for other unprovable crimes or for unpopular beliefs in response to a perceived public distaste for those persons or activities. A good example can be found in the prosecutions against drug users or sellers. Of particular note are *Lloyd v. United States*,⁸⁰ *Hutchinson v. United States*,⁸¹ and *Henderson v. United States*,⁸² where a charge was possible under a peculiarly strict federal law and under a more lenient District of Columbia statute, both statutes having the same standard of

⁷⁴ Snyder, *The District Attorney's Hardest Task*, 30 J. CRIM. L.C. & P.S. 167, 174 (1939); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1075 (1955). See generally T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 153-54 (1935).

⁷⁵ Some examples of these informal "guidelines" are given in REMINGTON, *CRIMINAL JUSTICE* at 461-67.

⁷⁶ REMINGTON, *CRIMINAL JUSTICE* at 460-61. At their most explicit (typically within the United States Department of Justice) these informal "guidelines" are somewhat similar to the non-statutory ministerial circulars in France which are issued to explicitly require non-prosecution. See Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483, 489 (1970).

⁷⁷ F. MILLER at 286. This is a corollary of the point developed in the text at notes 44 and 45 *supra*, and is used in similar situations in an effort to get the offender to act in a particular manner. One technique frequently used is strict enforcement of traffic violations of the individual concerned.

⁷⁸ F. MILLER at 292.

⁷⁹ *Id.* at 280.

⁸⁰ 343 F.2d 242 (1964).

⁸¹ 345 F.2d 964 (1965).

⁸² 349 F.2d 712 (1965).

proof. In the first two cases the prosecution was conducted under the harsher statute; in the third case, the prosecution was brought under the more lenient D.C. statute. Despite strong dissents by Judge Bazelon,⁸³ the court in each case held that the choice of which statute to make the charge under was entirely a matter of discretion of the United States Attorney. The fact that in *Hutchinson*⁸⁴ and *Henderson*⁸⁵ the government counsel could give no reason for the choice of statute involved and the defendant who had sold a larger quantity of narcotics was the one prosecuted under the more lenient statute, was one of no consequence to the court.

More attempts have been made to circumscribe the discretionary power to prosecute in situations in which it is not usually exercised, than have been made to check the power not to prosecute in such instances.⁸⁶ The equal protection clause of the Fourteenth Amendment has for some time been held to afford protection against discriminatory application of laws on the basis of *Yick Wo v. Hopkins*.⁸⁷ The traditional position has been that the Fourteenth Amendment does not extend to cases involving the discriminatory enforcement of nondiscriminatory laws.⁸⁸

The hesitation to make such an extension has been due primarily to a desire not to nullify valid laws, merely because of a prosecutor's failure to charge all offenders.⁸⁹ In *Bailleaux v. Gladden*,⁹⁰ the defendant was convicted for carrying a concealed weapon and was sentenced to three years in jail. After several months the government secured a vacated judgement on the above conviction, and secured a subsequent conviction and sentence for thirty years under the state Habitual Criminal Act. On appeal the defendant contended that the Habitual Criminal Act was discriminatory since it applied only to whites. This argument was rejected by the court, the majority stating that: "It is not a denial of equal protection that one person amenable to an enhanced penalty . . . has his penalty increased and the act is not applied to other previously convicted felons."⁹¹

⁸³ There were strong indications in *Henderson* that the defendant did not act as an informer. 349 F.2d at 713.

⁸⁴ 345 F.2d at 975-76.

⁸⁵ 349 F.2d at 712-13.

⁸⁶ This is due mostly to a desire not to hinder discretionary leniency. See text at notes 64-71 *supra*.

⁸⁷ 118 U.S. 356, 6 S. Ct. 1064 (1886). In a suit by a person of Chinese descent to prevent application against him of a municipal ordinance preventing him from operating a laundry in San Francisco, the Court held that such ordinance, which conferred arbitrary power on municipal officials to give or withhold appropriate licenses, without regard for the competence of the person applying therefore, violated the Constitution.

⁸⁸ See Note, *Discriminatory Law Enforcement and Equal Protection From the Law*, 59 YALE L.J. 354 (1949).

⁸⁹ See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1107 (1961). The only instances in which criminal prosecutions have been overturned under the *Yick Wo* rule seem to be where the crime alleged was an "otherwise harmless act which ordinarily had not therefore been treated as a crime." *People v. Montgomery*, 47 Cal. App. 2d 1, 117 P.2d 437 (2d Dist. Ct. App. 1941). See also *Wade v. San Francisco*, 82 Cal. App. 2d 337, 186 P.2d 181 (1st Dist. Ct. App. 1947).

⁹⁰ 230 Or. 606, 370 P.2d 722 (1962).

⁹¹ *Id.* at 611.

While there has been significant movement toward changing the direction of the law in this area,⁹² it is still probably true to say that the refusal to apply the equal protection clause as a limit on prosecutor's discretion is based on the feeling that the clause protects only pre-existing rights (such as a right to conduct a lawful business as in *Yick Wo*) and that there is no pre-existing right to commit a criminal act.⁹³

II. DISSATISFACTION WITH CURRENT PRACTICE

As an examination of traditional practice indicates, the power to be lenient necessarily includes the power not to be lenient.⁹⁴ For the rough approximation of community values that emerges from the legislatures has been substituted the personal, and perhaps vindictive values of the law enforcer, or prosecutor.⁹⁵ It seems clear that this discretionary power should not remain unstructured and without review.⁹⁶ The answer lies in part in the removal of the irrebuttable presumption of prosecutorial propriety.⁹⁷

Before any effort is made to formulate avenues of reform, it should be made clear that the effort should not be directed toward eliminating all remnants of discretionary power — this is neither desirable nor possible.⁹⁸ No amount of reform will eliminate all of the gray statutory areas created by legislators who are truthfully unable to create effective and workable statutory standards.⁹⁹ While maintaining a distaste for most unchecked and unstructured power, it should be kept in mind that: "[I]n recognizing the place of discretion we perforce accept the limitations on verbalized law. Inherently, the guidance of discretion lends itself not to rigid particularized rules, but rather to the reason of the law operating sensitively in the 'clutch of circumstance'."¹⁰⁰

⁹² See text at notes 151-55 *infra*.

⁹³ See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1106 (1961). Also at this level of analysis there is some feeling that *Yick Wo* has traditionally been viewed as prohibiting systematic discrimination only, and has not protected discriminatory enforcement on a personal level.

⁹⁴ K. DAVIS, DISCRETIONARY JUSTICE 170 (1969). See Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048, 1057 (1967).

⁹⁵ H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 290 (1968).

⁹⁶ Recognition that the power exercised by prosecutors should be placed within more effective limits was made fairly clearly by some commentators as early as 1934. See, e.g., Baker & DeLong, *The Prosecuting Attorney—Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L.C. & P.S. 1025, 1064 (1934).

⁹⁷ See Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 231 (1955). The reason that we allow the present level of discretionary power is arguably because we expect our prosecutors to be pre-eminently trustworthy. F. MILLER at 295. But cf. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 290 (1968); Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970).

⁹⁸ K. DAVIS, DISCRETIONARY JUSTICE 25-26 (1969).

⁹⁹ See generally Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 535 (1969).

¹⁰⁰ Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, at 435 (1960). There may thus be ways to argue with some force that not all guilty should be prosecuted (F. MILLER at 6), or that selective enforcement is not always

Reform should be aimed at locating the optimal levels¹⁰¹ of discretion needed by the prosecution in various enforcement situations, and should be made only in light of the recognition that these optimum levels will continually be yielding to new and different ones as a reliable body of experience is constructed.¹⁰²

As Professor Davis points out,¹⁰³ there are three key considerations in attempting to infuse a system of ordered justice into the prosecutor's discretionary power: elimination of all unnecessary discretion, more complete attempts at administrative rulemaking, and judicial review of prosecutors' decisions to ensure fairness. The point being that: "In order to ensure the stability which is demanded for the legal order, careful limitation of the cases in which discretion may be resorted to is clearly indicated. This is done by careful defining of the types of circumstances under which, cases in which, purposes for which, and persons by whom it may be employed."¹⁰⁴

A. Elimination of Unnecessary Discretion

One of the most effective means of reducing abuse of prosecutorial discretion would be to eliminate obsolete or unenforceable statutes.¹⁰⁵ This is particularly true of those consensual offenses that are just barely taken seriously.¹⁰⁶ As one writer points out:

A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those they may create for themselves. Whatever one would hold as to the need for discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence cannot be accepted as a substitute for a sufficient law.¹⁰⁷

unjustifiable. K. DAVIS, *DISCRETIONARY JUSTICE* 167 (1969). The point of contention is when the selective enforcement should occur and under what circumstances.

¹⁰¹ The term is Professor Davis's. K. DAVIS, *DISCRETIONARY JUSTICE* 52 (1969).

¹⁰² See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 at 193 (Supp. 1970).

¹⁰³ See K. DAVIS, *DISCRETIONARY JUSTICE* 52-157 (1969). While the particular terms "confining," "structuring," and "checking" are Professor Davis's, the general formulation was preceded by some agreement on the direction in which reform should proceed. See, e.g., Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 929 (1962); Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 535 (1969). See also, LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 536-38 (1970). Some commentators were less eager to confine and reduce a prosecutor's discretionary power than they were to control and check it. See Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 433 (1960); B. GROS-MAN, *THE PROSECUTOR* 101 (1969).

¹⁰⁴ Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U.L. REV. 925, 927 (1960).

¹⁰⁵ See LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 536 (1970); Cates, *Can We Ignore Laws?—Discretion Not to Prosecute*, 14 ALA. L. REV. 1, 3-6 (1961).

¹⁰⁶ See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 291 (1968).

¹⁰⁷ Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952). See Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, at 773 (1933).

While it is possible to analyze this problem in terms of a need for meaningful statutory standards, it would be better to realize that legislatures cannot do the detailed work necessary for developing criteria in these areas,¹⁰⁸ and that quite often any attempts they make in a particular area are only another reflection of the "impossibly ambitious goals of our criminal law."¹⁰⁹

Prosecutors have aggravated the problem through their failure to confine discretionary power even after they have developed the practical experience to do so.¹¹⁰ To some extent it is understandable that prosecutors would be unwilling to voluntarily confine the area within which they wield their power, but this should not preclude courts and legislatures from requiring that the needed rules be developed as quickly as possible.¹¹¹

A contentious aspect of the prosecutor's discretion is his power of selective enforcement. The central issue here is whether discretionary enforcement of penal laws violates the equal protection clause. A view of the Fourteenth Amendment which limits its application to the protection of pre-existing rights is inconsistent with the "Supreme Court's holding that when a state confers a privilege or benefit, the equal protection clause requires that it do so with evenhandedness."¹¹² If our criminal system aims at the uniform treatment of people in the same position¹¹³ and not merely the avoidance of punishing the innocent, does this justify non-punishment of those persons who have clearly violated the law, and who, but for the exercise of the prosecutor's discretion, would normally not be proceeded against? While the question is a close one, the defendant should at least be afforded a rebuttable presumption that the unusual prosecution is discriminatory and in violation of the Constitution. The argument is principally whether the Fourteenth Amendment includes a determination that the social interest in achieving equal justice outweighs the social interest in punishing offenders. Both sides have their sponsors.¹¹⁴

B. *Ordering the Use of Necessary Discretion*

Once unnecessary¹¹⁵ discretionary power is confined to the greatest extent possible, there remains the task of structuring the remaining discretion

¹⁰⁸ See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.14 at 211 (Supp. 1970).

¹⁰⁹ F. MILLER at 352. See generally N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970).

¹¹⁰ K. DAVIS, *DISCRETIONARY JUSTICE* 56-57 (1969).

¹¹¹ *Id.* at 57.

¹¹² Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, at 1111 (1961). For an incisive account of the development of the law in this direction, see Reich, *The New Property*, 73 YALE L.J. 733 (1964).

¹¹³ See text at note 116 *infra*.

¹¹⁴ Compare Comment, *The Right to Nondiscriminatory Enforcement of the Penal Laws*, 61 COLUM. L. REV. 1103, at 1112 (1961), with K. DAVIS, *DISCRETIONARY JUSTICE* 169 (1969).

¹¹⁵ The content of the term "unnecessary" is to be filled in by the prosecutor as experience with a particular situation develops.

so as to establish uniform disposition of similar cases.¹¹⁶ Though prosecutor's discretion cannot be reduced to a formula,¹¹⁷ administrative rulemaking can serve as a method of achieving this uniformity¹¹⁸ and of achieving the open reasons, precedents and findings that are desired.¹¹⁹ Written reasons should be required for both a prosecutor's decision to prosecute and his decision not to prosecute. This would force the prosecutor to enunciate what factors motivated that decision. These reasons should then be published¹²⁰ and developed into policy statements, which thereafter would be treated as binding precedent that could only be changed prospectively.¹²¹ Movement toward this goal should be made where necessary through a process of trial and error on specific small areas of discretion using as a guide the experience of the National Labor Relations Board in this area.¹²² Within the National Labor Relations Board, opinions of the Office of Appeals (under the Board's General Counsel) are indexed and made available to district offices. Important cases and trends in these opinions are regularly compiled and published in the General Counsel's *Quarterly Report on Case Developments*.

C. Review of the Use of Necessary Discretion

Most efforts in the United States toward checking the prosecuting power have failed.¹²³ This is not to suggest, however, that such control is impossible.¹²⁴ One need only look to the procedures in European countries to see

¹¹⁶ See Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3, 4 (1940); Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 526 (1969). That this uniformity does not at present exist is shown in at least one recent survey of the Los Angeles County District Attorney's Office. *Id.* at 526-27. However, the practice of the United States Department of Justice of formulating fairly precise prosecution policies in some areas (as evidenced by the policy statement on multiple prosecutions issued by Attorney General Rogers after the decision in *Abbate v. United States*, 359 U.S. 187 (1959)) is evidence of more sophistication at the federal level. See L. MILLER, *DOUBLE JEOPARDY AND THE FEDERAL SYSTEM* 117 (1968). These policies, however, are not open, are not binding, and are not subject to judicial review.

¹¹⁷ See American Bar Association Project on Standards For Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* 93 (tentative draft, 1970). There is some question whether it is feasible to formulate the criteria necessary to structure the decision to prosecute. See F. MILLER at 152-53. "In no legal system is justice administered wholly by rule." Pound at 929.

¹¹⁸ K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 at 191 (Supp. 1970).

¹¹⁹ *Id.* at 190.

¹²⁰ See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 526 (1969). The American Bar Association has recommended the development of a prosecutor's handbook with a guide to discretion. American Bar Association Project on Standards For Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* 64 (tentative draft, 1970).

¹²¹ K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.08 at 194 (Supp. 1970). There has previously been some movement along this line made by the Anti-Trust Division of the Justice Department. See K. DAVIS, *DISCRETIONARY JUSTICE* 198-205 (1969).

¹²² For a discussion of the N.L.R.B. as an example of full implementation of the structuring principle, see K. DAVIS, *DISCRETIONARY JUSTICE* 205-207 (1969).

¹²³ See text at notes 65-69.

¹²⁴ The reasons for checking the prosecutor's use of discretionary power may be even more convincing, because of the traditional political base of the office, than the argument for checking the enforcement function of other administrative bodies. See K. DAVIS, *DISCRETIONARY JUSTICE* 212 (1969).

that a prosecutor's discretionary power can be checked and limited effectively.¹²⁵ In Germany prosecutors have no discretion about whether or not to prosecute in serious cases if the evidence is clear.¹²⁶ This is due in large part to the continuing efficacy of the German "legality principle" which places the prosecutor somewhat in the position of "protector of the letter of the law." Unlike his American counterpart, the German prosecutor is subject to constant and close supervision from a hierarchical system of superior officers within the state prosecutor's office. The prosecutor's ability to decide whether his interest, or that of his political organization, or even the interest of the involved parties would be furthered by a course of prosecutorial conduct other than the one indicated by the scope and quality of the evidence, is thus strictly limited. Of equal importance here is the fact that all powers of mitigation and aggravation of official reaction to supposed criminal conduct are exercised later in the enforcement process (typically at the time of sentencing), when more complete judicial safeguards are apt to be in effect.¹²⁷ A similar hierarchical system exists in the French prosecutorial structure. At the district level French prosecutors are subject to summary punishment for deviation from strict guidelines covering the initiation of criminal suits.

The important point is that effective checks can be devised which will limit unconfined prosecutorial discretion. The major fear of implementing a similar system of checks in the United States has been that such a change would mean substitution of judicial judgment for that of the prosecutor.¹²⁸ This need not be the case in light of the "modern understanding that a judicial review can be provided without judicial assumption of [positive] power committed to administrators."¹²⁹ Judicial review can thus be seen as a method of requiring closer and more frequent departmental review of the prosecutor's decisions, rather than as an implementation of de novo judicial consideration.

Two further suggestions for checking prosecutors' discretion should be investigated. First, courts could require, independent of any closer control by a prosecutor's superior, a good faith effort to institute prosecutions in all known cases of criminal violations with a contempt citation for failure to do so.¹³⁰ This would not enable the court to bring prosecutions on its own, but

¹²⁵ See, e.g., Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970) [hereinafter cited as Jescheck]; Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483 (1970).

¹²⁶ Jescheck at 508. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.08 at 191 (Supp. 1970).

¹²⁷ See generally Jescheck. It has been suggested with some persuasiveness, however, that despite the rhetoric there are no real differences between the discretionary powers exercised by any enforcement agency in the metropolitan areas of any country. See Grosman, *The Role of the Prosecutor in Canada*, 18 AM. J. COMP. L. 498, 507 (1970).

¹²⁸ See, e.g., Note, *Discretion Exercised by Montana County Attorneys in Criminal Prosecutions*, 28 MONT. L. REV. 41, 74 (1966).

¹²⁹ K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 983 (Supp. 1970).

¹³⁰ Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, at 1311 (1965). But see Note, *Nonfeasance: A Threat to the Prosecutor's Discretion*, 30 IND. L.J. 74, at 82 (1954).

would induce the prosecutor to act. Second, contrary to current experience in which the only position presented is that of the government,¹³¹ the defense counsel could be included in the charging decision, thus offering at this stage of the proceedings the protections involved in the adversary process.¹³²

II. MOVEMENT TOWARD THE REVIEW OF PROSECUTOR'S DISCRETIONARY POWER

The traditional view that prosecutors have absolute discretionary power in determining whether to initiate proceedings has been evolving since 1960 toward a position favoring control through judicial review of that discretion. Some courts have recognized the potential for unequal justice inherent in past practice and have developed a measure of judicial review of abuse at least "around the edges"¹³³ of what is traditionally thought of as the prosecutor's office. The power to prosecute, in terms of seeking application of the enforcement mechanism of a particular statute, is thus seen as being exercised not only by those that refer to themselves as "prosecutors," but also by a wide variety of regulatory agencies not thought of as having criminal law enforcement functions.¹³⁴ Though technical differences may exist between the criminal and administrative cases, there still seems, because of the same punitive result, no valid reason not to find applicable the holdings in one area to the needs of the other.¹³⁵

Several different approaches have materialized in this movement toward judicial review of prosecutor's discretion. First is the requirement that enforcers develop standards as stated by Judge Friendly in *Wong Wing Hang v. Immigration and Naturalization Service*.¹³⁶ The petition sought review of the decision not to allow suspension of a deportation order. Petitioner Wong's presence in the United States was clearly in violation of the Immigration and Naturalization Act because of his entry into the United States without an inspection. He also claimed, however, to have met the statutory tests that would allow suspension of the deportation.¹³⁷ While rejecting Wong's contention that these criteria had been met, Judge Friendly established as a test of the abuse of the discretion: ". . . if it were made without a rational explanation, inexplicably departed from the established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other 'considerations that Congress could not have intended to make relevant.'"¹³⁸ In a more recent case, *United States v. Esperdy*¹³⁹ the continued failure of the Naturalization and Immigration Service to provide factors, either by regula-

¹³¹ See REMINGTON, CRIMINAL JUSTICE 415.

¹³² See Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 433 (1960); F. MILLER at 349.

¹³³ K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 988 (Supp. 1970).

¹³⁴ *Id.* at 189, 982.

¹³⁵ *Id.* at 987.

¹³⁶ 360 F.2d 715 (1966).

¹³⁷ *Id.* at 716-17.

¹³⁸ *Id.* at 719.

¹³⁹ 296 F Supp. 726 (1969).

tion or otherwise,¹⁴⁰ to guide the discretionary decision to suspend deportation, contributed to the petitioner's being released from custody.

A second method of reaching a requirement of judicial review of prosecutor's abuse of discretionary powers is contained in *DeVito v. Schultz*.¹⁴¹ Here in a mandamus proceeding to get the Secretary of Labor to initiate a proceeding to set aside a contested election for irregularity, the court held that the petitioner had the judicially enforceable right to demand that the Secretary exercise his authority in a manner that was not "arbitrary or capricious."¹⁴² The court rejected the government's contention that the executive power of discretion involved could be remedied only through the ballot box and stated that the "courts have a duty to maintain minimum standards in the executive department to assure that the wishes of Congress are not frustrated."¹⁴³ The court also stated that the government needed to give explicit reasons for its failure to act because the court was "unwilling to permit the Secretary to avoid all inquiry into his performance of a statutory responsibility by resort to a legal presumption that he exercised his discretion properly."¹⁴⁴ There might be some contention here that labor laws present a special case in which the intent of Congress to limit the discretion of the enforcing agent (the Secretary of Labor) is particularly clear. However, it does not seem more evident that the Secretary's powers are any more ministerial in character than those in other enforcement areas where the typical attitude of the courts has been to permit unfettered prosecutorial discretion. The clearest intent of Congress and the state legislatures that exists (if any does at all) is their decision that prosecutors "will" prosecute, rather than that they "may" do so. By using these words in statutes dealing with labor and other prosecutor-oriented fields, legislators have indicated an unwillingness to allow administrators to determine where the law is the law, without controls.¹⁴⁵

The dissent in *Berra v. United States*¹⁴⁶ can perhaps be seen as the precursor of this whole development toward requiring review, and also as providing a third avenue of approach to that end. The petitioner there was

¹⁴⁰ *Id.* at 729.

¹⁴¹ 300 F. Supp. 381 (1969). This case is a completion of the argument in favor of judicial review in this area begun in *Schonfeld v. Wirtz*, 258 F. Supp. 705 (1966). There an action by an unsuccessful candidate for local union office to compel the Secretary of Labor to institute suit to set an election aside after showing of probable cause to believe a violation existed was upheld. The court stated that if it did not review here, the petitioner would be left without a remedy; beyond this the court was reluctant to move in asserting its right to review the Secretary's discretionary enforcement power.

¹⁴² 300 F. Supp. at 383.

¹⁴³ *Id.*

¹⁴⁴ *Id.* In two other recent labor cases courts have proceeded along similar grounds to hold that once an unfair labor practice was shown, the Secretary of Labor had to issue a cease and desist order despite discretion as to the remedy to be imposed. See *International Woodworkers of America, AFL-CIO, Local 3-10 v. National Labor Relations Board* 380 F.2d 628 (1967); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. National Labor Relations Board*, 427 F.2d 1330 (1970).

¹⁴⁵ See Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1303-07 (1965).

¹⁴⁶ 351 U.S. 131, 76 S. Ct. 685 (1956).

indicted for attempted evasion of federal income tax under the harsher of two possible statutes. The court held that the trial judge's refusal to give instructions including the more lenient statute as an alternative was not in error. The issue of the prosecutor's discretion was not even broached. Justice Black in dissent disagreed with the contention that the government had the power under the Constitution to grant to the prosecutor the power, in effect, to determine the punishment for a particular act. Relying on *Yick Yo v. Hopkins*,¹⁴⁷ he stated that:

A basic principle of our criminal law is that the government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.¹⁴⁸

As noted by Professor Davis,¹⁴⁹ this opinion could have been finished without a break in logic, by stating that section 10 of the Administrative Procedure Act provides for review of such prosecutorial discretion. This point was, in fact, made in *Wong Wing Hang*.¹⁵⁰

Courts in the past ten years have proven even more willing to intervene in cases of discriminatory enforcement. While they have not yet reached the point of dismissing all cases in which the prosecutor has brought action in contravention of his policy toward most offenders,¹⁵¹ the courts have moved beyond their originally strict interpretation of *Yick Wo*.¹⁵² Proceeding from a "patent abuse" test as a basis for overturning prosecutor's discretion in *Moog Industries, Inc. v. Federal Trade Commission*,¹⁵³ to the requirement of proof of intent to discriminate in *People v. Utica Daw's Drug Company*¹⁵⁴ and *People v. Walker*,¹⁵⁵ courts have constructed some substantial protections for instances of abuse that occur before the charging process.

The most striking developments in requiring judicial review of prosecutor's discretion, however, have occurred within the last two years. Using a combination of the reasoning behind *Wong Wing Hang*, *DeVito*, and the dissent in *Berra*, the courts may indeed have moved to the "threshold of a new era."¹⁵⁶ The general trend has been to require the enforcement agency involved to promulgate criteria and state reasons for its failure to initiate proceedings on clear facts.

¹⁴⁷ 118 U.S. 356, 6 S. Ct. 1064 (1886). See notes 87-88, and 93 *supra*.

¹⁴⁸ 351 U.S. at 139.

¹⁴⁹ K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 990 (Supp. 1970).

¹⁵⁰ 360 F.2d at 717.

¹⁵¹ See text at notes 113-14.

¹⁵² See text at notes 88-89.

¹⁵³ 355 U.S. 411, 78 S. Ct. 377 (1958). See also *Universal Rundle Corporation v. Federal Trade Commission*, 352 F.2d 831 (1965), where the court disallowed prosecution of a minor offence of price discrimination in the plumbing industry in conjunction with a policy of non-prosecution of greater offences. Although this case was overruled later by the Supreme Court, 387 U.S. 244, 87 S. Ct. 1622 (1967), the principle acknowledged below was not rejected.

¹⁵⁴ 225 N.Y.S.2d 128 (1962).

¹⁵⁵ 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964).

¹⁵⁶ *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597 (1971).

In *Environmental Defense Fund v. Hardin*¹⁵⁷ the court held that the failure of the Secretary of Agriculture to act on a petition requesting issuance of a suspension of registration order on the use of D.D.T., when such failure to act itself inflicted such irreparable injury, was an abuse of the Secretary's discretionary power.¹⁵⁸ The court seemed to be indicating in its requirement of a statement of non-conclusionary reasons upon remand, that it would not establish the criteria for the exercise of the Secretary's discretion, but that it was going to require the Secretary to do so.¹⁵⁹

In *Medical Committee for Human Rights v. Securities and Exchange Commission*¹⁶⁰ the court, in rejecting the S.E.C.'s claim of absolute discretionary power to commence action against corporations for failure to include shareholder's proposals in their proxy statements, held that the "phrase 'prosecutorial discretion' cannot be treated as a magical incantation which automatically provides a shield for arbitrariness."¹⁶¹ The court further stated that its decisions to review the commission's "lack of articulated bases for past decisions" would not project it into an area which was committed by law to agency discretion.¹⁶²

Most recently in *Environmental Defense Fund v. Ruckelshaus*,¹⁶³ Judge Bazelon was finally able to swing a majority of the District of Columbia Court of Appeals in his favor, after his strong dissenting opinions in *Lloyd, Henderson, and Hutchinson*.¹⁶⁴ On facts quite similar to those in *Hardin*,¹⁶⁵ the court approved a decision to compel the Secretary of Agriculture to issue policies of cancellation of registration for an insecticide which were necessary for its sale, where it was clear that there was the requisite "substantial question" about the safety of an item.¹⁶⁶ The court acknowledged that it should not agree to review an administrative decision as to the probability that the harm involved actually would occur,¹⁶⁷ but stated that it could review when the "Secretary has made no attempt to deal with the problem of what falls into [the relevant 'imminent hazard'] category, either by issuing regulations relating to suspension, or by explaining his decision in this case."¹⁶⁸ Judge Bazelon stated that the court would not assume in the absence of adequate explanation that the standards were implicit in every exercise of enforcement discretion and that the Secretary, thus, had an obligation to

¹⁵⁷ 428 F.2d 1093 (1970).

¹⁵⁸ *Id.* at 1098-1099.

¹⁵⁹ *Id.* at 1099-1100. Judge Friendly proceeded along similar lines in *Safir v. Gibson*, 417 F.2d 972 (1969), when he required the Maritime Administration to give reasons for its failure to recover as required by statute subsidies paid to members of a shippers conference found by the Commission to have engaged in tactics designed to destroy competition. *Id.* at 970.

¹⁶⁰ 432 F.2d 659 (1970).

¹⁶¹ *Id.* at 673.

¹⁶² *Id.* at 674-76.

¹⁶³ 439 F.2d 584 (1971).

¹⁶⁴ See text at notes 80-85. Judge Bazelon in each of those cases had argued that there needed to be a judicial check on excessive prosecutor's discretion and that reasons for the exercise of the discretion should be formulated and stated.

¹⁶⁵ See text at notes 157-59.

¹⁶⁶ 439 F.2d at 595-97.

¹⁶⁷ *Id.* at 595-96.

¹⁶⁸ *Id.* at 596.

articulate in reasoned opinions the criterion that he might develop over the course of time.¹⁶⁹

The achievement of reviewability as formulated by the courts in *DeVito*, *Wong Wing Hang*, and *Environmental Defense Fund v. Ruckelshaus* can be seen as the threshold question. Once it is accomplished the mere knowledge that courts will review may reform the conduct of prosecutors and prosecutor-like agencies along the lines of confining, structuring, and checking their discretionary powers.¹⁷⁰ In the long run, the additional dollar cost of thus impinging upon prosecutor's discretion will be more than compensated for by the decreased litigation costs that clarified enforcement procedures will produce, and by the increased justice that will occur in individual cases.

¹⁶⁹ *Id.*

¹⁷⁰ See note 103 and accompanying text.