
The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions

Peter L. Davis

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DePaul L. Rev. 329 (1989)

Available at: <https://via.library.depaul.edu/law-review/vol38/iss2/3>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

THE CRIME VICTIM'S "RIGHT" TO A CRIMINAL PROSECUTION: A PROPOSED MODEL STATUTE FOR THE GOVERNANCE OF PRIVATE CRIMINAL PROSECUTIONS

*Peter L. Davis**

TABLE OF CONTENTS

INTRODUCTION.....	330
I. THE RISE OF THE VICTIM	331
II. FUNDAMENTAL PRINCIPLES OF THE CRIMINAL LAW AND THE ROLE OF THE VICTIM	334
III. THE TRADITION OF PRIVATE PROSECUTION IN NEW YORK	341
IV. INITIATING A PRIVATE PROSECUTION IN NEW YORK: TWO MODELS	345
A. <i>Model I: Direct Filing—No Judicial Screening</i>	345
B. <i>Model II: Judicial Screening</i>	358
1. <i>The Summons Part of the Criminal Court of the City of New York</i>	363
V. WHEN SHOULD A JUDGE ISSUE A CRIMINAL COMPLAINT; WHEN SHOULD A PRIVATE PROSECUTION BE APPROVED?	372
A. <i>The Need For Openness and Visibility in the Process of Determining Whether to Initiate a Criminal Prosecution</i>	372
B. <i>Standards for Determining When Criminal Complaints Should Issue</i>	376
1. <i>The Underlying Merit of the Complainant's Accusation</i>	377
a. The quantitative aspect	377
b. The qualitative aspect	379
2. <i>The Significance of the Private Prosecutor's Ulterior Objective</i>	380
3. <i>The State's Interest in Being Adequately Represented</i>	384
VI. THE ADVANTAGES OF JUDICIAL SCREENING OF CITIZEN COMPLAINTS.....	394
VII. PROPOSED MODEL STATUTE FOR THE GOVERNANCE OF PRIVATE CRIMINAL PROSECUTIONS AND RELATED MATTERS.....	398

* J.D., 1972, New York University; Associate Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. The author wishes to thank Patricia Davis and Alan Kitey, his research assistants, and the staff of the library of Touro College, Jacob D. Fuchsberg Law Center. The author also gratefully acknowledges the helpful comments of Chris Hansen, Richard Klein, Donna Levin, Gary Shaw, Dan Subotnik, Elizabeth Vila, and Peter Zablotsky.

INTRODUCTION

The Howard Beach and Tawana Brawley cases in New York City have recently raised questions that will no doubt lead to consideration of far more fundamental issues. In each case, controversy raged over who should prosecute.¹ Broadly viewed, these cases have left a significant legacy by raising two almost heretical ideas: first, that the local district attorney is not in all cases the appropriate person to prosecute, and second, that the crime victim should have some say in the selection of the prosecutor.

The Brawley and Howard Beach cases focused on the narrow issues—first, should the local district attorney be superseded, and second, if so, by whom—because from the inception of these cases law enforcement officials declared their desire to prosecute aggressively. What if, however, law enforcement officials had declined to prosecute these cases? Would the families of Tawana Brawley and the Howard Beach victims have had any remedy?

The thesis of this Article is that the public prosecutor should not have a monopoly on criminal prosecutions; some supplementary system of private criminal prosecution should be available. Two such systems, or models, currently exist in New York. The first model, available statewide, theoretically allows a complainant to initiate a non-felony criminal prosecution without any screening by a prosecutor or judge. This system is unwise, unworkable, and illusory because it obscures the exercise of judicial discretion and focuses the court's attention on the wrong issues, usually precluding the crime victim's complaint. The second model, limited by statute to New York City, allows an aggrieved person to apply to a judge for the issuance of a criminal complaint. This model, though far preferable to the first model, is in need of substantial refinement. The exercise of judicial discretion should be guided and circumscribed by explicit statutory guidelines. This Article suggests such guidelines in the form of a model statute to govern the initiation and litigation of private criminal prosecutions.²

1. In the Howard Beach incident, three black men were attacked by a group of white youths in the Howard Beach section of Queens County in December of 1986. Raab, *Lawyers for Queens Assault Victims Explain Refusal to Aid Investigation*, N.Y. Times, Jan. 1, 1987, at 30. One of the men was killed and the two survivors refused to cooperate with prosecutors and detectives investigating the incident. *Id.* Lawyers for the two surviving victims alleged that police and the local District Attorney acted in bad faith and instituted a cover up. *Id.* The lawyers for the victims stated that their clients would cooperate only with authorities from the federal government or a special prosecutor appointed by New York Governor Mario Cuomo. Purdum, *Lawyers Assert Queens Victims Would Aid U.S.*, N.Y. Times, Jan. 2, 1987, at A1 & B2, col. 1.

The Brawley case involved allegations by Tawana Brawley, a 15 year old black girl, and her mother that Tawana had been kidnapped, raped, and physically abused by six white men, one of whom wore a badge. *Tawana Brawley: Case vs. Cause*, TIME, June 20, 1988, at 22. The mother and daughter, following the advice of their lawyers and advisers, charged that local authorities were protecting the guilty parties. *Id.* They demanded an independent investigation and Governor Mario Cuomo appointed New York State Attorney General Robert Abrams as special prosecutor. *Id.*

2. In *Young v. United States*, 481 U.S. 787 (1987), the Supreme Court reversed the contempt

I. THE RISE OF THE VICTIM

The Justice Department has recently calculated for the first time one's chances of becoming a crime victim.³

* * * One out of every 133 Americans will be murdered.⁴

* * * Eighty-three percent (83%) of Americans will be victims or intended victims of violent crimes at some point in their lives.⁵

* * * Fifty-two percent (52%) of them will be victimized in this way more than once.⁶

* * * One out of every 12 females will be the victim of a rape or attempted rape.⁷

* * * Almost three-quarters of the population currently 12 or younger (74%) will be the victim of an assault or attempted assault.⁸

convictions of defendants who had been prosecuted by an interested special prosecutor. *Young* is not dispositive of the issues raised in this Article, however, because the Court decided the case in the exercise of its federal supervisory powers, not on constitutional grounds. *Id.* at 802. Indeed, only Justice Blackmun was of the opinion that prosecution by an interested private prosecutor constituted a violation of due process. *Id.* at 814-15 (Blackmun, J., concurring).

The Court's entire discussion of the issues was premised on two facts which were different from those that are assumed to exist by this Article. Both facts are concerned with the availability of alternatives to interested private prosecutors. First, the model statute proposed in this Article requires that the judge consider referring the case to the local district attorney. Indeed, under the terms of the statute, only in highly unusual circumstances would the judge not refer it to the district attorney before considering the appointment of a private prosecutor. Although the circumstances present in *Young* were certainly not of this unusual variety, the district court did not refer the case to the U. S. Attorney's office before appointing the special prosecutors. *Id.* at 802. Second, in New York, as in most jurisdictions, there is no mechanism available to reimburse court-appointed special prosecutors in minor misdemeanor prosecutions; the model statute gives that factor great weight in determining whether to appoint a special prosecutor. On the other hand, in *Young*, a system to reimburse court-appointed special prosecutors was available to, but not employed by, the district court. *Id.* at 806 n.17. This Article will deal with the more common situation, not that which obtained in *Young*. Consequently, the question of the constitutionality of private criminal prosecution, as yet undecided by the Supreme Court, is beyond the scope of this Article.

3. KOPPEL, LIFETIME LIKELIHOOD OF VICTIMIZATION, TECHNICAL REPORT, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, (March 1987). See also *The Chances of Becoming a Crime Victim*, N.Y. Times, Mar. 15, 1987, at E7, col. 1; *83% To Be Victims of Crime Violence*, N.Y. Times, Mar. 9, 1987, at A13, col. 1. The Justice Department study used figures compiled by the government's National Crime Survey from 1975 through 1984. KOPPEL, *supra*, at 2. The predictions are based on all Americans currently 12 years old. *Id.* at 1. For purposes of the study, "life" begins at age 12 because children under that age are not interviewed for the National Crime Survey. *Id.* Logically, the percentage of Americans who will be crime victims diminishes gradually for older segments of the population. For instance, while 83% of current 12 year olds will be victims of violent crimes (or attempts), for 20 year olds, the figure is 72%; for 30 year olds, 53%; for 40 year olds, 36%; for 50 year olds, 22%; for 60 year olds, 14%; and for 70 year olds, 8%. *Id.* at 3.

4. KOPPEL, *supra* note 3, at 1. For black males the statistic rises to 1 out of every 30. *Id.*

5. *Id.* at 2-3. "Violent crimes" include assault, rape, and robbery. For black males, the percentage rises to 92%. *Id.* at 2.

6. *Id.* at 2.

7. *Id.*

8. *Id.* at 2-3.

- * * * Almost one out of every three Americans (30%) will be the victim of a robbery or attempted robbery.⁹
- * * * Ninety nine percent (99%) of the public will be victims of a personal theft;¹⁰ eighty seven percent (87%) will be victimized in this manner three or more times.¹¹
- * * * Seventy two percent (72%) of all households will be burglarized in a 20-year period;¹² 9 out of 10 homes will experience theft without forcible entry.¹³

Inevitably, then, we live in a time of increasing concern for the rights of crime victims.¹⁴ We create crime victims compensation boards to recompense victims for their losses,¹⁵ empower courts to order criminal defendants to make restitution to their victims,¹⁶ enact legislation to protect victims from intimi-

9. *Id.* For blacks, this figure rises to more than half (51%). *Id.* at 2. And two out of every five Americans (40%) will be the victim of a robbery or assault resulting in injury. *Id.* at 2-3.

10. *Id.* This statistic includes attempts at personal thefts. *Id.* at 3.

11. *Id.* at 2-3.

12. *Id.* at 2-4.

13. *Id.* at 4.

14. See generally J. STARK & H. GOLDSTEIN, *THE RIGHTS OF VICTIMS* 1 (1985):

A book about the rights of crime victims could not have been written a decade ago. Some of the avenues open to crime victims that are discussed in this book (such as restitution, civil actions initiated by victims, and payments of witness fees to victims) have long existed. But public awareness of the opportunities available to victims and, indeed, the perception that they constitute "victims' rights," is a recent development; it is the outgrowth of a grass roots national movement whose goal is to provide assistance to victims, to help them maintain their dignity, to expand their opportunities for compensation for injuries or losses caused by crime and to increase the effectiveness of their participation in the criminal justice process.

See also Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *MISS. L.J.* 515 (1982); Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 *VAND. L. REV.* 931 (1975); McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 *AM. CRIM. L. REV.* 649 (1976).

The extent to which prosecutors appear to be concerned about the rights of victims may vary substantially. For example, the Annual Report of the Nassau County (New York) District Attorney for 1985 contains hardly a mention of victims' rights, while the Annual Report of the District Attorney of Brooklyn, New York (Kings County), for the same year is permeated with such concern. See 1985 *DIST. ATT'Y OF NASSAU COUNTY ANN. REP.*; 1985 *DIST. ATT'Y OF KINGS COUNTY ANN. REP.*

15. As of 1985, all states except Arizona, Arkansas, Georgia, Idaho, Maine, Mississippi, New Hampshire, South Dakota, Utah, Vermont, and Wyoming had established crime victim compensation programs. J. STARK & H. GOLDSTEIN, *supra* note 14, at 102, 140. For general discussions of crime victim compensation programs, see D. MCGILLIS & P. SMITH, *COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS* (WASHINGTON, D.C.: NAT'L INST. OF JUSTICE AND ABT ASSOCS., INC.; MAY 1983) (NO. J-LEAA-013-78). See also Childres, *Compensation for Criminally Inflicted Personal Injury*, 50 *MINN. L. REV.* 271 (1965); Mueller, *Compensation for Victims of Crime: Thought and Aftersaction*, 50 *MINN. L. REV.* 213 (1965). New York's compensation scheme is contained in N.Y. EXEC. LAW §§ 621-35 (McKinney 1982).

16. See generally Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Court*, 30 *UCLA L. REV.* 52 (1982). For New York's compensation scheme see N.Y. PENAL LAW §§ 60.27, 65.10 (McKinney 1981).

ation,¹⁷ and pass "Son of Sam" laws to allow victims to share in the earnings of criminals from the offenders' versions of their crimes.¹⁸

Unfortunately, however, we have paid considerably less attention to the far more complex and important issue of determining to what extent a crime victim has a right to what might variously be characterized as revenge, vengeance, vindication, or justice within the criminal justice system itself. In short, does the crime victim have a *right* to have the offender criminally prosecuted?

Scenario I:

A and B are neighbors or casual acquaintances. One day, on the street, A attacks B. After the fight comes the proverbial "race to the stationhouse." Ordinarily it is the loser of the fight (A) who goes to the precinct first and files a complaint. Even though A was the aggressor, having lost the fight he may seek revenge through the legal process. B may not even know about it until he is arrested. When B, now under arrest, says he was the one who was assaulted and wants to press charges against A, the police, the district attorney, and the courts decline to initiate criminal proceedings against the first complainant (A)—even though there is no evidence, other than A's self-serving statements, that it was B who started the fight. The race is to the swift, not the righteous.

What remedy does B have? What remedy should B have?

Scenario II:

One night at home, during a bitter domestic argument, H, the husband, assaults W, the wife. The police are called and W wants H arrested. The police decline to arrest H, or, if he is arrested, the district attorney declines to prosecute and dismisses the case.

What remedy does W have? What remedy should W have?

17. See generally J. STARK & H. GOLDSTEIN, *supra* note 14, at 281-300. In New York, courts may issue orders of protection for victims of family offenses. N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1984). The orders may be issued as a condition of pretrial release of the defendant or upon conviction. Violations of the terms of such an order may result in punishment for contempt, revocation of an order of recognizance or bail, and revocation of a conditional dismissal or sentence. The same protections are now provided for other crime victims as well. N.Y. CRIM. PROC. LAW § 530.13 (McKinney 1984).

In addition, witnesses in New York are protected by N.Y. PENAL LAW §§ 135.60, .65 (McKinney 1987) (prohibiting coercion of testimony or of silence concerning a "legal claim or defense"); N.Y. PENAL LAW § 215.10-13 (proscribing "tampering with a witness"); and N.Y. PENAL LAW §§ 215.15-17 (prohibiting intimidation of victims and witnesses).

18. As of 1985, at least 22 states had passed "Son of Sam" legislation. J. STARK & H. GOLDSTEIN, *supra* note 14, at 265, 278-79. These statutes require that all fees paid to offenders for their "version" of the crime be placed in an escrow account in order to satisfy any judgment against them obtained by victims of their crimes.

"Son of Sam" was the nickname bestowed by the media on the anonymous serial killer who left a note with that signature at the scene of one of his killings in New York City in 1977. Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331 (1987) (citing Winfrey, "Son of Sam" Case Poses Thorny Issues for Press, N.Y. Times, Aug. 22, 1977, at 1, col. 1, 38, col. 3).

Scenario III:

V suddenly finds himself in an altercation with a police officer. The police officer subdues V, arrests him, and then unjustifiably assaults and beats him. V's complaints about the beating fall on deaf ears at the police department, which refuses to arrest the officer, and the district attorney's office, which refuses to prosecute him.

What remedy does V have? What remedy should V have?

In New York, as in most jurisdictions today, crimes are prosecuted on behalf of the state, not the individual victim.¹⁹ Indeed, the United States Supreme Court has observed that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."²⁰ It may well be true that a crime victim does not have a federal constitutional right to the prosecution of another; it may also be true that the victim has no federal statutory right to the prosecution of another. But the Court goes too far in saying that the victim has no "judicially cognizable interest" in such a prosecution. Such a right may well arise under state law, by virtue of the state constitution, state statute, or case law.

In New York, for example, a crime victim may have a judicially cognizable interest in a criminal prosecution. This Article explores the state of the law on this issue in New York and grapples with the question of whether the crime victim ought to have an "interest" in the prosecution of those by whom he has been victimized. It argues that, when the prosecutor declines to prosecute, it is the judiciary, rather than the prosecution, that should determine whether a crime victim may initiate a criminal prosecution.

II. FUNDAMENTAL PRINCIPLES OF THE CRIMINAL LAW AND THE ROLE OF THE VICTIM

The three scenarios set forth above are not arcane, law school hypotheticals; they are, on the contrary, real life challenges to our commitment to equal enforcement of our criminal laws. Scenario I illustrates a problem that may be less familiar to the lay public than the other two scenarios because those victimized by the process in this scenario do not constitute an identifiable class (as do battered spouses, mostly women, in Scenario II; and police-brutalized civilians, frequently minorities, in Scenario III). Nor is there an identifiable

19. "Every accusatory instrument, regardless of the person designated therein as the accuser, constitutes an accusation on behalf of the state as plaintiff and must be entitled 'the people of the state of New York' against a designated person, known as the defendant." N.Y. CRIM. PROC. LAW § 1.20(1) (McKinney 1981).

20. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). See also *Leeke v. Timmerman*, 454 U.S. 83 (1981). Despite these holdings, one New York court has held that a prisoner had a constitutional right—under both the United States and New York State Constitutions—"of access to the criminal courts for the purpose of initiating a criminal proceeding against the corrections officer . . . who had allegedly assaulted him." *Sackinger v. Nevins*, 114 Misc. 2d 454, 469, 451 N.Y.S.2d 1005, 1014 (Sup. Ct. 1982).

class of abusers in this scenario as there are in the other two (battering spouses, mostly men, in Scenario II; and police officers, mostly white, in Scenario III). Given the lack of interest group cohesiveness—or even a common, identifiable enemy to join forces against—it is not surprising that this problem has received little attention in the media. Yet, it is likely that most criminal lawyers practicing in major urban centers in this country would recognize Scenario I as an extremely common phenomenon.

Scenario II illustrates the problem of unresponsive police who will not make arrests and unresponsive prosecutors who will not file charges in domestic violence cases, a problem that has been amply documented.²¹ Many police departments and prosecutors' offices have had policies of not initiating the arrest or prosecution of spouse abusers because of their belief that quite often the abused spouse will lose interest in the prosecution and fail to cooperate.²²

Equally important is the problem, illustrated in Scenario III, of prosecutors' reluctance to file criminal charges against police officers who brutalize civilians. Criminal prosecution by local district attorneys of police officers for brutality is exceedingly rare and ineffectual. In 1970, at the request of the Civil Rights Committee of the Philadelphia Bar Association, and with the cooperation of the District Attorney, Professor Louis B. Schwartz of the University of Pennsylvania examined approximately 25 files from the Philadelphia District Attorney's office concerning complaints of violence allegedly perpetrated by the police.²³ Professor Schwartz concluded that "the District Attorney's office has not been, and, in the nature of things, could not be, an effective instrument for controlling police violence."²⁴ This conclusion was mandated, Schwartz found, because, *inter alia*: (1) the District Attorney's office "is in a hopeless conflict-of-interest position," examining the police charges against the defendant at the same time as the defendant's charges against the police;²⁵ (2) the prosecutor's office is "basically oriented towards the police";²⁶ (3) the District

21. Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7 (1978).

22. *Id.* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 21 (1971). As a result, in part, of litigation, it appears that police and prosecutors are now substantially more responsive to the complaints of battered spouses. See, e.g., *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part and dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (App. Div. 1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); *Scott v. Hart*, Civ. No. 76-2395 (N.D. Cal.) (consent decree filed Nov. 9, 1979). See generally CONNICK, CHYTILO, & PERSON, *BATTERED WOMEN IN THE NEW YORK CITY CRIMINAL JUSTICE SYSTEM* 8 (1980). Nevertheless, most police departments are still reluctant to order the arrest of spouse abusers. J. STARK & H. GOLDSTEIN, *supra* note 14, at 353, 356.

23. 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).

24. *Id.* at 1023.

25. *Id.* at 1024. Schwartz notes that complaints against police almost always arise when the police have brought charges against the civilian complainant. *Id.* He also points out that this conflict of interest occasionally becomes quite graphic; at the trial of two policemen for assault and battery prosecuted by the District Attorney's office, the first assistant District Attorney and the Police Commissioner sat for a time at the defense table. *Id.* at 1025.

26. This orientation is inevitable, Schwartz concludes, because of the constant need for cooperation between the police department and the prosecutor's office. *Id.* at 1024.

Attorney's office is forced to rely on police department investigation of its own officers;²⁷ (4) the District Attorney's office will rarely move against a police officer who has beaten a citizen unless the injury caused is both severe and well-documented;²⁸ and, (5) in the interest of reducing his huge caseload, the District Attorney will frequently influence both sides—the police officer who arrested and beat the civilian, and the civilian—to drop the charges against each other.²⁹ Based on these factors cited by Schwartz, district attorneys, in Philadelphia and elsewhere, cannot be relied upon to prosecute police brutality charges.

These examples are not exclusive. Other scenarios could have been used. There are many situations in which law enforcement authorities—the police and the public prosecutor—fail to arrest and prosecute. For example, cases of political corruption, white collar crime, or the illegal dumping of toxic wastes may not result in prosecutorial action whenever warranted.

The three scenarios above, however, are certainly among the most common examples of prosecutorial inaction; and an analysis of these situations helps to elucidate the nature of the problem of prosecutorial inaction. There is little question that all three victims³⁰ in the above scenarios may have remedies under our civil law; but should they have remedies under our criminal law as well?³¹

27. *Id.* at 1025. As Schwartz correctly points out, "the district attorney's office cannot effectively police the police when its major source of information is the police department." *Id.* Schwartz also observes that "[p]olice investigation of police is not and cannot be neutral." *Id.* at 1027-28.

28. *Id.* at 1026.

29. *Id.*

30. Certainly, there would be little dissent from the assertion that the individual assaulted by his neighbor or acquaintance in Scenario I was the victim of a crime. There might be greater dissent from the proposition that the wife assaulted by her husband in Scenario II was a crime victim. See D. BLACK, *THE BEHAVIOR OF LAW* 42, 44, 56, 108 (1976) (advancing the proposition that there is "less law" among intimates). One might expect even greater dissent from the application of the term "crime victim" to the man beaten by the police in Scenario III. When we speak of the rights of crime victims, we do not naturally think of those who have been beaten illegally by police officers as "victims" in the same sense as the victim of a mugging or a rape. But if police can be lawbreakers, then their victims—even if they themselves are lawbreakers—are every bit as much victims of crimes as the victims of violent street crimes. At least one New York court has been willing to refer to a person allegedly assaulted by a police officer as a "victim" and indicated that "[v]ictim-initiated civil suits [in police brutality situations] are likely to be more common now that victim's rights are being emphasized." *People v. Hill*, 122 Misc. 2d 895, 895 n. *, 471 N.Y.S.2d 826, 827 n. * (Crim. Ct. 1984).

31. In our jurisprudence, the dividing line between civil and criminal is, at best, murky. Indeed, it is extremely hard to arrive at a serviceable distinction. Functional definitions of what constitutes a criminal action are attractive, but they are, in the end, recursive. S. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE* 1-2 (1984). Certainly, the Supreme Court's analysis has not been satisfactory. See *United States v. L. O. Ward*, 448 U.S. 242 (1980).

In his "Prolegomenon to the Principles of Punishment," H.L.A. Hart specified five characteristics of punishment. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4-5 (1968). In his critique of Hart's criteria, George Fletcher observed:

It may be that Hart's test can help us understand the rudimentary difference between civil commitment, compulsory military service, quarantine, on the one hand, and

There are several reasons why they should. First, simple justice dictates that where a crime has been committed, the victim should be able to look to the state for redress. Indeed, crime control and redress of such grievances are basic justifications for the existence of the state. If the state does not provide these functions, then surely its legitimacy may be questioned. More particularly, in all three scenarios, a failure to prosecute constitutes a failure to actualize the purported justifications for punishment:³² rehabilitation, retribution,³³ incapacitation, specific deterrence, and general deterrence.³⁴

Failure to enforce the law creates a tear in the fabric of society. One who violates the law and is not punished derives the benefits of the social compact without accepting its burdens. And if one person may do this, why may others not do likewise? Soon, no one would be willing to abide by societal restrictions.³⁵

criminal punishment on the other. The former does not presuppose the violation of a legal rule; the latter does. Yet the truly difficult problems in determining the scope of the criminal law are left unresolved. We may share an intuitive sense that deportation, expatriation, tort damages, customs fines, and impeachment are not cases of criminal punishment, yet it is by no means easy to explain why. It is particularly difficult to explain why a prison term for the morally neutral act of possessing brass knuckles is a case of criminal punishment, but deportation for a morally heinous act is not. It may be that in a legal context, we can do no better than associate the criminal process with certain characteristic sanctions, such as capital punishment, whipping, and punitive (rather than therapeutic) confinement. This association is, of course, historically determined. It is a far cry from a theory of punishment or of the criminal process.

G. FLETCHER, *RETHINKING CRIMINAL LAW* 411-12 (1978) (footnote omitted).

32. J. HALL, R. FORCE, & B.J. GEORGE, JR., *CRIMINAL LAW* 707-11 (1983).

33. Retribution is "the deserved infliction of suffering on evildoers . . ." J. VORENBERG, *CRIMINAL LAW AND PROCEDURE* 40 (1981) (quoting H.L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 36 (1968)). The justification for retribution is that "only through suffering punishment can the criminal expiate his sin." J. VORENBERG, *supra*, at 41 (quoting H.L. PACKER).

34. The Model Penal Code includes rehabilitation and deterrence as legitimate purposes of punishment. "Section 1.02 Purposes; Principles of Construction: (2) The general purposes of the provisions governing the sentencing and treatment of offenders are: (a) to prevent the commission of offenses; (b) to promote the correction and rehabilitation of offenders; . . ." MODEL PENAL CODE § 1.02 (Proposed Official Draft) (1962). Under the New York Penal Law, the "general purposes" of its provisions include rehabilitation, deterrence, and incapacitation. N.Y. PENAL LAW § 1.05(6) (McKinney 1987).

Section 1.05 also specifically points to the concerns of the crime victim. One of the "purposes" of the Penal Law, as listed in that section, is "[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community." N.Y. PENAL LAW § 1.05(5) (McKinney 1987).

35. It has been said:

[I]t is only reasonable that those who voluntarily comply with the rules be provided some assurance that they will not be assuming burdens which others are unprepared to assume. Their disposition to comply voluntarily will diminish as they learn that others are with impunity renouncing burdens they are assuming . . . [I]t is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. . . . Justice—that is punishing such individuals—restores the

Moreover, one important purpose of the criminal law is to channel feelings of vengeance into societally approved, non-threatening actions. Failure to enforce the law may result in violent self-help.³⁶

In addition, the district attorney's failure to act in at least two of these three scenarios creates favored and disfavored classes. In Scenario II, the government has, in effect, created two classes—the spouse abusers, who are beyond the law, and the abused spouses, who are without remedy under the criminal law. In Scenario III, the two classes are the police officers, who are given special favor, and those beaten by police, who are deprived of equal status at law. The creation of favored and disfavored groups clearly violates the fundamental guarantee of evenhanded justice.³⁷

In all three scenarios the system is misused. In Scenario I, the system is misused by a false victim. In Scenarios II and III, the system is misused in that, rather than being the vehicle for justice that it was intended to be, the system is actually used to obstruct justice by blocking the filing of criminal charges.

In Scenarios I and III (if, in III, the defendant is charged with resisting arrest, assault on the arresting officer, or a similar crime), the task of the fact-finder, judge or jury, is skewed because only half of the case is being tried. While the defendant may, indeed, put on a defense, that defense may not be the same as the affirmative case he would have offered had he also been a complainant in the criminal case.

Obviously, it would be far fairer to allow both sides to press charges against each other; but the system does not—at present—always work that way. As a result, only half the case is tried and, in Scenario I, B, the person who was arrested only because he did not get to the precinct first, is at a tremendous procedural disadvantage in litigation and plea bargaining.

Furthermore, the person who, in Scenario I, was not allowed to press charges simply because he arrived at the police station second, and the victim of police brutality in Scenario III, who is not allowed to press criminal charges against

equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.

H. MORRIS, ON GUILT AND INNOCENCE 33-34 (1976), *quoted in* KADISH, SCHULHOFER, AND PAULSEN, CRIMINAL LAW AND ITS PROCESSES 189 (1983).

Of nonenforcement, Bentham wrote:

But when we consider that an unpunished crime leaves the path of crime open not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all.

J. BENTHAM, THE RATIONALE OF PUNISHMENT 19-21 (3d ed. 1836), *quoted in* J. VORENBERG, *supra* note 33, at 390.

36. "[P]unishment is justifiable because it provides an orderly outlet for emotions that, denied it, would express themselves in socially less acceptable ways." J. VORENBERG, *supra* note 33, at 40-41 (quoting H.L. PACKER).

37. E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 7 (1960). "Uniformity or regularity is included in the conventional definition of criminal law because law attempts to provide evenhanded justice without respect to persons." *Id.*

the police officer, are seriously injured by being deprived of bargaining power in the litigation. Both are labelled "defendants" (as opposed to their adversaries, who are referred to as "complainants"), which immediately diminishes their credibility and power. More importantly, they are deprived of the chance to take the offensive. At best, they may be acquitted and returned to the *status quo ante*. But they cannot gain anything; they cannot place their adversary in jail or have him fined. As a result, their bargaining power is severely impaired.

In the cross-complaint situation (Scenario I), had B been successful in lodging criminal charges against A, he would have significantly increased the likelihood of having the case against him dismissed—on the condition that he consent to the case against A being dismissed as well.³⁸ And in Scenario III, as noted above, where a criminal defendant is successful in charging the arresting officers with brutality the district attorney frequently urges both sides to drop the charges.³⁹ In both these situations, the classic cross-complaint scenario and the police brutality scenario, courts have recognized the strategic advantages and the tactical power inherent in being able to bring such countercharges.⁴⁰

38. *People v. Vial*, 132 Misc. 2d 5, 502 N.Y.S.2d 930 (Crim. Ct. 1986).

39. See *supra* text accompanying note 29.

40. See *Vial*, 132 Misc. 2d at 7, 502 N.Y.S.2d at 932. The court stated: "On March 25, 1986, recognizing that the complainant/defendant James Jones would be severely prejudiced by the dismissal of his complaint against the defendant/complainant James Vial, the court authorized the filing of the instant information drawn against Vial . . ." *Id.* See also *People ex rel. Luceno v. Cuzzo*, 97 Misc. 2d 871, 412 N.Y.S.2d 748 (Westchester County Court 1978). The court opined that "[t]he filing of a criminal action [by a defendant or the defendant's attorney] against a police officer on allegations of fact which arise out of the same transaction or occurrences from which a defendant is charged, places the police and the prosecuting police officers at a severe tactical disadvantage in court proceedings." *Id.*

Of course, the reverse situation may also occur. Schwartz, in his study of the Philadelphia District Attorney's handling of complaints against the police, observed:

The "complainant's satisfaction" policy is manifested in the disposition of complaints on a nonprosecution basis whenever C [the complainant] will be satisfied if the policeman receives a reprimand or short-term suspension. Sometimes a file gives evidence of an affirmative effort by the assistant district attorney to secure agreement by C to some such compromise or settlement. The process may end up with a "mutual release" understanding in which both sides drop their charges against each other. Again, the practice is understandable from the point of view of a busy prosecutor seeking to clear his docket of as many cases as possible. But the adverse consequences and social cost of the practice are excessive: cases which should result in some sanctions against the police are washed out without even a reprimand to the policeman. *An incentive is established for the policeman involved in any complaint to file charges against C for bargaining purposes, and sometimes such charges are filed only after the private citizen has complained.*

Schwartz, *supra* note 23, at 1026 (emphasis added).

In fact, the ability to initiate litigation is so potent a bargaining chip that the criminal justice system is also concerned with the threat of civil litigation. As a result a practice has grown up in which prosecutors routinely ask—or require—criminal defendants alleging police brutality to agree not to sue the police or the municipality civilly in return for a dismissal of the criminal charges against them. This practice was recently approved by the Supreme Court in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). See also *Macdonald v. Musick*, 425 F.2d 373 (9th Cir.), *cert. denied*,

In theory, if a crime victim has a judicially cognizable interest in a criminal prosecution, that interest will be vindicated by the public prosecutor who will file charges and initiate the prosecution. The problem with this theory is that prosecutors do not—and are not legally required to—prosecute every case brought to them or even every case in which they have probable cause. For a variety of reasons, prosecuting attorneys have almost absolute discretion in determining whether or not to prosecute.⁴¹ The courts will not direct the prosecutor to prosecute.⁴² As the Supreme Court recently observed:

Our decisions . . . uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute. Their reasons for judicial deference are well-known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions “are not readily susceptible to the kind of analysis the courts are competent to undertake,” we have been “properly hesitant to examine the decision whether to prosecute.”⁴³

Prosecutorial discretion is one thing in theory—and another in practice. The extent of prosecutorial discretion can be easily illustrated by the use of statistics taken from prosecutors' offices. For example, the New York County District Attorney's office maintains a Consumer Protection and Complaint Bureau to receive and screen complaints of citizens who feel they have been the victims of crimes. The most recent statistics available from that office indicate that in 1983 the bureau received 8600 complaints; from those complaints the District

400 U.S. 852 (1970); *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); and *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 620 P.2d 628, 170 Cal. Rptr. 42 (1980) (defendant's release from civil liability included private persons as well as law enforcement officers and the municipality).

In New York, see *Dziuma v. Korvetes*, 61 A.D.2d 677, 403 N.Y.S.2d 269 (App. Div. 1978) (vacating as “inherently coercive” a release from civil liability imposed on criminal defendant *sua sponte* by trial court at time of prosecutor's motion for dismissal). See also *People v. Wilmot*, 104 Misc. 2d 412, 428 N.Y.S.2d 568 (Crim. Ct. 1980). For a general discussion of such stipulations and their relationship to the “give-and-take” of plea bargaining, see *People v. Wei Chen*, 104 Misc. 2d 1057, 430 N.Y.S.2d 469 (White Plains City Court 1980); *People v. Siragusa*, 81 Misc. 2d 368, 366 N.Y.S.2d 336 (Dist. Ct. 1975).

41. *United States v. Kysar*, 459 F.2d 422 (10th Cir. 1972); *New York v. Muka*, 440 F. Supp. 33 (N.D.N.Y. 1977); *Moss v. Ward*, 434 F. Supp. 69, 71 (S.D.N.Y. 1977); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *Siragusa*, 81 Misc. 2d 368, 366 N.Y.S.2d 336; *Johnson v. Boldman*, 24 Misc. 2d 592, 203 N.Y.S.2d 760 (1960); *Prentice v. Gulotta*, 13 Misc. 2d 280, 176 N.Y.S.2d 433 (1958).

42. *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (1973); *Pugach*, 193 F. Supp. at 635 (“[I]t is not the business of the Courts to tell the United States Attorney to perform what they perceive to be his duties.”); *People v. Mackell*, 47 A.D.2d 209, 366 N.Y.S.2d 173 (1975), *aff'd*, 40 N.Y.2d 59, 386 N.Y.S.2d 37 (1976); *Hassan v. Magistrates' Court of N.Y.*, 20 Misc. 2d 509, 191 N.Y.S.2d 238 (1959); *Siragusa*, 81 Misc. 2d 368, 366 N.Y.S.2d 336; *Matter of McDonald v. Sobel*, 272 A.D. 455, *aff'd*, 297 N.Y. 679 (1947).

43. *Newton*, 480 U.S. at 396 (citations and footnote omitted).

Attorney's office chose to file 180 cases (2.09% of the complaints received). In 1984, the bureau received 8400 complaints and filed 198 cases (2.36% of the complaints received).⁴⁴

Even allowing for the many mentally ill who undoubtedly report their grievances to this bureau and the avalanche of "bad check" complaints that the office, in the exercise of its discretion, declines to prosecute,⁴⁵ it is significant that in 1983 and 1984 the District Attorney declined to prosecute over 97.5% of the complaints received. The huge number of complaints which district attorneys decline to prosecute exemplifies the enormous scope of prosecutorial discretion.

If the public prosecutor cannot be relied upon by the victim to prosecute his case, who will vindicate the victim's interest in a criminal prosecution?

III. THE TRADITION OF PRIVATE PROSECUTION IN NEW YORK

Section 700 of the New York County Law appears to require that *all* criminal prosecutions be handled by the district attorney:

Section 700. District attorney; powers and duties

1. It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed⁴⁶

44. 1983-84 NEW YORK COUNTY DIST. ATT'Y REP. 48. Interestingly, these figures reflect a decreasing exercise of discretion not to prosecute. In 1978, the bureau received 14,200 complaints; from these complaints the District Attorney's office filed 29 cases, .2042253% of the complaints received. 1979 NEW YORK COUNTY DIST. ATT'Y REP. 74. In 1979, the bureau received 11,300 complaints and filed 57 cases, .504247% of the complaints received. 1980 NEW YORK COUNTY DIST. ATT'Y REP. 109. And in 1980, the bureau processed 11,466 complaints and filed 72 cases, .6279434% of the complaints received. 1980 NEW YORK COUNTY DIST. ATT'Y REP. 109.

45. Comment, *Prosecutorial Discretion at the Complaint Bureau Level*, 3 HOFSTRA L. REV. 81, 104-05 (1975).

46. Section 700(1) continues:

[E]xcept when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county where the indictment is found to conduct the trial of the indictment so removed, and it shall be the duty of the district attorney of the county to which such trial is changed to assist in such trial upon the request of the district attorney of the county where the indictment was found. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors.

N.Y. COUNTY LAW § 700(1) (McKinney 1972). Section 927 imposes the same duties more specifically on the district attorneys of the counties of New York City and specifically incorporates § 700:

Section 927. General duties of district attorneys

It shall be the duty of the district attorney of the respective counties of New York, Bronx, Kings, Queens and Richmond to prosecute all crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed, except when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county where the indictment is found to conduct the trial of the indictment so removed, but said district attorney shall assist in the trial of an indictment removed to his county for trial, upon request of the

The language of this section has not been interpreted literally,⁴⁷ however, and other statutes are relevant to its interpretation. There is nothing in either the New York Criminal Procedure Law ("CPL") or the New York Penal Law that requires a criminal case to be prosecuted by a "prosecutor." The CPL does, however, define "prosecutor": "Prosecutor" means a district attorney or any other public servant who represents the people in a criminal action."⁴⁸ "Public servant" is defined as "(a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee"⁴⁹ While the definitions of "prosecutor" and "public servant" are recursive, it seems clear that anyone who prosecutes a criminal case is a public servant, and, being a public servant, is a "prosecutor." There is, then, nothing in either the CPL or the Penal Law to prevent counsel for the complainant from prosecuting the case himself.⁵⁰ Indeed, it is expressly permitted.

district attorney of the county wherein the indictment was found. He shall perform the duties prescribed in section seven hundred of this chapter and such other duties as are prescribed by law.

N.Y. COUNTY LAW § 927 (McKinney 1972).

47. *People ex rel. Allen v. Citadel Management Co.*, 78 Misc. 2d 626, 627, 355 N.Y.S.2d 976, 978 (Crim. Ct. 1974). "[D]espite sections 700 and 927 of the County Law, it has long been common practice for the complainant to conduct the prosecution in certain cases, generally involving violations." *Id.*

48. N.Y. CRIM. PROC. LAW § 1.20(31) (McKinney 1981) (emphasis added).

49. N.Y. PENAL LAW § 10.00(15) (McKinney 1987) (emphasis added). "Public servant" is not defined in New York's Criminal Procedure Law. However, § 1.20 of New York's Criminal Procedure Law states: "Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in Section 10.00 of the penal law are applicable to this chapter" N.Y. CRIM. PROC. LAW § 1.20 (McKinney 1987).

50. In *People v. Vlasto*, 78 Misc. 2d 419, 426, 355 N.Y.S.2d 983, 989 (Crim. Ct. 1974), Judge Alfred Kleiman discussed this issue:

Defendant contends that by reason of CPL § 1.20 (subd. 1) of the Criminal Procedure Law a private attorney cannot represent the People. This section defines a "Prosecutor" as "a district attorney or any other public servant who represents the people in a criminal action." (CPL 1.20, subd. 31.) Was it the intention of the Legislature in enacting this section to limit all prosecutions to district attorneys and other public officials? The Assistant Attorney-General, in his affidavit, agrees with defendant's contention stating that "there does not appear to be statutory authority for a private attorney to represent the People of the State of New York as the prosecutor in a criminal action." If such is the law, must it not necessarily follow that since a criminal action is commenced with the filing of an accusatory instrument (CPL 1.20, subds. 16, 17), the District Attorney or other designated public servant alone may file an information or misdemeanor complaint? (The Assistant District Attorney, in his affidavit, took no position on these issues.)

Since the court finds the determination of this motion is not dependent on the resolution of these issues, they must await resolution in an appropriate case.

78 Misc. 2d at 426, 355 N.Y.S.2d at 989 (emphasis in original). While purporting not to decide this issue, finding it unnecessary to the determination of the motion, Judge Kleiman nevertheless appears skeptical of the existence of the right of private prosecution under the New York Criminal Procedure Law. The flaw in his reasoning is his failure to examine the definition of "public servant" in the New York Penal Law. See *supra* notes 48-49 and accompanying text.

There is a strong common law tradition of private prosecution in New York. The vast majority of cases and opinions of the State Comptroller and Attorney General support the proposition that someone other than the district attorney may prosecute a criminal case. The lower courts have repeatedly approved prosecutions by government lawyers other than the district attorney, despite the plain language of County Law sections 700 and 927.⁵¹ In addition, the State Attorney General and the Comptroller have uniformly taken the position that, despite sections 700 and 927, lawyers for the state other than the district attorney may prosecute criminal cases.⁵²

The New York Court of Appeals has, without exception, approved such private prosecutions.⁵³ In approving a prosecution of a traffic offense by a Deputy Town Attorney, the court said: "It is no longer open to question that petty crimes or offenses of this nature may be prosecuted in courts of special sessions by administrative officers and attorneys other than the District Attorney"⁵⁴

The prosecutor need not even be a lawyer. The Court of Appeals has approved a prosecution conducted by the complaining witness, a Deputy Sheriff.⁵⁵ Similarly, the arresting officer may prosecute a case.⁵⁶ In addition, one lower court affirmed the conviction for a misdemeanor violation of the game laws prosecuted by an inspector of the Conservation Department, a person admittedly not licensed to practice law.⁵⁷ The court stated:

We do not believe that the Legislature of this State sought to bring about so absurd a situation as is here presented. If it were intended that every time

51. *Santacrose v. Bean*, 52 Misc. 2d 167, 275 N.Y.S.2d 418 (Sup. Ct. 1964) (district attorney need not appear to prosecute traffic infractions); *People v. Apostle*, 30 Misc. 2d 55, 214 N.Y.S.2d 101 (Rockland County Ct. 1961) (prosecution by attorney for Parks Commission); *Johnson v. Boldman*, 24 Misc. 2d 592, 203 N.Y.S.2d 760 (Sup. Ct., Spec. Term. 1960) (district attorney not required to prosecute violations of local ordinances); *People v. Lanni*, 10 Misc. 2d 42, 168 N.Y.S.2d 35 (Monroe County Ct. 1957) (prosecution of Vehicle and Traffic Law violation not by district attorney; defendant does not have right to choose his prosecutor); *People v. Montgomery*, 7 Misc. 2d 294, 166 N.Y.S.2d 455 (N.Y.C. Spec. Sess. Richmond County 1957) (Corporation Counsel prosecuted violation of sanitary code with no prejudice to the defendant; "the right to prosecute is not vested exclusively in the District Attorneys"); *Coleman v. Lee*, 1 Misc. 2d 685, 148 N.Y.S.2d 753 (Sup. Ct., Spec. Term. 1956) (city attorney prosecuted violations of local ordinances); *People ex rel. Bruckner v. Wyner*, 207 Misc. 673, 142 N.Y.S.2d 393 (1955) (prosecution by village attorney for intoxicated driving).

52. INF. OP. ATTY. GEN. 125 (1966); INF. OP. ATTY. GEN. 118 (1965); INF. OP. ATTY. GEN. 66 (1963); 12 OP. N.Y. COMP. 7922 (1956); 8 OP. N.Y. COMP. 119 (1952); 6 OP. N.Y. COMP. 117 (1950).

53. *People v. Leombruno*, 10 N.Y.2d 900, 179 N.E.2d 517, 223 N.Y.S.2d 516 (1961) (prosecution by village attorney); *People v. Schildhaus*, 4 N.Y.2d 883, 150 N.E.2d 768, 174 N.Y.S.2d 465 (1958) (sanitary code violation prosecuted by Corporation Counsel).

54. *People v. Czajka*, 11 N.Y.2d 253, 254, 183 N.E.2d 216, 217, 228 N.Y.S.2d 809, 810 (1962).

55. *People v. DeLeyden*, 10 N.Y.2d 293, 294, 177 N.E.2d 924, 924, 220 N.Y.S.2d 961, 962 (1961).

56. INF. OP. ATTY. GEN. 74, 77 (1962). See also *People v. Caputo* No. 2492-1935 (Westchester County Court 1935) (not officially reported), cited in *People ex rel. Bruckner v. Wyner*, 207 Misc. 673, 676, 142 N.Y.S.2d 393, 396 (Westchester County Court 1955).

57. *People v. Black*, 156 Misc. 516, 282 N.Y.S. 197 (1935).

a rabbit be snared or a frog speared after dark that the heavy artillery of the offices of the Attorney-General or the District Attorney be wheeled into action, then the said Legislature was flying in the face of common sense and upsetting a century-old institution.⁵⁸

The opinions holding that a lay complainant or his lawyer may prosecute a criminal case are numerous.⁵⁹ It has been said that "particularly where complaints are instituted by private persons, the district attorney historically and traditionally need not and does not prosecute such crimes, but that the complainant may do so himself or by an attorney retained by him."⁶⁰ Indeed, "it is commonplace for the Magistrates to avail themselves of the services of counsel representing the complaining witnesses."⁶¹ The leading case on point is the Court of Appeals decision in *People v. Van Sickle*,⁶² in which the court affirmed the third-degree assault conviction of a defendant prosecuted by the lay complaining witness. "Neither the District Attorney nor an assistant was present at the trial, the charge was not preferred or prosecuted by a public officer, but by the woman who claimed to have been mauled by defendant in the washroom."⁶³ Judge Van Voorhis, in his concurring opinion, approvingly quoted *People v. Wyner*: "Historically, the District Attorney has seldom appeared in police courts, which are now the Courts of Special Sessions. The right of the complainant to prosecute the case himself or to hire an attorney to assist him has never been doubted."⁶⁴

Expanding upon Chief Judge Desmond's terse, one paragraph opinion for the majority,⁶⁵ Judge Van Voorhis noted that district attorneys frequently have insufficient staffs and resources to prosecute all misdemeanors and lesser offenses in the various lower courts of the state:

In these courts there are certain to be situations, like the present, where the charges have not been preferred through public officials and where there

58. *Id.* at 519, 282 N.Y.S. at 201.

59. *See infra* notes 60-67.

60. OP. N.Y. ATT'Y GEN. 117, 119 (1958). *See also* *People v. Polunov*, N.Y.L.J., March 21, 1986, at 15, col. 4 (App. Term 9th and 10th) (private attorney prosecuted zoning violation).

61. *People ex rel. Kohler v. Scharer*, 185 Misc. 616, 617, 58 N.Y.S.2d 87, 89 (N.Y.C. Magis. Ct. War Emerg. Ct. Brooklyn 1945), *quoted approvingly in* *People ex rel. Bruckner v. Wyner*, 207 Misc. 673, 675, 142 N.Y.S.2d 393, 395-96 (1955).

62. *People v. Van Sickle*, 13 N.Y.2d 61, 192 N.E.2d 9, 242 N.Y.S.2d 34 (1963).

63. *Id.* at 63, 192 N.E.2d at 9, 242 N.Y.S.2d at 35.

64. *Id.* at 64-65, 192 N.E.2d at 10, 242 N.Y.S.2d at 37 (Van Voorhis, J., concurring) (quoting *People ex rel. Bruckner v. Wyner*, 207 Misc. 673, 674, 142 N.Y.S.2d 393, 395 (1955)).

65. The narrow holding of Chief Judge Desmond's majority opinion, concurred in by three other judges, was that a criminal conviction should not be reversed solely because the case was prosecuted by the lay victim rather than the public prosecutor. In dictum, however, Chief Judge Desmond suggested that the district attorney "must set up a system whereby he knows of all the criminal prosecutions in his county and either appears therein in person or by assistant or consents to appearance on his behalf by other public officers or private attorneys." *Van Sickle*, 13 N.Y.2d at 62-63, 192 N.E.2d at 9, 242 N.Y.S.2d at 35. Judge Van Voorhis' concurrence expressly disagreed with this dictum. *Id.* at 65, 192 N.E.2d at 10, 242 N.Y.2d at 37 (Van Voorhis, J., concurring in result).

would be no one but the complaining witness to press the charge which would otherwise be dropped by default. It would be impractical, nor do we consider that the statute requires that a lawyer be employed in every instance to act *ad hoc* under and with the consent of the District Attorney if the District Attorney or his office cannot be present. A threshold problem would almost always arise in such instances: who would compensate the lawyer? We consider that a complaining witness has *prima facie* the right to conduct such a prosecution if the District Attorney does not do so, but must abide by the same rules of fairness and of law which would bind a public law officer if he were present.⁶⁶

The present state of the law clearly permits the complainant or his attorney to prosecute a criminal case; as one court noted: "So far as the defendant is concerned, it is not for him to select his prosecutor. If he has committed a crime against the People of the State, it is for the People of the State to say by whom they shall be represented on his trial."⁶⁷

IV. INITIATING A PRIVATE PROSECUTION IN NEW YORK: TWO MODELS

The realization that the district attorney will not prosecute certain individual offenders or groups of offenders leads inevitably to consideration of "private prosecution"—criminal prosecution by the victim or his lawyer without the participation of the district attorney. Private prosecution can be used whenever the police or the public prosecutor fail to commence proceedings against a lawbreaker. But how does one initiate a private prosecution in New York?

There are at least two different ways for a civilian to file charges against an offender without the concurrence of the district attorney in New York. The first allows for no screening of the complaint by the judiciary—at least at the stage at which the complaint is filed. The second requires that the complaint be approved by the judiciary.

A. Model I: Direct Filing—No Judicial Screening

The first step in the process toward a crime victim's criminal prosecution of an offender when the public prosecutor declines to prosecute is the filing of a criminal complaint with the court. This can be done without any judicial determination of the merits of the complaint; under little known and even less utilized New York law, all the victim has to do is draw up the complaint and file it directly with the court. In New York County, for example, criminal complaints are prepared in the District Attorney's "Complaint Room" by an assistant district attorney.⁶⁸ There appears, however, to be no legal reason why the district attorney should have a *de facto* monopoly on the filing of criminal charges.⁶⁹ There is no apparent legal bar to someone other than the district

66. *Id.*

67. *People v. Kramer*, 33 Misc. 209, 220, 68 N.Y.S. 383, 391 (Gen. Sess. 1900).

68. *But see infra* text accompanying notes 156-201.

69. "It should be noted that prior to 1967, in New York City, the preparation of misdemeanor and felony complaints was a function of the court. Subsequent to that date this function was transferred *administratively* to the various District Attorneys except as to the Summons Part of the Court." *People v. Doherty*, 98 Misc. 2d 878, 880, 414 N.Y.S.2d 844, 845 (Crim. Ct. 1979) (emphasis added).

attorney filing a criminal complaint directly with a criminal court. The district attorney need not be involved in any way.⁷⁰

The New York Criminal Procedure Law states that a criminal action commences with the filing of an accusatory instrument.⁷¹ The accusatory instrument definition includes: an "indictment," a "superior court information," an "information," a "prosecutor's information," a "simplified information," a "misdemeanor complaint," or a "felony complaint."⁷² An indictment may be voted only by a grand jury.⁷³ A superior court information⁷⁴ and a prosecutor's information⁷⁵ are accusations by a district attorney, and a simplified information is an accusation by a police officer or other authorized public servant.⁷⁶ However, an information, a misdemeanor complaint, and a felony complaint are each defined as "a verified written accusation *by a person*"—not just by a prosecutor, police officer, or other public servant⁷⁷—that is "filed with a local criminal court."⁷⁸

This language, unfortunately, is not unambiguous. There may well be a distinction between the maker of the accusation and the filer of the accusatory instrument. The fact that informations, misdemeanor complaints, and felony complaints do not require accusations by district attorneys, police officers, or

70. *But see* *People v. Vlasto*, 78 Misc. 2d 419, 355 N.Y.S.2d 983 (Crim. Ct. 1974) (holding that only the district attorney may prosecute a case in which defendant may be sentenced to more than six months in jail). The *Vlasto* court's reasoning and holding are criticized *supra* at note 50.

71. N.Y. CRIM. PROC. LAW §§ 1.20 (16)(a), (17); 100.5 (McKinney 1984). *See also* *People v. Osgood*, 52 N.Y.2d 37, 417 N.E.2d 507, 436 N.Y.S.2d 213 (1980) (filing of a felony complaint commenced criminal action); *People v. Lomax*, 50 N.Y.2d 351, 406 N.E.2d 793, 428 N.Y.S.2d 937 (1980) (if more than one accusatory instrument is filed a criminal action commences when first instrument is filed).

72. N.Y. CRIM. PROC. LAW § 1.20 (1) (McKinney 1984).

73. *Id.* §§ 1.20(3), 200.10.

74. *Id.* §§ 1.20(3)(a), 200.15.

75. Sections 1.20(6) and 100.10(3) define a prosecutor's information as "a written accusation *by a district attorney . . . filed with a local criminal court . . .*" N.Y. CRIM. PROC. LAW §§ 1.20(6), 100.10(3) (McKinney 1984) (emphasis added).

76. Sections 1.20(5)(b),(c),(d) and 100.10(2)(a),(b),(c) define a "simplified traffic information," a "simplified parks information," and a "simplified environmental conservation information" as "a written accusation . . . *by a police officer, or other public servant authorized by law to issue same, filed with a local criminal court . . .*" N.Y. CRIM. PROC. LAW §§ 1.20(5)(b),(c),(d), 100.10(2)(a),(b),(c) (McKinney 1984) (emphasis added). *See also* *People v. Shapiro*, 61 N.Y.2d 880, 462 N.E.2d 1188, 474 N.Y.S.2d 470 (1984) (where village did not have authority to maintain its own constabulary, village constable was not authorized to issue simplified traffic information).

77. Moreover, "[a]ny local criminal court accusatory instrument may be filed with a district court of a particular county when an offense charged therein was allegedly committed in such county . . ." N.Y. CRIM. PROC. LAW § 100.55(1) (McKinney 1984). The same principle is applicable to the New York City Criminal Court, *id.* § 100.55(2), and all city courts, *id.* § 100.55(3). And "[t]he complainant may be any person having knowledge, whether personal or upon information and belief, of the commission of the offense or offenses charged." *Id.* § 100.15(1). These statutory sections support the proposition that anyone—not just a prosecutor or police officer—may file a criminal complaint directly with a criminal court.

78. N.Y. CRIM. PROC. LAW § 100.10 (1), (4), (5) (McKinney 1984) (emphasis added). *See also id.* § 1.20 (4) (informations); § 1.20 (7) (misdemeanor complaints); and § 1.20 (8) (felony complaints).

other authorized public servants does not conclusively prove that these instruments do not have to be *filed* by a government official. On the other hand, the fact that the legislature distinguished between accusations made by officials (a superior court information, a prosecutor's information, and a simplified information) and those that could be made by "a person" (informations, misdemeanor complaints, and felony complaints), without ever explicitly requiring that such citizen-initiated complaints had to be filed by government officials, raises a presumption that such a result was not intended.

In an enigmatically brief memorandum opinion in *People v. Shapiro*, the New York Court of Appeals apparently rejected the possible distinction between the accuser and the filer when it stated that "an ordinary information may be *filed* by any person," citing only CPL section 100.10(1) as its authority.⁷⁹

The *Shapiro* Court would have been on firmer ground if, in support of its statement that a civilian may file a complaint with a criminal court without the participation of a district attorney or peace officer, it had relied upon CPL section 110.20. That section, in its entirety, reads:

When a criminal action in which a crime is charged is commenced in a local criminal court, other than the criminal court of the city of New York, a copy of the accusatory instrument shall be promptly transmitted to the appropriate district attorney upon or prior to the arraignment of the defendant on the accusatory instrument. If a police officer or a peace officer is the complainant or the filer of a simplified information, or has arrested the defendant or brought him before the local criminal court on behalf of an arresting person pursuant to subdivision one of section 140.20, such officer or his agency shall transmit the copy of the accusatory instrument to the appropriate district attorney. In all other cases, the clerk of the court in which the defendant is arraigned shall so transmit it.⁸⁰

Because the purpose of section 110.20 is to assure that the district attorney knows of all accusatory instruments already filed with and acted upon by the courts,⁸¹ it is axiomatic that an instrument may be *filed* without the participation or even the knowledge of the district attorney. Section 110.20 provides that

79. *Shapiro*, 61 N.Y.2d at 882, 462 N.E.2d at 1188, 474 N.Y.S.2d at 470 (emphasis added). The principle that *anyone* may file a criminal complaint is bolstered by the language of the New York Court of Appeals in *People v. Hicks*, 38 N.Y.2d 90, 341 N.E.2d 227, 378 N.Y.S.2d 660 (1975), a case concerned with the sufficiency of the probable cause underlying a search warrant. The *Hicks* Court stated:

The sworn statements of private citizens who report crime in a honest and forthright manner, may, and should be relied upon by the police and the courts as a basis for further action. It is not uncommon to place such heavy reliance upon the role of citizen informers. For example, an information, a misdemeanor complaint and a felony complaint may be sworn out by 'any person having knowledge, whether personal or upon information and belief, of the commission of the offense or offenses charged.' 38 N.Y.2d at 94, 341 N.E.2d at 230, 378 N.Y.S.2d at 664 (citing N.Y. CRIM. PROC. LAW § 100.15 (1) (McKinney 1981)).

80. Section 110.20 is entitled: "Local Criminal Court Accusatory Instruments; Notice Thereof To District Attorney." N.Y. CRIM. PROC. LAW § 110.20 (McKinney 1981).

81. *Id.* § 110.20 commentary at 107.

where a police or other peace officer is involved in the filing, that officer must transmit the instrument to the appropriate district attorney; but if the filer of the accusatory instrument is a civilian and no such officer is involved, the clerk of the court must transmit the instrument. This section thus recognizes that an accusatory instrument can be filed without the participation of any officer or district attorney.

More than simply recognizing that civilians may file accusatory instruments with the courts without the knowledge and consent of the public prosecutor, CPL section 110.20 actually expresses the district attorney's desire not to know or participate in a whole class of criminal actions, namely "violations," offenses which carry penalties of up to 15 days in jail.⁸² Therefore, by the terms of CPL section 110.20, accusatory instruments charging violations may be filed without any notice to the appropriate district attorney. Two things should be noted about the nature of these violations when considering the way in which a private party might use them in filing a criminal complaint against another without the consent or knowledge of the local prosecutor. First, most of these offenses are notoriously broad in their scope,⁸³ lending themselves to selective

82. Section 110.20, by its express language, is limited to "criminal action[s] in which a crime is charged . . ." Despite the manifest infelicity of the terminology, a "criminal action" may be commenced for the commission of a *noncriminal* offense. The definitional section of the New York Criminal Procedure Law purports to define the term "criminal action." In fact, however, it merely describes a "criminal action" as commencing "with the filing of an accusatory instrument against a defendant in a criminal court . . ." N.Y. CRIM. PROC. LAW § 1.20(16) (McKinney 1981). In addition, the term "accusatory instrument" includes an "information" and a "prosecutor's information." *Id.* § 1.20(1) (McKinney 1981). Both of these types of accusatory instruments may be used to charge an offender "with the commission of one or more offenses . . ." *Id.* §§ 1.20(4), (6), 100.10(1), (3) (McKinney 1981). An offense is defined as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same." N.Y. PENAL LAW § 10.00(1) (McKinney 1987). Offenses are divided into crimes, N.Y. PENAL LAW § 10.00(6) (McKinney 1987); violations, N.Y. PENAL LAW § 10.00(3); and traffic infractions, N.Y. PENAL LAW § 10.00(2) (McKinney 1987). Crimes include felonies and misdemeanors, which are not violations. *Id.* § 10.00(6) (McKinney 1987). A "violation" is "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed." N.Y. PENAL LAW § 10.00(3) (McKinney 1987).

Since a violation is not a "crime" but may be the basis of a "criminal action," prosecutions on violation charges alone do not fall within the scope of N.Y. Crim. Proc. Law § 110.20. Hence, if a civilian files a complaint against another, charging violations only, the local district attorney is not to be notified.

It should be noted that the notification requirement only arises with respect to crimes, i.e., felonies and misdemeanors, and has no application to other violations and traffic infractions. This is designed intentionally to avoid situations where prosecutors would be flooded with matters *unnecessary to be brought to their attention*. The Legislature didn't want to cure the problem of no-notification by over-notification.

N.Y. CRIM. PROC. LAW § 110.20 commentary at 108 (McKinney 1981) (emphasis added).

83. In New York, the most frequently charged violations include:

PENAL LAW §140.05 Trespass.

A person is guilty of trespass when he knowingly enters or remains unlawfully in or

and arbitrary application. Second, while overcharging may be an inappropriate

upon premises.

PENAL LAW § 221.05 Unlawful possession of marihuana.

A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana.

PENAL LAW § 240.20 Disorderly conduct.

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

PENAL LAW § 240.25 Harassment.

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or
2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
3. He follows a person in or about a public place or places; or
4. As a student in school, college or other institution of learning, he engages in conduct commonly called hazing; or
5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

PENAL LAW § 240.35 Loitering

A person is guilty of loitering when he:

1. Loiters, remains or wanders about in a public place for the purpose of begging; or
2. Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphernalia; or
3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; or
4. Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities; or
5. Loiters or remains in or about school grounds, a college or university building or grounds, not having any reason or relationship involving custody or responsibility for a pupil or student, or any other specific, legitimate reason for being there, and not having written permission from anyone authorized to grant the same; or
6. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial

exercise of discretion for a prosecutor (public or private), there is nothing to prevent the private complainant from *undercharging* in order to keep the offense within the scope of a violation charge, thereby allowing him to file a violation complaint without any notice to the local prosecutor.

In *Matter of Maynard v. Shanker*,⁸⁴ for example, the petitions of parents of New York City school children alleged that respondents, the teachers' union and Board of Education officials, failed to provide education for their children during a teachers' strike. Although the court dismissed the petitions for facial insufficiency,⁸⁵ it perceptively discussed the individual's right to file criminal charges with a court. Petitioners charged respondents with violation of sections 3212(5)(a) & (b) of the New York Education Law.⁸⁶ The respondents replied that Education Law section 2570,⁸⁷ which erected a bureau of compulsory

transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing, or playing any musical instrument; or
7. Loiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence.

PENAL LAW § 240.35 (7) was held unconstitutional in *People v. Bright*, 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988).

PUBLIC LAW § 240.40 Appearance in public under the influence of narcotics or a drug other than alcohol.

A person is guilty of appearance in public under the influence of narcotics or a drug other than alcohol when he appears in a public place under the influence of narcotics or a drug other than alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

84. 59 Misc. 2d 55, 297 N.Y.S.2d 801 (Family Ct. 1969).

85. The court dismissed the petitions for failure to allege willful and unlawful intent and for failure to allege the illegal acts with sufficient particularity. *Id.* at 57, 297 N.Y.S.2d at 804.

86. In 1969, these sections read:

5. Duties of other persons.

a. No person shall induce a minor to absent himself from attendance upon required instruction or harbor him while he is absent or aid or abet him in violating any provision of part one of this article.

b. No person shall interfere with an attendance officer in the lawful pursuit of his duties, or neglect or refuse to answer his lawful inquiries.

N.Y. EDUC. LAW § 3212(5)(a), (b) and historical note at 271 (McKinney 1981).

87. In 1969, this section read, in pertinent part:

§ 2570. Bureau of compulsory education, school census and child welfare.

In a city having a population of one million or more there shall be a bureau of compulsory education, school census and child welfare. Said bureau shall consist of a director, an assistant director, a chief attendance officer, division supervising attendance officers and such other supervisors, attendance officers, enumerators, clerks and other employees as may be necessary to carry out the provisions of articles sixty-five and ninety-three of this chapter, and to perform other and related duties imposed by the provisions of any other statutes or requirements of the board of education. . . . The director of said bureau shall have the power to commit and parole delinquent children in the manner provided by section thirty-two hundred fourteen of this chapter, but such authority may be delegated in his absence or disability as the board of education shall provide. The superintendent of schools shall have general supervision of the bureau of compulsory education, school census and child welfare.

N.Y. EDUC. LAW § 2570 (McKinney 1981).

education, school census, and child welfare, and charged it with the duty of enforcing article 65 of the Education Law, "in effect bars anyone not professionally connected to the school system from proceeding under Article 65 of the Education Law."⁸⁸ Emphatically rejecting that assertion, the court observed that it is a general principle of the criminal law that "[o]rdinarily anyone who is directly harmed by alleged criminal conduct can file an accusatory information before a Magistrate,"⁸⁹ unless the statute criminalizing the conduct complained of expressly provides otherwise, or the relationship between the complainant and the criminal conduct is too attenuated.⁹⁰ The *Maynard* court went on to note that since the courts are frequently the only place where a complainant can secure redress, they have a responsibility not to decline jurisdiction even if they do not constitute the preferable forum.⁹¹

Because the CPL allows any person to file a criminal complaint with a court, unlike the prosecutor who cannot be directed to prosecute a case,⁹² a judge or court clerk who refuses to accept a complaint for filing can be mandamus and ordered to allow the filing. For example, in *Artis v. Keegan*,⁹³ an article 78 proceeding⁹⁴ in the nature of a writ of mandamus, the petitioner sought to compel the justice and clerk of the Albany Police Court to accept for filing an accusatory instrument charging one named and two unidentified police officers with assaulting the petitioner.⁹⁵ The two respondents had twice refused to accept this accusatory instrument. The *Artis* court noted that article 78 will not compel the performance of a discretionary act (like the district attorney's "duty" to prosecute)⁹⁶ but found that "petitioner is not seeking to compel the discretionary act of issuing a warrant,"⁹⁷ but, instead, merely seeks to compel

88. 59 Misc. 2d at 56, 297 N.Y.S.2d at 803.

89. *Id.*

90. *Id.*

91. The court said:

Section 1 of article XI of the New York State Constitution guarantees to the children of this State the right to public instruction. I know of no system where the enforcement of constitutional rights is entrusted solely to the public officials of the State.

"The judiciary is an indispensable part of the operation of * * * system. With the growing complexities of government it is often the one and only place where effective relief can be obtained * * * where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors." (Mr. Justice Douglas in *Flast v. Cohen*, 392 U.S. 83, 111.).

It may be that the Family Court is not the ideal forum to hear these complaints, (*People v. Anonymous*, 44 Misc. 2d 392), but this court cannot decline jurisdiction for that reason.

59 Misc. 2d at 56-57, 297 N.Y.S.2d at 804.

92. See *supra* text accompanying note 42.

93. *Artis v. Keegan*, 77 Misc. 2d 638, 354 N.Y.S.2d 504 (Sup. Ct. 1974).

94. Proceeding against Body or Officer. N.Y. CIV. PRAC. L. & R. art. 78 (McKinney 1981).

95. *Artis*, 77 Misc. 2d 638, 354 N.Y.S.2d 504.

96. See *supra* text accompanying notes 41-42.

97. Issuance of a warrant in this circumstance is, indeed, discretionary with the court, see *infra* text accompanying notes 116-20, but it appears that the *Artis* court may not have fully understood that under current statutory law, whether or not the court elects to issue a warrant, arraignment on the filed complaint may be mandatory. See *infra* text accompanying notes 109-19.

what the petitioner says is the ministerial act of accepting a document for filing."⁹⁸ The *Artis* court observed:

Pursuant to the applicable statutes (CPL § 100.10, subs. 1, 4, 5; § 100.55), "a person" is privileged to file an accusatory instrument and the existence of a legal privilege compels the conclusion that the appropriate public official has the legal duty to accept such instrument for filing. Any other conclusion would take away the privilege the said statutes specifically confer.⁹⁹

In reaching this conclusion, the *Artis* court relied on *Maynard v. Shanker*,¹⁰⁰ the requirements of section 2019 of the Uniform City Court Act ("UCCA"), and New York Judiciary Law section 255,¹⁰¹ requiring the clerk to keep, search for, and copy all records for inquiring members of the public. In addition to the U.C.C.A., the Uniform District Court Act,¹⁰² the Judiciary Law,¹⁰³ the Uniform Justice Court Act,¹⁰⁴ and the County

98. *Artis*, 77 Misc. 2d 638, 354 N.Y.S.2d 504. Because a ministerial duty is involved, the court stated that an article 78 proceeding will lie—even though it is related to a criminal case. *Id.* at 639, 354 N.Y.S.2d at 506 (citing *Koslow v. Morrison*, 4 Misc. 2d 158, 163, 160 N.Y.S.2d 455, 458 (Sup. Ct., Spec. Term 1956)). See also *Sackinger v. Nevins*, 114 Misc. 2d 454, 457-58, 451 N.Y.S.2d 1005, 1008 (Sup. Ct. 1982).

99. 77 Misc. 2d at 639, 354 N.Y.S.2d at 504. See also *OP. N.Y. ATT'Y GEN.* 125 (1979).

100. See *supra* notes 84-91 and accompanying text.

101. The New York Judiciary Law states:

A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found.

N.Y. JUD. LAW § 255 (McKinney 1983).

102. The District Court Act states:

All judges of the court shall keep or cause to be kept legible and suitable records and dockets of all criminal actions and proceedings separate and apart from the records and dockets of civil actions and proceedings kept by them or by clerks of their respective courts.

N.Y. UNIFORM DIST. CT. ACT § 2019 (McKinney 1963).

103. "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." N.Y. JUD. LAW § 255-b (McKinney 1983).

104. New York law requires that:

Each justice shall keep or cause to be kept legible and suitable books, papers, records and dockets of all civil actions and proceedings and all criminal actions and proceedings. The rules may prescribe their form, care, custody and disposition, provided, however, that in any county or part of a county where the district court system has been duly adopted, all the dockets of the town justices then on file or required to be filed, in the office of the town clerk, shall be transferred to the office of the clerk of the district court and there kept and maintained in the same manner as other official records of the district court and responsibility for such records on the part of the town shall cease.

N.Y. UNIFORM JUST. CT. ACT § 107 (McKinney 1988).

All justices of courts governed by this act shall keep or cause to be kept legible and

Law¹⁰⁵ all contain similar record-keeping requirements. As the *Artis* court stated, "it is difficult to perceive how the respondents can properly comply with these statutory duties if they do not accept the accusatory instrument for filing."¹⁰⁶

In short, a judge or clerk of a local criminal court in New York is required to accept for filing any sufficient accusatory instrument presented to him, and, if he refuses, compliance may be compelled through mandamus proceedings.¹⁰⁷

Whether it is prudent to allow private individuals to file criminal complaints without either the consent of the public prosecutor or screening by a magistrate depends upon the significance of the filing of a criminal complaint. Simply

suitable records and dockets of all criminal actions and proceedings. The rules may govern the manner, form, care, custody and disposition of such records.

Id. § 2019 (McKinney 1975).

The records and dockets of the court, except as otherwise provided by law shall be at reasonable times open for inspection to the public and shall be and remain the property of the village or town of the residence of such justice, and at the expiration of the term of office of such justice shall be forthwith filed by him in the office of the clerk of such village or town, provided, however, that if such records and dockets are transferred pursuant to section twenty hundred twenty-one of the uniform district court act, the responsibility for such records and dockets by the city, village or town shall cease and they shall be the property of the district court to which they are transferred. The record of every criminal action shall state the names of the witnesses sworn and their places of residence, and if in a city, the street and house number; and every proceeding had before him. It shall be the duty of every such justice, at least once a year and upon the last audit day of such village or town, to present his records and docket to the auditing board of said village or town, which board shall examine the said records and docket, or cause same to be examined and a report thereon submitted to the board by a certified public accountant or a public accountant and enter in the minutes of its proceedings the fact that they have been duly examined, and that the fines therein collected have been turned over to the proper officials of the village or town as required by law. Any such justice who shall willfully fail to make and enter in such records and docket forthwith, the entries by this section required to be made or to exhibit such records and docket . . . to the auditing board as herein required, shall be guilty of a misdemeanor and shall, upon conviction, in addition to the punishment provided by law for a misdemeanor, forfeit his office.

N.Y. UNIFORM JUST. CT. ACT § 2019-a (McKinney 1988).

105. The New York County Law requires that:

The clerk of any of the counties comprising the city of New York, upon payment of the fee prescribed therefore, shall diligently search the files, papers, records and dockets in his office, when so requested, and make one or more transcripts therefrom, and certify to the correctness thereof, or certify that a document or paper, of which custody legally belongs to him, cannot be found.

N.Y. COUNTY LAW § 925 (McKinney 1972).

106. 77 Misc. 2d at 640, 354 N.Y.S.2d at 507. "The keeping of records of the court and certifying and furnishing true copies thereof are among the fundamental duties of a Clerk of the Court and his assistants. The acts are ministerial in nature . . ." *People ex rel. Harris v. Lindsay*, 21 A.D.2d 102, 105, 248 N.Y.S.2d 691, 695, *motion granted*, 14 N.Y.2d 841, 200 N.E.2d 579, 251 N.Y.S.2d 688 (1964).

107. The article 78 action must be brought against the court, not the prosecutor. One article 78 proceeding, apparently inspired by *Artis*, was dismissed because it was mistakenly brought against the prosecutor, rather than the court. *In re Maniscalco*, N.Y.L.J., June 30, 1978 at 17, col. 1, 2 (N.Y. Sup. Ct. 1978).

because an accusatory instrument has been filed by a private citizen does not mean that the case will, in fact, be prosecuted. Nonetheless, the filing of the accusatory instrument does constitute the commencement of a criminal action against the accused;¹⁰⁸ and once the instrument has been filed, the case must automatically proceed in some manner. The court cannot simply do nothing, thereby abrogating the private prosecution;¹⁰⁹ it has a duty to bring the accused before it and arraign him.¹¹⁰ New York Criminal Procedure Law section 170.10(1) states that “[f]ollowing the filing with a local criminal court of an [accusatory instrument charging other than a felony] the defendant *must* be arraigned thereon.”¹¹¹ This section is applicable to accusatory instruments charging the commission of misdemeanors and/or violations only; there is no corresponding section applicable to felony complaints.¹¹² According to this section, once a non-felony accusatory instrument is filed with the court, the court has no choice but to arraign the defendant. And, unless the court issues a summons and allows the defendant to appear by counsel, the defendant ordinarily must appear in person at the arraignment.¹¹³

Unfortunately, there is an irreconcilable conflict between section 170.10's mandate that the defendant must be arraigned and the CPL's provisions governing the ways in which the defendant is compelled to appear at the arraignment. When an accusatory instrument has been filed with the court, the court may secure the defendant's appearance in at least two ways.¹¹⁴ In a non-

108. See *supra* text accompanying note 71.

109. Under New York law, the arraignment is normally the first court appearance in a criminal case. In theory, the defendant appears at the arraignment “for the purpose of having such court acquire and exercise control over his person with respect to such accusatory instrument and of setting the course of further proceedings in the action.” N.Y. CRIM. PROC. LAW § 1.20(9) (McKinney 1981). At the arraignment the court must inform the defendant of the charges against him, *id.* § 170.10(2) (misdemeanors and violations), *id.* § 180.10(1) (felonies), and of the fact that he has certain rights, *id.* § 170.10(3), (4), (5) (misdemeanors and violations). The court, if it does not finally dispose of the criminal matter before it at the arraignment, must either release the accused on his own recognizance or set bail as a condition of his release, *id.* § 170.10(7) (misdemeanors and violations), *id.* § 180.10(6) (felonies), although, in the case of felonies, the court may decline to set bail. *Id.* § 180.10(6) (McKinney 1982). See also *id.* § 530.20 (McKinney 1984) (providing that where defendant is charged with a felony court may, in its discretion, order recognizance or bail).

110. In holding that a private citizen may file an accusatory instrument under a town's local dog control ordinance, the New York State Attorney General noted that once the private citizen had filed the information, “[t]he determination as to acting further upon the allegations contained in the accusatory information would be a matter for the judicial determination by the Town Justice.” VOL. OP. N.Y. ATT'Y GEN. 125, 126 (1979).

111. N.Y. CRIM. PROC. LAW § 170.10(1) (McKinney 1982) (emphasis added).

112. See *id.* § 180.10(1).

113. However, the New York statute provides that “[t]he defendant must appear personally at such arraignment except . . . [i]n any case in which the defendant's appearance is required by a summons . . . the court in its discretion may, for good cause shown, permit the defendant to appear by counsel instead of in person.” *Id.* § 170.10(1)(b). There is also an exception to the requirement of personal appearance in cases involving simplified informations charging very minor offenses. *Id.* § 170.10(1)(a).

114. *Id.* § 110.10(1)(a)(b) (McKinney 1981). Where the defendant is either outside the jurisdiction or incarcerated in New York, other procedures are provided. *Id.* § 110.10(1)(c).

felony case, the court may issue a summons directing the defendant to appear before it on a certain date;¹¹⁵ or it may issue an arrest warrant.¹¹⁶ The court may issue a warrant if the accusatory instrument is sufficient on its face.¹¹⁷ Even if it is sufficient on its face, however, the court may decline to issue the warrant until it determines that there is reasonable cause to believe that the defendant committed the offense charged.¹¹⁸ In order to determine whether there is reasonable cause, the court may conduct an "inquiry" and "may examine, under oath or otherwise, any available person whom it believes may possess knowledge concerning the subject matter of the charge."¹¹⁹

If, after conducting this inquiry, the court fails to find reasonable cause to believe that the defendant committed an offense charged, it will decline to issue a warrant. Because a summons may be issued only when a warrant may issue,¹²⁰ the court may not order a summons for the defendant either. Hence, the failure to find reasonable cause means that the court has determined that there is no reason to continue the "case" and no arraignment will be held—despite the plain language of CPL section 170.10(1) that "[f]ollowing the filing with a local criminal court of an . . . [accusatory instrument] . . . , the defendant must be arraigned thereon."¹²¹ There is simply no way to reconcile these sections and, in reality, the mandated arraignment provision of section 170.10(1) will be ignored.

To summarize, a court faced with a civilian-filed accusatory instrument has three options. First, it can find reasonable cause to believe that the defendant committed the crime charged in the instrument without the necessity of holding such an inquiry. The court is unlikely to take such a step because it is mindful that either the district attorney was never consulted; or, if he was consulted, after investigating the case and interviewing witnesses he determined that a prosecution was not appropriate. For a court to substitute its own judgment for that of the public prosecutor without even making an inquiry and hearing testimony would indeed be a totally unjustifiable act.

Second, a court could attempt to "dismiss" the civilian complaint without any inquiry. However, assuming the complaint is facially sufficient, such a

115. *Id.* § 130.30.

116. *Id.* § 120.20.

117. *Id.* § 120.20(1). Whether a court may issue a warrant of arrest in a nonfelony case when it believes that a summons will suffice to guarantee the defendant's appearance is uncertain; the statute appears to answer that question in the negative. *Id.* § 120.20(3). However, there is authority to the contrary. *People v. Boyer*, 105 Misc. 2d 877, 892, 430 N.Y.S.2d 936, 947 (Syracuse City Ct. 1980), *rev'd on other grounds*, 116 Misc. 2d 931, 459 N.Y.S.2d 344 (Onondoga County Ct. 1981), *rev'd sub nom.* *People v. Rickert*, 58 N.Y.2d 122, 446 N.E.2d 419, 459 N.Y.S.2d 734 (1983); *People v. McNeil*, 90 Misc. 2d 180, 393 N.Y.S.2d 662 (Sup. Ct., Crim. Term 1977). *See also* Pitler, *New York Criminal Practice Under the CPL*, 43 (Supp. 1979); and N.Y. CRIM. PROC. LAW § 120.20 commentary at 117 (McKinney 1981).

118. N.Y. CRIM. PROC. LAW § 120.20(2) (McKinney 1981).

119. *Id.*

120. *Id.* § 130.30.

121. *Id.* § 170.10(1).

result seems inconsistent with the requirements of CPL section 120.20(2), which impliedly requires an inquiry before the court can terminate the case by declining to issue an arrest warrant or a summons. Presumably, any attempt to do this would be subject to appellate review or collateral attack by virtue of an article 78 proceeding.

The third option would be to conduct the inquiry into reasonable cause. If, after the inquiry, the court found reasonable cause and issued either a warrant or a summons, it would have carried out its statutory responsibility and done a competent job of screening the complaint by allowing a prosecution to go forward when the district attorney had, for whatever reason, declined to prosecute. Alternatively, at the conclusion of the inquiry, the court might find no reasonable cause and terminate the prosecution.

Despite the fact that the complainant may not have succeeded in launching his criminal prosecution, both he and the public have gained something from this procedure. First, unlike the situation in which the district attorney in the privacy of his own office has declined to prosecute, there is now a public record of the grounds alleged for the issuance of the warrant. Precisely what form this record takes is unclear because CPL section 120.20(2) states only that the court "may examine, under oath or otherwise, any available person whom it believes may possess knowledge concerning the subject matter of the charge."¹²² One commentator has said that "[t]his examination need not be made under oath and it may be informal; but an adequate record should be made and maintained."¹²³ Another has suggested a more formal record:

If there is some doubt whether sufficient facts have been presented, the best course would be to have the complainant or deponent brought before the court to testify. The court should ask questions designed to fill in any gaps in the accusatory instrument. Such testimony should be before a court reporter and under oath.¹²⁴

Under the New York Criminal Procedure Law's predecessor statute, the Code of Criminal Procedure, when a magistrate was asked to issue an arrest warrant after an accusatory instrument was laid before him, he took the depositions under oath of the complainant and any witnesses.¹²⁵ Given modern technological improvements, there is no persuasive reason not to have a stenographic record of the inquiry.¹²⁶ The existence of such a detailed record would

122. See *supra* note 118.

123. N.Y. CRIM. PROC. LAW § 120.20 commentary at 117 (McKinney 1981).

124. Pitler, *supra* note 117, at 93.

125. When an information is laid before a magistrate of the commission of a crime, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. N.Y. CODE CRIM. PROC. § 148 (repealed 1971).

126. Analogous provisions include applications for search warrants, N.Y. CRIM. PROC. LAW § 690.40(1) (McKinney 1984), and applications for eavesdropping warrants. *Id.* § 700.25(1). See also *Matter of Sarisohn*, 21 N.Y.2d 36, 43, 233 N.E.2d 276, 279, 286 N.Y.S.2d 255, 259 (1967) (information obtained from wire taps excluded from evidence because testimony taken in support

enable the media and the public to review it in order to study the fairness of the court's decision. In addition, although the CPL is silent on this issue, the existence of a record facilitates appellate review.

There are, though, three problems with this legislative scheme. First, the scheme is internally inconsistent; honoring articles 120 and 130 of the CPL requires judges to ignore the mandatory arraignment provision of section 170.10(1).¹²⁷ Second, pursuant to this scheme, the judicial screening function arises in a very awkward way. The question the court must decide is not whether a criminal prosecution should be initiated and go forward but whether, by the terms of the statute, an arrest warrant or a summons should issue. In other words, even though the final result is the same, the discretion is being exercised in determining an instrumental, rather than a fundamental, question.

Third, the only standard the court can use under this statute is whether "there is reasonable cause to believe that the defendant committed an offense charged."¹²⁸ "Reasonable cause" is defined thus:

'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.¹²⁹

By the terms of the statute, the court is not permitted to take into account such concerns as the public importance of the prosecution, the significance of the crime charged, the resources which will be consumed by the case, or other similar factors. The determination is therefore limited to the seemingly mechanical measurement of a quantum of evidence; public policy considerations are impermissible.

The decision whether a criminal prosecution should be allowed to proceed requires more than the mere ability to measure whether the evidence adduced rises to a specified minimum level; it also requires sound judgment and a sensitivity to several factors, including important public policy concerns. In failing to allow for their consideration, the present statutory scheme dehumanizes the judicial decisionmaker even as it trivializes the significance of a criminal prosecution.

And, human nature being what it is, it is simply unrealistic to expect judges to make this decision without introducing various extrinsic and societal factors into the equation. Were these factors spelled out in the statutory scheme, judges would be required to apply the criteria without incorporating their own individual values. However, the total absence of guidelines in this area undoubtedly

of grant of eavesdropping order was unrecorded); *People v. Schnitzler*, 18 N.Y.2d 457, 461, 223 N.E.2d 28, 30, 276 N.Y.S.2d 616, 618-19 (1966) (oral testimony taken in support of an application for a search warrant should be recorded in court's minutes or by stenographic record).

127. Of course, this problem could be remedied quite easily by amending § 170.10(1) slightly.

128. N.Y. CRM. PROC. LAW § 120.20(2) (McKinney 1981).

129. *Id.* § 70.10(2).

encourages judges, consciously or unconsciously, to read into the standard their own particular concerns, including such statutorily impermissible factors as the identity of the parties, the nature of the case, the importance of the controversy, and the already overburdened court dockets. This complete lack of legislative guidance leads inevitably to a standardless and arbitrary exercise of judicial discretion.

B. Model II: Judicial Screening

New York Criminal Procedure Law section 110.20's express exclusion of New York City from the requirement that the appropriate district attorney be notified when an accusatory instrument charging a crime is filed in a local criminal court indicates that in some way prosecutors in New York City are situated differently from district attorneys elsewhere in the state.¹³⁰ As New York Court of Appeals Judge Joseph Bellacosa has explained: "The section has no application to and would be superfluous in the Criminal Court of the City of New York, where all prosecutors are involved in the initial screening and preparation of accusatory instruments in their so-called 'complaint rooms.'"¹³¹

Judge Bellacosa's explanation, however, is a bit misleading. While it is true that New York City prosecutors do prepare complaints in their complaint rooms, in New York City literally thousands of criminal complaints are docketed with the courts each year without any active participation by local prosecutors.¹³²

State law provides a special procedure allowing crime victims in New York City to initiate criminal prosecutions without the assistance or consent of the district attorney. Pursuant to the New York State Constitution,¹³³ the State Legislature established the Criminal Court of the City of New York,¹³⁴ which has trial jurisdiction over all misdemeanors and violations¹³⁵ and preliminary jurisdiction over all felonies committed within the City.¹³⁶ The practice and

130. *Id.* § 110.20 (McKinney 1984). See *supra* text accompanying notes 80-82.

131. N.Y. CRIM. PROC. LAW § 110.20 commentary at 107 (McKinney 1981).

132. In 1987, there were 11,793 criminal complaints docketed in the Criminal Court of the City of New York which were drafted in the court's complaint room rather than the district attorneys' complaint rooms. Interview with John Sakoutis, Assistant Chief Clerk, Summons Parts, Criminal Court of the City of New York (Apr. 6, 1988).

133. "The legislature shall by law establish a single court of city-wide civil jurisdiction and a single court of city-wide criminal jurisdiction in and for the city of New York . . ." N.Y. CONST. art. VI § 15(a) (McKinney 1969).

134. N.Y. CITY CRIM. CT. ACT § 31 (McKinney 1963).

135. N.Y. CONST. art. VI § 15(6) (McKinney 1969); N.Y. CRIM. CT. ACT § 31 (McKinney 1963).

136. The New York City Criminal Court is a "local criminal court." N.Y. CRIM. PROC. LAW §§ 1.20(21), 10.10(3) (McKinney 1981). Local criminal courts have preliminary jurisdiction over felony cases. N.Y. CRIM. PROC. LAW § 10.30(2) (McKinney 1981).

procedure of this Criminal Court is governed by the New York City Criminal Court Act ("N.Y.C.C.C.A."), and, where it is silent, the CPL.¹³⁷ In addition, the Criminal Court may also be governed by court rules.¹³⁸ The N.Y.C.C.C.A. expressly creates a method of initiating a criminal prosecution without the participation of the district attorney.

N.Y.C.C.C.A. section 50 reads:

§ 50. Complaints; not to be prepared in courtroom. Provision shall be made at all times in each part of the court in which a judge is sitting as a magistrate whereby the clerk, the clerk's assistants or other employees whose duty it is to prepare complaints shall have proper accommodations and the necessary room or rooms separate from but convenient to the room in which the court is held, and therein shall be at all times conspicuously posted a notice legibly printed in English, Spanish, Italian and Yiddish, respectively, and such other language as a rule or order of court shall prescribe, to the effect that any person to whom permission is refused to make and verify a complaint and who is thereby aggrieved will be heard upon application to the judge in person before the closing of the pending session of the court. It shall be the duty of each such judge before opening and again before closing a session to cause to be intelligibly announced to all persons in and about his courtroom that the court will then and there hear all complaints which have not been taken by the complaint clerk.¹³⁹

Section 50 provides a procedure by which court clerks or other employees must receive citizens' complaints for the purpose of preparing and verifying accusatory instruments. The section does not leave one at the mercy of a clerk, however; it further provides that if the clerk refuses to prepare and verify any person's complaint, that person must be allowed, that same day, to present his complaint to the presiding judge.

Rule 4 of the now repealed Rules of the Criminal Court of the City of New York supplemented N.Y.C.C.C.A. section 50. Entitled "Complaints and Informations," it read:

Whenever the Complaint Clerk shall deem the facts stated to him to be insufficient to draw a complaint or information for the crime or offense charged, he shall note the facts on a form provided therefor, and send the

137. Section 41(1) of the New York City Criminal Court Act states: "Unless otherwise specifically prescribed, the practice and procedure in this court is governed by the criminal procedure law." In other words the specific N.Y.C.C.C.A. controls over the general New York Criminal Procedure Law in the criminal court. See *People v. Anonymous*, 126 Misc. 2d 673, 676, 481 N.Y.S.2d 987, 989-90 (Crim. Ct. 1984); *People ex rel. Harris v. Lindsay*, 21 A.D.2d 102, 104-05, 248 N.Y.S.2d 691, 694 (App. Div.), *motion granted*, 14 N.Y.2d 841, 200 N.E.2d 579, 251 N.Y.S.2d 688 (1964).

138. The New York City Criminal Court Act states:

The appellate divisions of the first and second judicial departments shall jointly adopt rules to implement and facilitate practice and procedure in the court, consistent with standards and policies adopted by the administrative board of the judicial conference. Such rules shall be uniform to the extent practicable. The administrative board may promulgate such uniform rule or rules in the event the appellate divisions are unable to agree.

N.Y. CITY CRIM. CT. ACT § 41(2) (McKinney 1963).

139. *Id.* § 50.

parties interested before the judge presiding in the Part. The judge shall cause the complainant to be sworn, and hear his testimony and any other relevant testimony or evidence, and specify on the form the complaint to be taken, if any. This form shall be filed as a court record.¹⁴⁰

While the interplay of section 50 and former rule 4 did not *require* the clerk or the judge to initiate criminal proceedings, it did have two extremely important functions. First, it legitimized a procedure by which a private citizen, bypassing the district attorney, could present his complaint directly to the court. Second, because the judge was required to hear the matter in open court if the clerk refused to draw a complaint, section 50 and rule 4 performed the vital function of taking the decisionmaking process (whether or not to issue a complaint) out of the confines of the private halls of the district attorney's office, where the decision would be functionally unreviewable¹⁴¹ and the basis for the decision unknown. Instead, these sections combined to place the decisionmaking process squarely in an open courtroom where it would be highly visible and subject to intense public scrutiny.

Rule 4 was an important element of this scheme. Section 50 required only that the judge "hear" the complaint, without specifying the procedures that the judge was supposed to follow. Rule 4 provided this procedure by requiring the judge to take sworn testimony from the complainant and any other relevant person and to note upon the form the action to be taken.

Rule 4 of the Rules of the Criminal Court of the City of New York, which were effective as of September 1, 1962, was substantially changed effective March 8, 1971. The new rule 4 read:

Whenever an assistant district attorney on duty in a complaint room in the Criminal Court of the City of New York shall deem that the facts as related to him do not constitute an offense as a matter of law he shall, any time prior to arraignment, direct that the defendant, if he is in custody, be released. The complainant shall be advised of the foregoing, and of his right to appear before a judge if he so desires, in which event there shall be no disposition until the complainant and the defendant appear before the judge.¹⁴²

The new rule 4 no longer required the judge to "hear" the complainant's complaint by listening to sworn testimony, leaving it unclear precisely what the judge was supposed to do when the complainant and the defendant appeared before him.¹⁴³

The focus of rule 4 was also changed. Because the complaint-drawing function had been transferred administratively from the court to the district

140. Crim. Ct. of the City of N.Y., Rule 2950.4, NEW YORK R. CT. (McKinney 1975) (repealed 1987).

141. See *supra* text accompanying notes 41-42.

142. See *supra* note 140.

143. Precisely how the now released defendant was to be persuaded to remain in the courthouse to appear voluntarily in front of the judge when the assistant District Attorney had already certified that, as a matter of law, the defendant could not be held, was also not explained in the revised rule.

attorneys,¹⁴⁴ the new rule addressed not what happened when a court clerk refused to issue a complaint but what happened when an assistant district attorney declined to file one. Furthermore, while this rule gave the complainant a right to appear before a judge when the district attorney declined to file a complaint, it was silent as to the existence of that right when the district attorney declined to file a complaint for any reason other than the failure of the incident to constitute an offense as a matter of law. Under this rule it was unclear, for example, whether the complainant had the right to appear before the judge when the district attorney declined to file a complaint because he felt that, in the exercise of his discretion, "bad check" cases should not be prosecuted.¹⁴⁵

The Rules of the Criminal Court of the City of New York were rescinded in their entirety as of January 6, 1987, when they were replaced by the Uniform Rules for the New York State Trial Courts ("Uniform Rules").¹⁴⁶ The Uniform Rules, however, are virtually silent about rules governing local criminal courts, except to note how such rules may be adopted.¹⁴⁷ It appears that currently there are virtually no rules governing the Criminal Court of the City of New York, although some are in the process of being drafted.¹⁴⁸

Although the old rule 4, requiring the judge to take sworn testimony from the complainant, no longer exists, section 50 is still good law. From reading section 50 one would think that he could walk into any courtroom in the Criminal Court of the City of New York, on any business day, and have his complaint heard. The provision applies at *all* times and in *each* part of the court,¹⁴⁹ so that anyone should be able to avail himself of this procedure *any* day in *any* part of the Criminal Court—the date and part being chosen by the complaining crime victim.

Reality, however, does not comport with theory. At present, despite the fact that these procedures are required by section 50, they simply are not available in the criminal courthouses of the City of New York. There are no complaint

144. See *supra* note 69.

145. See *infra* note 168.

146. NEW YORK R. CT. at 265, 500 (McKinney 1987).

147. UNIFORM R. FOR CTS. EXERCISING CRIM. JURISDICTION §§ 200.20 to .22, NEW YORK R. CT. (McKinney 1988).

148. Telephone interview with Ms. Megan Tallmer, Deputy Counsel to the New York State Office of Court Administration (Mar. 31, 1988); telephone interview with Mr. Joseph Grosso, Chief Law Assistant for the New York City Criminal Court (Mar. 31, 1988).

149. While § 50 expressly limits the availability of this procedure to "each part of the court in which a judge is sitting *as a magistrate . . .*," N.Y.C.C.C.A. § 30 states that *all* judges of the Criminal Court are magistrates. N.Y. CITY CRIM. CT. ACT §§ 30, 50 (McKinney 1963) (emphasis added). See also *People v. Shiffrin*, 64 Misc. 2d 311, 319, 314 N.Y.S.2d 745, 748-749 (N.Y.C. Crim. Ct., N.Y. County 1970) (citing § 30 as source of court's authority to conduct hearing to determine probable cause for seizure). "A part of court" is defined as "a designated unit of the court in which specified business of the court is to be conducted by a judge or quasi-judicial officer." UNIFORM R. FOR CTS. EXERCISING CRIM. JURISDICTION § 200.2(b), NEW YORK R. CT. (McKinney 1988). Therefore, there really is no limitation and the procedure is available in every part (courtroom) of the court.

clerks to draft complaints; there are no signs in English, Spanish, Italian, and Yiddish informing people that they can be heard by the judge; and there are no such announcements. In short, in the criminal courthouses of New York City, section 50 is simply ignored.

While section 50 is ignored at New York City's criminal courthouses, it appears that the "summons" process available at another courthouse, 346 Broadway¹⁵⁰ in Manhattan, represents the court system's somewhat ambivalent attempt to comply with the mandates of Section 50.¹⁵¹ At "346 Broadway," as it is popularly known, a private citizen who wishes to file criminal charges

150. The courthouse at 346 Broadway, just one block from the Manhattan Criminal Courthouse at 100 Centre Street, is described in the next section of this Article. "The rules of the Criminal Court, as established in 1962, provided for a Summons Part of the Criminal Court, although such Part existed long before that date. A Summons Part existed in each city borough until 1975, when they were consolidated in one court at 346 Broadway in New York County." *People v. Doherty*, 98 Misc. 2d 878, 879, 414 N.Y.S.2d 844, 845 (Crim. Ct. 1979). Since *Doherty*, some aspects of this court have been decentralized, and the movement for decentralization continues.

"Testifying at a hearing by [sic] the City Council Committee on Women, the prosecutors asked for facilities in boroughs outside Manhattan where battered women could file criminal complaints . . ." *DAs Ask New Laws to Aid Abused Women*, N.Y.L.J., March 16, 1988, p.1.

151. There is some evidence that the Request to Appear section at the courthouse at 346 Broadway is the court system's attempt to comply with § 50. Former rule 1 of the Criminal Court of the City of New York, which set out the parts of the court in each county, described New York County Part 7 (the Summons Part):

Applications for, and issuance of warrants of arrest; applications for, and issuance of court summonses, and proceedings relating to court summonses and police summonses, other than those returnable in Parts 5 and 6.

R. OF THE CRIM. CT. CITY OF N.Y. Rule (1).

Rule 1 also stated, however, that "the number of such parts and the jurisdiction thereof may be varied from time to time by the Administrative Judge." Furthermore, subsection (3) of rule 12 read:

(c) Applications for summonses must be made by the complainant and shall be made in the first instance to the Complaint Clerk (Assistant Court Clerk) in Parts 7 of New York, Bronx, Kings, and Queens, or Part I, Richmond. If the application is denied by the Complaint Clerk, it may be renewed by the applicant before the judge presiding in the Part.

R. OF THE CRIM. CT. CITY OF N.Y. Rule 12(3). In other words, the rules seemed to dictate that any application for a summons pursuant to § 50 had to be made in Part 7 despite the plain mandate of § 50 that application could be made in all courtrooms.

Judicial decisions also recognize the relation between the summons process and § 50. "The procedure used by the Judge, namely, to inquire and investigate, was mandated by subdivision (6) of 57 of the New York City Criminal Court Act. This section [was] repealed in 1971, thus weakening the statutory authority for the powers of the Summons Part. It can be argued, however, that the judge retains this power to inquire and investigate by reason of Section 50 of the New York City Criminal Court [Act]." *People v. Doherty*, 98 Misc. 2d 878, 880, 414 N.Y.S. 844, 845 (Crim. Ct. 1979). "Criminal Court Judges, under the authority of New York City Criminal Court Act § 50, routinely authorize summonses and informations in this Summons Part, based upon the sworn allegations of private citizens who seek redress for criminal acts against them." *People v. Vial*, 132 Misc. 2d 5, 8, 502 N.Y.S.2d 930, 933 (Crim. Ct. 1986) (footnote omitted).

But see *Susser v. Fried*, 115 Misc. 2d 968, 970, 455 N.Y.S.2d 930, 932 (Civ. Ct. 1982) ("there is no statutory authority for the proceedings in the Summons Part of the New York City Criminal Court . . .").

against another for a misdemeanor or petty offense without the consent or assistance of the district attorney or any other law enforcement officer may take out a "summons" against the alleged offender.

It is significant that this procedure exists at only one location when, as noted above, section 50 seemingly makes this procedure available "at *all* times in *each* part of the court." Admittedly, the Appellate Division and its administrative board have the right and authority to promulgate rules governing the Criminal Court of the City of New York,¹⁵² particularly in areas not specifically covered by the legislature in the N.Y.C.C.C.A. It is equally clear, however, that they may not, promulgate rules that directly contradict the provisions of the N.Y.C.C.C.A., enacted by the legislature.¹⁵³ Therefore, they are not authorized to restrict the application of section 50 to 346 Broadway when section 50 explicitly makes the procedure available in *each* part of the court at *all* times.

One can easily understand what must have been the administrative board's rationale. Because the procedure outlined in section 50 would greatly change the normal functioning of the courts, it makes a great deal of sense, from the viewpoint of an administrator concerned only with efficiency, to limit its application to one courtroom, separate and apart from all others.¹⁵⁴ The quality of this reasoning, however, does not alter the fact that the current rules are illegal; section 50, by its own terms, applies to each and every part of the Criminal Court. And it is clear that "a state agency cannot make regulations which contravene the requirements or mandate of a statute."¹⁵⁵

Applications for the issuance of complaints against offenders should be accepted, pursuant to section 50 of the N.Y.C.C.C.A., in any courtroom of the Criminal Court of the City of New York. Currently, they cannot be made anywhere but at the courthouse at 346 Broadway.

1. The Summons Part of the Criminal Court of the City of New York

The court at 346 Broadway is worth serious study because it is a prominent example of the method by which a citizen whose attempt to file criminal charges has been rebuffed both by the district attorney and the police may apply to the court to have a criminal complaint issued.

152. N.Y. CITY CRIM. CT. ACT § 41(2) (McKinney 1963).

153. "Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute. We conclude, therefore, that by adding a requirement not found in the existing State statute, the regulation as presently written is invalid." *Jones v. Berman*, 37 N.Y.2d 42, 53, 332 N.E.2d 303, 308-09, 371 N.Y.S.2d 422, 429 (1975) (citations omitted).

154. The same logic of administrative efficiency and economics no doubt led to the removal of the Summons Parts from courthouses in the various counties of New York City and their consolidation at 346 Broadway. *People v. Esteves*, 95 Misc. 2d 70, 406 N.Y.S.2d 674 (Crim. Ct. 1978). But this practice has been severely criticized. *People v. Hexner*, 104 Misc. 2d 671, 674-75, 428 N.Y.S.2d 860, 862-63 (Crim. Ct. 1980).

155. *Schmitz v. Smith*, 93 Misc. 2d 570, 571, 403 N.Y.S.2d 433, 434 (Sup. Ct., Spec. Term 1978) (citation omitted).

The process by which a crime victim petitions the court for the issuance of a criminal complaint against another goes something like this:¹⁵⁶ The complainant must go to room 114 of 346 Broadway (between 9 a.m. and 1 p.m. only) where he is seen by an "interviewer"¹⁵⁷ employed by the Institute for Mediation and Conflict Resolution ("IMCR") or the Victim Services Agency ("VSA").¹⁵⁸

The interviewer, who is not a lawyer, is trained in mediation. His job is to mediate the dispute, if possible.¹⁵⁹ The interview has several possible results: (1) referral of the complainant to another, more appropriate agency for service; (2) initiation of the mediation process by providing the complainant with a Request to Appear ("RTA"); (3) referral to the complaint room of the Criminal Court; or (4) in rare cases, a complete failure to provide the complainant with any remedy. The interviewers appear to be remarkably patient and determined to be helpful; in general, they seem to prefer giving complainants what they want.¹⁶⁰ While the interviewers talk a great deal about what they call "due process," during the interviews themselves they operate without any written guidelines to help them decide whether to refer the complainant to the complaint room, send him to another agency, or issue an RTA.¹⁶¹ Because of the absence of written guidelines, the extent to which the interviewer exercises his discretion and the grounds for his decisions are entirely unclear. There also does not appear to be any formalized process to review his exercise of discretion.

156. This account of the process is derived from a telephone interview with Mr. Arthur Reilly, Clerk of the Criminal Court of the City of New York (Mar. 31, 1988); personal interviews with Mr. John Sakoutis, Assistant Chief Clerk, Summons Parts, Criminal Court of the City of New York, New York County (Feb. 11, 1982 and Apr. 6, 1988) and several members of his staff (Apr. 6, 1988); personal interviews with Mr. Alberto Charles, Court Coordinator for the Institute for Mediation and Conflict Resolution (IMCR), and several members of his staff (Apr. 4, 1988); a telephone interview with a judge of the Criminal Court of the City of New York who had presided in the Summons Part of 346 Broadway and who agreed to answer questions only upon a promise of anonymity (Apr. 14, 1988); several observations of the court at 346 Broadway during the period 1976-88; and case law. Where in the following account attribution to an identifiable informant is lacking, this has been done purposefully, to avoid penalizing the informants for their candor. Where in the following account precision is lacking, a major cause is the lack of written standards and guidelines available to interviewers and court clerks; it is quite clear that in the absence of such written criteria interviewers and court clerks act on their own personal interpretations of the law and practice.

157. "Interviewer" is the author's term, based on a functional description of the work these people do; it is not necessarily the word they would use to describe themselves.

158. IMCR and the Victim Services Agency (VSA) are now statewide agencies funded by the Office of Court Administration. Interview with Arthur Reilly, *supra* note 156. IMCR conducts the interview if the crime occurred in Manhattan or the Bronx; VSA does the interview if it occurred in Brooklyn or Queens. Staten Island cases do not come to 346 Broadway. Requests to Appear in Bronx matters may also be obtained in the Bronx, and there is some movement toward providing that capability in Brooklyn and Queens. Interview with John Sakoutis, *see supra* note 156 (Apr. 6, 1988).

159. "We try to resolve more things outside court than in court," said one interviewer. *See supra* note 156 (providing setting and explanation of the source of the quotation).

160. As one interviewer expressed it, "We try to accommodate as much as possible." *Id.*

161. "None of this is written down, but you get it in training," said one interviewer. *Id.*

Many complainants are referred away from the criminal courts and the mediation process because their problems can best be solved by other agencies (result #1). However, it is very difficult to know whether those "referred" are being given helpful information or whether they are really being fobbed off with theoretically correct, but realistically useless, information or referrals—which would place these complainants in the fourth category of possible interview results.¹⁶²

The interviewer may give the complainant a Request to Appear¹⁶³ and a date to appear at IMCR or VSA facilities to attempt to mediate the dispute. The RTA, which resembles a summons, bears the name and the address of the complainant, the return date, the offense alleged, and the legend, "IF YOU FAIL TO APPEAR . . . a criminal action against you may be commenced without your first having an opportunity to be heard."¹⁶⁴ The complainant must then serve the RTA upon the alleged offender; if the complainant fears that violence may occur at the time of service, he may enlist the help of a police officer in the precinct in which the offender may be found to accompany him while he serves the notice.¹⁶⁵

The complainant must then go to the Dispute Center on the appointed date. If the complainant fails to appear, the "case" will be dismissed. If the "defendant" fails to appear, another date will be set, and the complainant will be given a "Final Notice to Appear," which must be served on the putative defendant. The same rules hold for this second date. If the complainant fails to appear, the case is dismissed. If the putative defendant does not show up

162. According to IMCR statistics for March, 1988, of 787 complainants interviewed, 201 were referred elsewhere. IMCR's statistical form did not, however, contain a column for those complainants who were sent away, for whatever reason, without any true remedy or useful advice. Indeed, in my presence an extremely patient interviewer sent an elderly, semi-coherent woman to the United States Attorney General's Office. Given the nature of the woman's problem, it is unlikely that the interviewer truly believed that this referral would be useful. One wonders in what category this referral will be recorded in IMCR statistics.

163. One interviewer explained that they will give RTAs to most complainants. *See supra* note 156 (providing setting and explanation of the source of the information). Virtually all complainants will get RTAs, said one court clerk. *See supra* note 156. IMCR statistics for March, 1988, indicate that of the 787 people screened, 298 were given 367 RTAs. (The discrepancy between 298 and 367 is explained by the number of complainants who were given RTAs for more than one respondent.) There is, however, absolutely no legal authority for such a document. *People v. Vlasto*, 78 Misc. 2d 419, 425-26, 355 N.Y.S.2d 983, 988-89 (Crim. Ct. 1974). *Accord* *Susser v. Fried*, 115 Misc. 2d 968, 970, 455 N.Y.S.2d 930, 932 (Civ. Ct. 1982). The RTA appears to be a creature of necessity. Since the Criminal Procedure Law permits the issuance of court process only after the filing of an accusatory instrument, N.Y. CRIM. PROC. LAW §§ 120.10, .20 (arrest warrant) and §§ 130.10, .20 (summons) (McKinney 1981), the court system "created" the RTA in order to bring people together to mediate their problems before the issuance of an accusatory instrument. Interview with Arthur Reilly, *see supra* note 156.

164. *Susser*, 115 Misc. 2d at 970, 455 N.Y.S.2d at 932; *Vlasto*, 78 Misc. 2d at 425, 355 N.Y.S.2d at 988.

165. According to one clerk it is very common for a police officer to accompany the complainant when the RTA is served. *See supra* note 156.

on the second appearance date, the complainant will be given a letter of referral to the court's complaint room (room 205) at 346 Broadway.

If, on either date, both the complainant and the "defendant" appear, the Dispute Center will attempt to mediate the case, producing a stipulated settlement enforceable in a civil court. If the parties cannot reach an agreement, the case will be referred to the court's complaint room at 346 Broadway.

At the initial interview, the interviewer also has the option to refer the complainant to the complaint room immediately. In recent years—apparently in response to public perception that spouses were being beaten and small children abused while the court process lumbered on, oblivious and unresponsive—a decision was made not to attempt to mediate certain classes of cases. Instead, such complainants were to be given access to the criminal courts immediately.¹⁶⁶ These cases include:

[1] any case involving violence where bodily injury is visible or there is medical proof of such injury, such as domestic violence or battered women cases;

[2] any case involving a gun;

[3] any case in which the complainant is declared by law to be handicapped; and,

[4] any case involving sexual assault.

It is logical that these cases are sent to court immediately so that the complainant can get a temporary order of protection.¹⁶⁷ But there are additional categories of cases sent directly to the complaint room, the inclusion of which may be more difficult to comprehend:

[5] any "bad check" case where fraudulent intent is apparent;¹⁶⁸ and,

[6] any case in which the complainant has legal counsel and counsel insists on "going to court."¹⁶⁹

In addition, it appears that if the complainant is sufficiently stubborn and simply refuses to mediate, the interviewer, after failing in his attempt to persuade the complainant to try mediation, will refer him to the complaint

166. According to IMCR statistics for March, 1988, of the 787 people screened, 420 were referred to the complaint room immediately; of these, by far the largest category was cases involving violence.

167. See *supra* note 17.

168. The amount of the fraud does not appear determinative of whether the case will receive this "expedited" treatment. If fraud is not apparent, the interviewer may simply issue an RTA. And in some cases the complainant will be referred to Small Claims Court. The inclusion of "bad check" cases in this class of expedited cases may be related to the fact that District Attorney's offices are reluctant to prosecute such cases. Indeed, according to one clerk, Manhattan District Attorney Morgenthau refers these cases to 346 Broadway. See *supra* note 45 for more on the policy of the New York County District Attorney's Office. See also Comment, *Prosecutorial Discretion at the Complaint Bureau Level*, 3 HOFSTRA L. REV. 81, 104-05 (1975).

169. As one interviewer explained, "if an attorney comes in and wants to go to court, we assume he knows his business." See *supra* note 156. He added, without any plaintiveness in his voice, that "attorneys get privileges here," including the right to be interviewed right away. *Id.*

room.¹⁷⁰ Of course, some complainants undoubtedly fall into the fourth category, those who simply do not receive any real help.¹⁷¹

Once the complainant has reached the complaint room stage—either on an expedited basis pursuant to direct referral, or after attempts at mediation have failed—it is the court clerk who must use his discretion to determine whether a criminal complaint should issue. The complaint clerk has two options: (1) draw the criminal complaint and send it to the judge in the Summons Part; or (2) decline to draw the complaint and fill out a form specifying the grounds for the denial.

During normal working hours, there are usually three complaint clerks on duty at 346 Broadway, assisted by a fourth person who does the necessary clerical work. Like the IMCR and VSA interviewers, the complaint clerks are nonlawyers. And like the interviewers, the clerks have no written guidelines to help them determine whether or not to issue a complaint or, if one is to be issued, what crime should be charged.¹⁷² For example, even where a misdemeanor assault¹⁷³ (punishable by up to one year in jail)¹⁷⁴ is legally made out, the complaint clerk may well—in the exercise of his unfettered, and apparently unchallenged, discretion—charge only the violation of harassment¹⁷⁵ (punishable by up to only 15 days in jail).¹⁷⁶

In the vast majority of cases, the complaint clerk, after interviewing the complainant, draws and types the complaint. In what court officials estimate as one to five percent of cases, the clerk declines to issue a complaint, records the nature of the complainant's accusation on a form, and sends the form and the complainant before the judge presiding in the Summons Part in 346 Broadway.¹⁷⁷

170. According to one interviewer, "if he [the complainant] refuses to mediate, if he doesn't get up and leave [out of frustration], he will get it [the letter of referral to the complaint room]." See *supra* note 156.

171. See *supra* note 162 and accompanying text.

172. When asked if he had any written guidelines to assist him in making decisions, one clerk responded, "None other than the *Penal Law*." See *supra* note 156. The *Penal Law*, of course, states the necessary elements of the crime; it does not, however, indicate how one's discretion should be exercised.

173. N.Y. PENAL LAW § 120.00 (McKinney 1987).

174. *Id.* § 10.00(4).

175. *Id.* § 240.25.

176. *Id.* § 10.00(3).

177. This practice is, of course, entirely consistent with the provisions of New York City Criminal Court Act § 50. See *supra* text accompanying note 139. As one clerk put it, "in situations like this there should be an authority beyond the court clerk." See *supra* note 156. Sending the complainant before the judge with an official form may also be good public relations. The same clerk also explained "the importance of giving someone an official piece of paper." He recalled that many years earlier he had been working in a courtroom with a judge when he was repeatedly pestered by someone who appeared to be emotionally disturbed. The judge told the clerk to give the man a piece of paper. "What paper?" asked the clerk. "Any paper," said the judge. "Here," he continued, seizing a piece of court letterhead and stamping it with the nearest available rubber stamp, "give him this." The clerk gave the man the meaningless piece of paper, and the man went away happy. "Always give them an official piece of paper," the judge advised. *Id.*

The same factors that can dissuade IMCR and VSA interviewers from issuing RTAs or referring complainants to the complaint room may also discourage the clerks from drawing complaints. These factors include the identity of the complainant and the identity of the putative defendant. Where one of these two factors is problematic, it is not uncommon for the other to be troublesome as well.

Interviewers are less likely to give RTAs or referrals to the complaint room to complainants who seem emotionally disturbed or have a record of filing frequent complaints. One court clerk claimed that virtually all complainants can get RTAs, except for "wackos" and "abusers" (meaning those who abuse the process with too many complaints); he reported that the interviewing agencies keep a list of these people to help identify them.¹⁷⁸ Even most of these complainants will, in the end, get their RTAs or referrals to the complaint room if they cannot be dissuaded from pressing charges. As one interviewer stated, "We can't deny anyone due process, no matter how unstable we think they are."¹⁷⁹

Occasionally a complainant wishes to file charges against the Mayor, the Governor, or some other notable. The interviewers try to dissuade them from pressing their complaint by arguing that the mediation agencies deal with interpersonal problems and that if the complainant has a problem with a governmental agency, he ought to go to the District Attorney's office or the Legal Aid Society.¹⁸⁰ Where the complainant insists, however, he may well be referred to the complaint room.

When a complainant believed to be emotionally disturbed is allowed to advance through the system, interviewers and court clerks attempt to warn those further down the line of their perception of the complainant's emotional health. This is done either by oral communication or by making some indication on the form that accompanies the complainant through the system.¹⁸¹

178. He reported that IMCR has a box with names of "wackos" and "abusers" but that VSA has computerized its list. *Id.*

179. *Id.*

180. This argument has great seductive appeal. Despite its seeming reasonableness, it may have the effect of decriminalizing the criminal conduct of a public official solely because he holds government office.

181. According to several interviewers and clerks, interviewers used to put the initials "e.d.p." ("emotionally disturbed person") on the bottom of the appropriate forms to indicate, in one clerk's words, that the complainant was "demented." *Id.* This practice was halted, however, when one complainant found those initials on her referral form and inquired as to their meaning. The resulting embarrassment led to more sophisticated and subtle methods of labelling. In cases where he doubted the emotional stability of the complainant, one clerk adopted the practice of putting a question mark on the form immediately after the description of the substance of the complaint. Another opined that this was too obvious and suggested the use of "Please advise?," a phrase which was to be used only in cases involving unstable complainants. As the clerk explained, it looked "more natural" and was less likely to provoke embarrassing inquiries from complainants and other outsiders. In some cases, nothing is put in writing and opinions about a complainant's mental health are merely transmitted orally. *Id.*

In the one to five percent of cases in which complaint room clerks decline to draw the complaints, the same factors are present. According to one clerk, there are two types of complainants who will be sent before the judge because the clerk has declined to draft a complaint.¹⁸² The first category is composed of those who want relief which cannot be received in a criminal court.¹⁸³ Their stories are frequently vague, or they cannot actually identify the alleged mal-factors. The second category consists of those complainants who are, according to a clerk, "on the index." These are frequent complainers whose "credibility is exhausted."¹⁸⁴ They are frequently "people with fixations about something or someone."¹⁸⁵ They are "not all moonbeam and raygun people; some appear terribly rational," at least in the beginning.¹⁸⁶

Some of these complainants wish to lodge charges against prominent people.¹⁸⁷ In these cases, the clerks are very careful to indicate on the form sent to the judge precisely who the notable is; otherwise, an uninformed judge might mistakenly issue the complaint. Celebrities appear to enjoy a certain amount of immunity in these climes. One clerk indicated that it was "very doubtful I would ever issue a complaint" against a Governor Cuomo or a Mayor Koch. "That should go to a special prosecutor; it's way over our heads," he added.¹⁸⁸

Another clerk indicated that he would not issue a complaint against someone in city government.¹⁸⁹ He admitted that he had "no specific guidelines," but said that he would not authorize a complaint which had anything "to do with something politically charged, something that would make the press."¹⁹⁰

182. *Id.*

183. This clerk related the story of a Rumanian refugee who wanted to file a criminal complaint against the International Rescue Committee (IRC) for harassment; the IRC had secured employment and lodgings for the refugee, but, to his mind at least, they were both insufficient. *Id.*

184. According to this clerk, these people were on a list of "frequent flyers." When pressed for an example, he mentioned the case of a man who complained about another tenant whose swinging of his bat in his own apartment seriously harassed the complainant. Although the two lived four floors apart, the reverberations apparently took a serious toll. "Reverberation assault" cases, according to the clerk, are not well received at 346 Broadway. *Id.*

185. *Id.*

186. *Id.*

187. One citizen wanted to file charges against Walter Cronkite because his anchoring of the evening news was keeping the complainant out of that position. In another case, a young man applied for a criminal complaint against a female soap opera star, claiming that she was harassing him. The complaint was drawn but the judge dismissed it; the clerk explained later that the judge had read how busy she was filming so many hours a day that the judge concluded she simply could not have had time to harass this fellow. In another case, however, a complaint was issued against a baseball superstar, resulting in an acquittal after trial. Despite these cases, one clerk indicated that they do not get as many "celebrity cases" as they used to. *Id.*

188. *Id.*

189. *Id.* Significantly, when asked about officials in state or federal government, he pondered a while and indicated that they did not necessarily enjoy the same full immunity. *Id.*

190. *Id.* "Obviously, they won't get a summons against [Manhattan] D.A. Morgenthau," he added. He also related the story of how the court staff had caught just in time the application of the president of a municipal union who had requested the issuance of a complaint against the administrator of his City department. *Id.*

Against this background, it is instructive to consider how each of our three scenarios¹⁹¹ is treated. First, consider the victims in Scenario II, battered women. As noted above, these victims now get expedited treatment.¹⁹² Their cases are not mediated, but sent to the complaint room immediately. There, it appears, complaints will be issued.

The problem of cross-complaints, described in Scenario I, is a bit more problematic, particularly if the complainant is the defendant in a related matter in the regular criminal court. In that case, once the complainant provides the interviewers with the docket number and return date of the related case, they expedite the case and send the complainant to the complaint room immediately, primarily because of the potential for violence.¹⁹³ It is a little less clear what is likely to happen to the case once it reaches a complaint clerk. One clerk, who conceded that in the normal assault case they did not require any corroboration before they issued a complaint, mentioned, however, that a cross-complaint might not issue unless "it had substance to it"; some kind of corroboration, like records of medical treatment, might be required.

Referring to the pendency of a related case in Criminal Court, one clerk stated that "we go slower when there is an arrest." In these cases, the clerk of the Summons Part obtains the court papers on the related matter from the Criminal Court so that the Summons Part judge can have them before him when he considers the application. Clerks indicate that judges will "usually" grant applications for cross-complaints, but "not always." If the application is granted, the new complaint will be sent over to "join" the pending matter in Criminal Court.

The waters get even muddier when one examines how the police brutality complaint described in Scenario III is handled. There is some confusion among interviewers about what the policy is when a complainant wishes to press charges against a police officer. Some believe that the complainant is to be automatically referred to the Civilian Complaint Review Board ("CCRB") of the New York City Police Department, an administrative agency without the power to bring criminal prosecutions. Other interviewers indicate that this may not be the procedure if the officer was not on duty or making an arrest at the time he allegedly assaulted the complainant.

The clerks are also split on this issue. Some say that complaints against police officers are automatically referred to the CCRB. One clerk would make the determination whether the alleged assault occurred in the process of an arrest or other official act. He would draw the complaint if the officer's acts were unrelated to his official duties; otherwise, no complaint would issue and the complainant would be referred to the CCRB. Other clerks came up with still other variations, and one suggested that even if the complainant were

191. See *supra* text following note 18.

192. See *supra* text accompanying note 166.

193. IMCR statistics indicate that in March, 1988, 44 cases were sent directly to the complaint room because cross-complaints were pending.

brought before the judge, the judge was likely to send him to the CCRB.

Several clerks agreed that they see very few complaints against police officers, probably because they are rerouted to the CCRB early in the process. This policy raises very fundamental issues. Even assuming the CCRB is an effective disciplinary apparatus, there is no justification for subjecting civilian offenders to the rigors of a criminal prosecution and the possibility of incarceration while sparing police officers who have committed identical crimes these same risks. Such a dual system of justice—one for the average citizen and another, more lenient one, for law enforcement officers—is contrary to the ideal of equality before the law and sends out a strong message to all citizens, including the minority community. Certainly there is nothing in N.Y.C.C.C.A. section 50 or any other law that supports the idea of such a dual system.

In the one to five percent of cases in which the court clerk declines to draw the complaint and sends the complainant before the judge in the Summons Part, the judge will conduct a very informal proceeding. He will normally direct the complainant "to tell your story"; if there are points on which the judge is unclear, he may ask questions of the complainant. Although the complainant is not sworn, the proceedings are stenographically recorded. The whole "process" usually takes around five minutes. The standard by which the judge determines whether a complaint should be drawn is entirely unclear. Of the judge faced with this decision, one court has written, "[I]f he determines that reasonable cause exists to believe that the respondent or prospective defendant committed a crime or offense—pursuant to CPL section 180.70—a Criminal Court complaint will be ordered drawn."¹⁹⁴ But despite that decision and subsequent guidelines laid down by an appellate court,¹⁹⁵ courthouse opinions do not seem much affected by doctrinal analysis. According to one clerk, there are "no specific guidelines; it's more of a common sense thing." And one judge, who appeared utterly unfamiliar with the appellate court's guidelines, said she decided "on a case by case basis," using the limited opportunity available to make a determination of the complainant's credibility and motivation.

If a complaint is drawn, the complainant is given a sealed envelope containing the complaint and all the necessary paperwork for the judge. The complainant is then directed to appear at the Summons Part of the criminal courthouse in the borough of the occurrence of the underlying incident, except that in Manhattan the Summons Part is located at 346 Broadway rather than in the Criminal Courthouse at 100 Centre Street.

346 Broadway is an extremely busy court, handling the minor criminal business for every borough of the City except Staten Island. In 1987, the court and related staff issued 14,692 Requests to Appear¹⁹⁶ and 11,793 criminal

194. *People v. Doherty*, 98 Misc. 2d 878, 880, 414 N.Y.S.2d 844, 845 (Crim. Ct. 1979).

195. *People v. Kissling*, No. 17657 (N.Y. App. Term. 1st Dep't July 7, 1981).

196. These figures did not include Bronx County. The 14,692 RTAs included 3,772 for Queens County, 7,465 for Kings County (Brooklyn), and 3,455 for New York County (Manhattan). Interview with John Sakoutis, *supra* note 156 (April 6, 1988).

complaints.¹⁹⁷ The chief clerk's impression is that the most common categories of cases handled by this court are harassment, aggravated harassment (harassment by mail or telephone), assault, bounced checks, misapplication of property (usually by an ex-boyfriend or -girlfriend), refusal of access (to a landlord who wishes to do repairs), sexual abuse and misconduct, criminal mischief, excessive noise, and falsely reporting an incident. Many of these cases were referred to 346 Broadway by district attorneys' offices.

According to one court clerk, most of the "consumers" in this court are from "the very lower end of the economic scale."¹⁹⁸ They "almost never have lawyers," although "judges probably pay more attention if the complainant has a lawyer."¹⁹⁹ Having a lawyer "shows greater depth and sincerity" and "gets more credibility."²⁰⁰

An accurate assessment of 346 Broadway's performance is probably dependent upon one's definition of the court's mission. Torn between a desire to rid the criminal courts of petty cases and mediate citizen disputes wherever possible, on the one hand, and the recognition that many complainants have genuine grievances that require expeditious, judicial resolution on the other, the court lurches between these two approaches. While their speech is suffused with references to the requirements of due process, the court's functionaries—interviewers, clerks, and judges—nonetheless operate utterly without written standards and guidelines. The entire question of how the processing of civilian complaints might be improved is currently under study.²⁰¹

V. WHEN SHOULD A JUDGE ISSUE A CRIMINAL COMPLAINT; WHEN SHOULD A PRIVATE PROSECUTION BE APPROVED?

A. *The Need for Openness and Visibility in the Process of Determining Whether to Initiate a Criminal Prosecution*

When a prosecutor commits a serious error in a criminal case, the remedy may be reversal of the conviction upon appeal. Where, however, the prosecutor is guilty of a pattern of prosecutorial misconduct over several cases, there are two possible remedies: removal by the governor or refusal by the public to reelect the incumbent.²⁰² These remedies assume, however, that someone—the

197. The 11,793 complaints issued included 2,135 for Queens County, 2,132 for Bronx County, 3,930 for Kings County, and 3,596 for New York County. *Id.*

198. *See supra* note 156.

199. *Id.*

200. *See supra* note 169 and accompanying text.

201. *See Court Study Aims to Better Handling Civilian Complaints*, N.Y.L.J., Feb. 3, 1988, at 1.

202. The federal courts are powerless to interfere with his [the United States Attorney's] discretionary power. The Court cannot compel him to prosecute a complaint, or even an indictment, whatever his reasons for not acting. The remedy for any dereliction of his [the prosecutor's] duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people.

Pugach v. Klein, 193 F. Supp. 630, 635 (S.D.N.Y. 1961).

governor or the populace—knows that cases are being mishandled. This assumption is unrealistic in view of the fact that, in modern prosecutors' offices, decisions are made in relative secrecy.

The prosecution of cases that should never have been filed or the mishandling of cases during prosecution may well come to light. After all, the victim of the prosecutor's misconduct has a forum in which to air his grievances, the courtroom; the defendant can make his case through his counsel, in open court, with a stenographic record, to a judge, the media, the public, and, ultimately, an appellate court.²⁰³ But, if a district attorney improperly refuses to prosecute a case, what remedy does the victim of that impropriety—the complainant—have? By definition, with the refusal to prosecute the complainant has lost his chance to argue in open court, his opportunity to adduce sworn testimony from witnesses, a stenographic record of the proceedings, the presence of the media, and the possibility of appellate review. In short, where the prosecutor improperly declines to prosecute, it is highly unlikely that this fact will ever reach the attention of the media, the public, or the governor. These decisions are fundamentally invisible. Hence, at least in the instances where the prosecutor's misconduct is his failure to prosecute cases that ought to be prosecuted, the remedy of removal by the governor or rejection by the electorate at the next election is wholly illusory. The district attorney's discretion is, for all intents and purposes, completely unchecked.

Most authorities recognize the need to control the vast discretion of the public prosecutor. The National Advisory Commission on Criminal Justice Standards and Goals concluded that one way to remedy the problem of unchecked discretion is through the structure of discretionary decisionmaking:

One means of structuring is to raise the visibility of discretionary decision-making. Discretionary decisions involved in the administrative processing of criminal defendants are ones of low visibility—that is, they are seldom seen by observers of the system or, in many cases, by the participants themselves. As a result, it is difficult to determine what decisions are being made as well as why they are being made.

Where possible and desirable, the Commission proposes that the visibility of administrative processing of criminal defendants be raised by requiring that rules for such decisionmaking be formulated, written down, and publicized. In addition, it recommends that the reasons for making particular decisions be articulated and recorded. If this is done, the substance of discretionary decisions and the process by which they are made will become apparent.²⁰⁴

Recommendations to increase the visibility of the exercise of prosecutorial discretion have taken several forms. For example, the authorities are virtually unanimous in suggesting that prosecutors' offices should establish written

203. Even a crime victim who feels his pending criminal case is being mishandled by the prosecutor may have access to the press, if not the court, if the media is present covering the court proceedings.

204. REPORT ON COURTS 3 (National Advisory Commission on Criminal Justice Standards and Goals 1973).

standards for determining when criminal charges will and will not be lodged.²⁰⁵ These guidelines "should be readily available to the public as well as to those charged with offenses, and to their lawyers,"²⁰⁶ although the prosecutor should retain the discretion to keep appropriate sections of the guidelines confidential.²⁰⁷ The authorities also recognize the advantage of requiring the prosecutor to memorialize his reasons for not filing charges²⁰⁸ or for dismissing pending charges in individual cases.²⁰⁹

However, these proposals will never make the remedies of removal by the governor or the electorate effective. First, it is not at all clear that prosecutors will make public their entire charging guidelines, perhaps taking refuge in "confidentiality" as a way of maintaining secrecy.²¹⁰

Second, there is no requirement that the recorded reasons why prosecution of a particular case was declined be made available to the disappointed crime victim or any other aggrieved party. Indeed, the National Prosecution Standards are quite explicit that no one outside the prosecutor's office should be given access to these records.²¹¹

Third, only the American Bar Association Standards ("A.B.A. Standards") require the recording of reasons for dismissals; the standards of the National Advisory Commission and the National District Attorneys Association do not.²¹² Even the A.B.A. Standard requiring memorialization of the reasons for dismissals is applicable only to felonies²¹³ because the A.B.A. found that "[t]his requirement would perhaps be unduly onerous in relation to misdemeanors."²¹⁴ It is, however, precisely the misdemeanor cases in which the exercise of discretion is most in need of formal monitoring. The felony cases are those which, because of their nature, have the best chance of being publicized by the media, thereby providing some check on the prosecutor's discretion. Minor misdemeanor cases, however, because of their unspectacular nature, are unlikely to attract the attention of the press.

205. American Bar Association, 1 STANDARDS FOR CRIMINAL JUSTICE §§ 3-2.5, 3-3.4(c) (2d ed. Supp. 1986); REPORT ON COURTS, *supra* note 204, at §§ 1.2, 3.3, 12.7; NATIONAL PROSECUTION STANDARDS § 6.1 (National District Attorneys Ass'n 1979).

206. REPORT ON COURTS, *supra* note 204, at § 1.2.

207. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-2.5 commentary at 26; NATIONAL PROSECUTION STANDARDS, *supra* note 205, at § 6.1 commentary at 91.

208. "When a defendant is screened [out of the system] after being taken into custody, a written statement of the prosecutor's reasons should be prepared and kept on file in the prosecutor's office." REPORT ON COURTS, *supra* note 204, at § 1.2. *Accord* NATIONAL PROSECUTION STANDARDS, *supra* note 205, at § 8.4.

209. "Whenever felony criminal charges are dismissed by way of *nolle prosequi* (or its equivalent), the prosecutor should make a record of the reasons for the action." 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-4.3.

210. *See supra* note 207.

211. NATIONAL PROSECUTION STANDARDS, *supra* note 205, at § 8.4 commentary at 127.

212. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-4.3.

213. *Id.*

214. *Id.*

Finally, because it is unlikely that most aggrieved complainants will have counsel,²¹⁵ it is equally unlikely that they will have sufficient knowledge to avail themselves of whatever information is obtainable from the prosecutor's office. Even if the complainant were to secure this information, in order to assure any redress he would have to seize the attention of the public, the media, or the governor. Of those three, the media would certainly be the most directly accessible; but, even in the unlikely event that the complainant could enlist the aid of the media, the information he could provide would be thin gruel for a newspaper story.

In short, regardless of the steps taken to make the exercise of discretion within prosecutors' offices more visible, that exercise will always be essentially unchallengeable without a full airing of the case in a completely open forum. A district attorney who continually refuses to prosecute cases brought to him by private citizens is protected from public and media criticism because, except in the most egregious of crimes, the facts of the individual cases are rarely publicly known. In most instances, the district attorney who declines to prosecute a complaint brought to him can be confident that the facts of the case, including the prosecutor's decision not to prosecute, are unlikely to reach the media and the general public. Even a consistent track record of refusals to prosecute a particular type of crime is unlikely to become known to the media or the public—precisely because these decisions are made in the privacy of the district attorney's office, where the facts and decisionmaking process do not receive public scrutiny.

It is axiomatic that some discretion must be exercised in determining whether criminal charges will be prosecuted. Who is the proper party to exercise that discretion? Some lower New York courts have suggested that modern law enforcement requires that public prosecutors, not judges, make that decision.

The fundamental question, as to whether or not the "settlement" of a comparatively small number of disputes between aggrieved citizens, by Judges of the Criminal Court, many of which do not initially belong in a criminal proceeding, outweighs the thousands who have abused the process and the other thousands who have been abused by it, must be resolved in other forums. In the City of New York, at least, should it not be the duty of the office of the District Attorney to initially "screen" all criminal complaints, rather than give the individual complainant the right to initiate such proceedings?²¹⁶

The National District Attorneys Association takes the position that, other than the grand jury, the prosecutor—and only the prosecutor—is the appropriate person to determine whether or not criminal charges should be filed in a particular case.²¹⁷ The A.B.A. appears to accept with great ambivalence the

215. See *supra* text accompanying note 200.

216. *People v. Vlasto*, 78 Misc. 2d 419, 428, 355 N.Y.S.2d 983, 991 (Crim. Ct. 1974). See also *People v. Doherty*, 98 Misc. 2d 878, 880 (Crim. Ct. 1979) ("Parenthetically, one might seriously question whether in this era a Judge, rather than the prosecutor or police, should determine if an individual is to be charged and prosecuted.").

217. NATIONAL PROSECUTION STANDARDS, *supra* note 205, at §§ 8.1, 9.1.

practice of allowing judges to order prosecutions upon the complaint of a citizen "[w]here the law permits,"²¹⁸ finding that "[t]here are sound general policy reasons that argue for the joint screening of cases by both the prosecutor and the magistrate,"²¹⁹ but, nevertheless, recommending certain safeguards in those jurisdictions.²²⁰ The National Advisory Commission on Criminal Justice Standards and Goals, like the A.B.A., while asserting that the decision to prosecute should generally rest with the public prosecutor, also takes the position that disappointed complainants, or the police, should be able to apply to the court for the issuance of criminal charges once the prosecutor has refused.²²¹ The Commission also argues, however, that the court should not undertake a *de novo* review of the complaint, but, instead, should consider merely whether the prosecutor's decision to decline prosecution constitutes an abuse of discretion.²²²

Under a statutory scheme like that of N.Y.C.C.C.A. section 50, however, a public prosecutor's refusal to prosecute a particular case, or particular type of case, is exposed to the public. Sworn testimony may be adduced in the presence of the public and the media; a stenographic record facilitates the right to appeal. In this way, the Governor's right of removal and the electorate's right not to reelect the incumbent may be exercised intelligently. Judges who consistently refuse to act on citizen complaints are also exposed to media and public oversight because of the public nature of the proceedings. If public prosecutors or judges continually refuse to initiate proceedings against, for example, police officers alleged to have committed brutality, investigation of these cases may be undertaken by the media. And in this situation, unlike that in which the district attorney quietly declines to prosecute, reporters can write substantive articles because they can attend open court proceedings where witnesses testify about the purported brutality.

In addition to making critical data available to the media, such a statutory scheme makes possible appellate review. Therefore, both district attorneys and trial court judges must be cognizant that their decisions may be reviewed critically—or reversed—by appellate tribunals.

B. Standards for Determining When Criminal Complaints Should Issue

If judges are to exercise their discretion in determining when they should issue criminal complaints, when should they allow private prosecutions to proceed, and by what standards should that discretion be guided? It is ironic—but also symbolic of the embryonic nature of this area of jurisprudence—that the leading New York case on this issue is not officially reported. In *People v. Kissling*,²²³ the complainant loaned \$550 to his former landlord. After his

218. 1 STANDARDS FOR CRIMINAL JUSTICE § 3-3.4(d).

219. *Id.* § 3-3.4 commentary at 3-48 (1986).

220. *Id.*

221. REPORT ON COURTS, *supra* note 204, at § 1.2 (1973).

222. *Id.* § 1.2 commentary at 1-26.

223. *People v. Kissling*, No. 17657 (N.Y. App. Term. 1st Dep't July 7, 1981).

repayment check was dishonored, the landlord signed a confession of judgment, which the creditor filed with the Small Claims Court. When the District Attorney refused to prosecute this matter,²²⁴ the complainant obtained a RTA²²⁵ in order to prosecute the defendant for the misdemeanor of "Issuing a Bad Check." On the return of the Request to Appear, the Criminal Court of the City of New York "dismissed" the case, ruling that a criminal prosecution was precluded under the election of remedies doctrine because the complainant had already filed the confession of judgment with a civil court. The Appellate Term, finding the election of remedies doctrine wholly inapplicable, reversed the dismissal and remanded for a new hearing.

The *Kissling* court found that, "[a]lthough a private person has the right to act as a prosecutor, 'the court has the discretion as to whether to allow a private attorney to continue with the prosecution.'"²²⁶ The court identified three factors to be considered in determining whether to issue a complaint upon the application of a private citizen: "(1) the underlying merit of complainant's accusation; (2) the right of the accused to be prosecuted by one 'not actuated by an ulterior objective in obtaining a conviction'; and, (3) the People's interest in being adequately represented."²²⁷

Since *Kissling*, no New York court, appellate or *nisi prius*, has seen fit to explicate these rather enigmatic criteria. While an analysis of the *Kissling* guidelines and attendant case law is far from definitive, it does provide a framework for understanding the dilemma of the judge who is asked to rule on the propriety of a private prosecution.

1. *The Underlying Merit of the Complainant's Accusation*

a. The quantitative aspect

The precise meaning of the first factor cited by the *Kissling* court, "the underlying merit of complainant's accusation," is not entirely clear. It appears to have both quantitative and qualitative aspects. In its quantitative aspect "merit" presumably means the factual or legal guilt of the putative defendant. Precisely how this criterion differs from the "reasonable cause" standard the court is required to use in determining whether or not to issue a warrant after a civilian has filed an accusatory instrument²²⁸ is unclear. Unlike the reasonable cause standard, this factor is not framed so that a certain level of evidence is automatically determinative of the outcome. "Merit" can hardly be equated

224. Although the opinion is silent on this issue, the District Attorney's refusal to prosecute was probably a function of office policy. See *supra* note 168.

225. For an explanation of Requests to Appear see *supra* notes 163-65.

226. *People v. Kissling*, No. 17567 slip op. at iii (quoting *People ex rel. Luceno v. Cuozzo*, 97 Misc. 2d 871, 876, 412 N.Y.S.2d 748, 751 (1978)).

227. *Id.* at iii.

228. N.Y. CRIM. PROC. LAW § 120.20 (2) (McKinney 1981). See also *supra* the text accompanying notes 128-29.

with reasonable cause. If the "merit" of the complainant's accusation is less than reasonable cause, may the complaint still issue—either because this prong of the test does not dictate a certain minimum level of merit necessary for issuance of a criminal complaint, or because any defect in this prong may be remedied by a strong showing on one or both of the other two prongs?²²⁹

"Reasonable cause" is not a stringent standard; it is a standard "of a lower order and lower quantum" than "legally sufficient evidence."²³⁰ New York courts have equated reasonable cause with the constitutional standard probable cause.²³¹ An arrest should not be made,²³² nor a warrant²³³ or a summons²³⁴ issued on less than probable cause. Similarly, because it is unethical for a "public prosecutor or other government lawyer [to] institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause[.]"²³⁵ it would be illogical to interpret the first prong of the *Kissling* test to allow a private prosecution to proceed on a showing of less than probable cause.

Similarly, if the "merit" of the complainant's accusation—the evidence of guilt or legally provable guilt—is greater than reasonable cause, may the presiding magistrate ever decline to issue the complaint or disallow the private prosecution? May the magistrate refuse to issue a complaint in spite of the presence of reasonable cause because the complainant's showing on the other two prongs of the test is so poor as to outweigh the strong "merit" of a complainant's case?

These questions must be answered in the affirmative. If judges were required to sanction any private prosecution where there was reasonable cause to believe the putative defendant was guilty, there would be no need for the other two prongs of the test. Other than the process of deciding whether or not reasonable cause existed, the test would be self-executing.

Yet, this very answer points out the danger of the court's discretion. Why should not *all* cases where there is reasonable cause be prosecuted? Why should the courts exercise a chancellor's foot veto over such prosecutions? The lesson of this is that, to ensure the integrity of the prosecutorial system, courts should be slow to block private criminal prosecutions where reasonable cause to believe that the putative defendant is guilty has been established.

229. For a test allowing a strong showing on one prong to compensate for a weak showing on another prong in a probable cause context, see *Illinois v. Gates*, 462 U.S. 213 (1983).

230. N.Y. CRIM. PROC. LAW § 70.10 commentary at 706 (McKinney 1981). Compare N.Y. CRIM. PROC. LAW § 70.10 (1) (McKinney 1981) (legally sufficient evidence) with N.Y. CRIM. PROC. LAW § 70.10 (2) (reasonable cause) (McKinney 1981).

231. *People v. Verrecchio*, 23 N.Y.2d 489, 492, 245 N.E.2d 222, 224, 297 N.Y.S.2d 573, 575 (1969).

232. U.S. CONST. amend. IV; N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1981).

233. U.S. CONST. amend. IV; N.Y. CRIM. PROC. LAW § 120.20 (2) (McKinney 1981).

234. N.Y. CRIM. PROC. LAW §§ 130.30, 120.20(2) (McKinney 1981).

235. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (2d ed. Supp. 1986) [hereinafter MODEL CODE]. Accord 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.9.

There is a procedural lesson inherent in this factor as well. Because reasonable cause is a prerequisite for the issuance of a criminal complaint, the complainant must be given every opportunity to establish such quantum of evidence. In order to reach this level, he must be given full opportunity to adduce his proof, including the right to call witnesses, cross-examine any witnesses called by other parties, and to present arguments to the court.²³⁶

b. The qualitative aspect

As noted above, there is a qualitative aspect to the concept of "the underlying merit of complainant's accusation" as well. It is not merely a question of the quantity and credibility of the evidence against the putative defendant; it is also the importance or unimportance of the issue involved. Surely a complaint that raises important issues of public policy ought to be allowed to proceed as a private prosecution sooner than the complaint of one neighbor against another for excessive noise. In *People ex rel. Luceno v. Cuozzo*,²³⁷ the court opined that "[c]ases which present important public issues, rank unfairness or injustice should not be kept from judicial scrutiny."²³⁸ The problem comes in defining an "important public issue."²³⁹ This is an area in which reasonable people may differ, but the likelihood is that most courts would find, for example, police brutality (Scenario III) and domestic violence (Scenario II) to be important public issues.

The *Cuozzo* standard did not exclude purely private disputes either, however, referring to cases of "rank unfairness or injustice." If an "important public issue" is difficult to define, certainly "rank unfairness or injustice" is close to impossible. However, it seems reasonable to argue that the greater the injustice or unfairness made out by the sworn testimony of the complainant, the more willing the court should be to allow the private prosecution to proceed.

With complaints emanating from mere private disputes, utterly untouched by important public issues (if such a pure case is possible), what level of unfairness or injustice must the complainant's testimony reach in order to persuade the court to allow the private prosecution to go forward? It is submitted that the level ought to be extremely low because the criminal law,

236. N.Y. CRIM. PROC. LAW § 60.15 (McKinney 1981). See *supra* text accompanying notes 122-25.

237. *People ex rel. Luceno v. Cuozzo*, 97 Misc. 2d 871, 876, 412 N.Y.S.2d 748, 751 (White Plains City Court 1978).

238. *Id.* at 876, 412 N.Y.S.2d at 751.

239. In *Cuozzo*, counsel for the civilian complainant sought to prosecute, for various traffic violations, the police officer who had already lodged traffic violation charges against the civilian, all stemming from of the same car accident. The court refused to consent to the private prosecution, apparently finding the mystery of the causation of the accident not a burning public issue. *Id.*

This case is a good example of the elastic nature of the "important public issue" standard, because one could surely argue that where a police officer causes an accident and then, in order to cover up his own misdeeds, falsely accuses another, that is an extremely important public issue going to the very heart of the integrity of law enforcement personnel.

for reasons explained above,²⁴⁰ ought to be extremely responsive to the plight of the individual member of society. As one court put it, "when a prosecution rises above the level of spite litigation or strictly private animosity of a *de minimis* nature, it should be permitted."²⁴¹ This is a very low standard,²⁴² and any complaint not clearly below this standard should, other factors aside, be approved for private prosecution.

2. *The Significance of the Private Prosecutor's Ulterior Objective*

The second criterion set down by the *Kissling* court is "the right of the accused to be prosecuted by one 'not actuated by an ulterior objective in obtaining a conviction.'"²⁴³ This criterion should not be read literally; the case law does not support the proposition that the defendant has a "right" to be prosecuted by a disinterested party. Certainly, the right to bring a criminal prosecution can be abused,²⁴⁴ and, consequently, care should be exercised where it appears the complainant has an ulterior motive:

240. See *supra* notes 31-37 and accompanying text.

241. *People v. Birnberg*, 112 Misc. 2d 870, 874, 447 N.Y.S.2d 597, 600 (Crim. Ct. 1981).

242. With all the discussion about the litigation explosion, Americans have perhaps an unrealistic idea of what a truly litigious culture might look like. Compared to lawsuits in some cultures, even the actions brought in 346 Broadway appear to be of signal importance. See *supra* notes 156-201 and accompanying text. We may well gain insight into the meaning of spite litigation and *de minimis* by looking, for example, at modern Yugoslavia:

Yugoslavs often complain of a personality characteristic in their neighbors that they call *inat*, which translates roughly as "spite." . . . One finds countless examples of it chronicled in the press . . . the case of two neighbors in the village of Pomoravije who had been suing each other for 30 years over insults began when one "gave a dirty look" to the other's pet dog.

Last year the second district court in Belgrade was presented with 9000 suits over alleged slanders and insults. . . . Often the cases involve tenants crowded in apartment buildings. In one building in the Street of the October Revolution tenants began 53 suits against each other. Other causes of "spite" suits . . . included "a bent fence, a nasty look." Business enterprises are not immune and one court is handling a complaint of the Zastava Company of Knic over a debt of 10 dinars (less than 1 cent). In the countryside spite also appears in such petty forms as a brother who sued his sister because she gathered fruit fallen from a tree he regarded as his own

Dr. Mirko Barjakterevic, professor of ethnology at Belgrade University . . . remarked that few languages had as many expressions for and about spite as Serbian and that at every turn one hears phrases like, "I'm going to teach him a lesson," and "I don't want to be made a fool of."

Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & Soc'y REV.* 95, 105 n.22 (1975) (quoting *N.Y. Times*, Oct. 16, 1966).

In the Phillipines, among the Lipay, litigation is virtually a way of life: "A large share, if not the majority, of legal cases deal with offenses so minor that only the fertile imagination of a Subanum legal authority can magnify them into a serious threat to some person or to society in general . . ." *Id.* (quoting FRAKE, *LITIGATION IN LIPAY: A STUDY IN SUBANUM LAW*, quoted in NADER, *THE ANTHROPOLOGICAL STUDY OF LAW* 21 (Nader ed. 1965)).

243. *People v. Kissling*, No. 17567 (N.Y. App. Term 1st Dep't July 7, 1981) (quoting *Read v. Sacco*, 49 A.D.2d 471, 375 N.Y.S.2d 371 (App. Term. 1975)).

244. *In re Hart*, 131 A.D. 661, 116 N.Y.S. 193 (1st Dept. 1909) (attorney disbarred for, *inter*

A prudent magistrate should proceed with the utmost caution when he has reason to suspect that a criminal proceeding was commenced before him, not to vindicate public justice, but to serve some private purpose, and should withhold process until satisfied that the complainant is acting in good faith in behalf of the People and not to aid personal objects.²⁴⁵

In *Kissling and Read v. Sacco*,²⁴⁶ however, the fact that the private prosecutor had an "ulterior objective" did not stop the court from approving the prosecution. In *Kissling*, the complainant had failed to collect on a \$550 debt the defendant owed him and, therefore, had \$550 worth of "ulterior objective." The Appellate Term reversed the Criminal Court's dismissal of the criminal action and ordered a new hearing on the complainant's application, despite the complainant's obvious ulterior objective and financial incentive. The *Kissling* court did not take advantage of the facts of that case to rule that a complainant with an ulterior objective may not prosecute a criminal case against a defendant.

Similarly, in *Read*, plaintiff's counsel, serving as private prosecutor, had obtained a conviction of the defendant for assault in the third degree. Subsequently, in his civil suit for assault and battery, plaintiff moved for summary judgment, arguing that the doctrine of collateral estoppel precluded the defendant from relitigating the facts underlying the assault claim because they had been adequately litigated and determined in the criminal case. Defendant argued, *inter alia*, that collateral estoppel, being an equitable doctrine, should not apply where the prosecutor was an interested party, "impelled by the desire to secure money damages on behalf of the plaintiff."²⁴⁷

In rejecting the defendant's contention, the court indicated its unhappiness with interested private prosecutors²⁴⁸ but upheld the claim of collateral estoppel

alia, having summons [earlier, legally authorized version of Request to Appear] served, and threatening criminal prosecution, with ultimate goal being not criminal prosecution but extortion of money from putative defendant to avoid prosecution).

245. *People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 392, 79 N.E. 330, 333 (N.Y.C. Spec. Sess. 1906). At the very least, care means that the magistrate must examine for himself the facts alleged to underlie the criminal complaint:

The minutes of the hearing below reveal that the court and the judgment creditor's attorney discoursed on the reason for the summons, with counsel stating that he had proof "under oath" that defendant was in violation of section 1170 of the Penal Law. The record does not indicate that the court read any depositions. The attorney admitted that his action may be grounded in the civil law, but urged that "Section 1170 specifically makes it a misdemeanor." Hence, it would seem that the court accepted the conclusions of the attorney and thereupon issued the summons. It is plain, however, that the "evidence" before the court was not sufficient to support the issuance of an *arrest warrant*.

An application for a summons in a criminal case is not unusual. However, where the summons is sought as a device to induce settlement of judgment, more than a cursory inquiry to ascertain the facts warranting the issuance of the summons is proper. *People v. Powell*, 40 Misc. 2d 550, 550-51, 243 N.Y.S.2d 482, 483-84 (Sup. Ct. 1963) (citations omitted).

246. *Read v. Sacco*, 49 A.D.2d 471, 375 N.Y.S.2d 371 (App. Term. 2d Dept. 1975).

247. *Id.* at 474, 375 N.Y.S.2d at 376.

248. As the *Read* court stated:

because it found no unfairness in the underlying criminal prosecution.²⁴⁹ The court found that the private prosecutor's ulterior objective alone, without any indication in the record that the trial itself was not fair, was not enough to invalidate the conviction, or more precisely, prevent its use for purposes of collateral estoppel: "[t]here may, indeed, be lurking in his mind the object to acquire a judgment for money damages at a later date, but that alone should not defeat the prosecution or prevent the use of the conviction as a foundation for collateral estoppel."²⁵⁰

Do simple personal animus and the desire for revenge constitute ulterior objectives? Examine Scenario I.²⁵¹ There is a question whether the crime victim who comes before the court seeking issuance of a complaint for assault against another who has already begun a criminal prosecution for assault against him has an ulterior objective. Certainly, he gains a significant litigation advantage if he is allowed to criminally prosecute the other party.²⁵² If he has filed a civil suit for damages for assault and battery surely that adds to his ulterior objective. Where the district attorney, for whatever reason, cannot or will not prosecute, should this complainant be estopped from prosecuting the case himself or through counsel because he has ulterior objectives?

Consider the battered wife or girlfriend in Scenario II.²⁵³ The issuance of a criminal complaint against the assaultive male would most likely give the complainant significant litigation advantages in her divorce and custody actions.²⁵⁴ Where the district attorney, for whatever reason, cannot or will not prosecute, should the complainant be estopped from prosecuting the case herself or through counsel because she has these ulterior objectives?

What of the victim of police brutality in Scenario III?²⁵⁵ If the district attorney will not prosecute, should the victim be prohibited from prosecuting the criminal charges himself merely because a criminal conviction would greatly facilitate his pending federal civil rights action against the officer and his employers?²⁵⁶

There can be no question that certain litigation advantages adhere to being on the plaintiff's side of virtually all criminal litigation;²⁵⁷ and it would be

Clearly, the preferable and approved practice is that the attorney representing a litigant in a civil action should not be the prosecutor of the opposing party in a criminal proceeding arising out of the same subject matter. The conflicts implicit in such a case may create a course of conduct prejudicial to the defendant and violate the dictates of due process. Neither the conviction itself nor the use of the conviction as an estoppel should stand against a finding of the existence of such a course of conduct.

Id. at 476, 375 N.Y.S.2d at 377.

249. *Id.* at 475-76, 375 N.Y.S.2d at 377.

250. *Id.* at 475, 375 N.Y.S.2d at 376.

251. *See supra* text following note 18 discussing Scenario I.

252. *See supra* note 38 and accompanying text.

253. *See supra* text following note 18 discussing Scenario II.

254. *See supra* note 38.

255. *See supra* text prior to note 19 discussing Scenario III.

256. *See supra* note 29 and accompanying text.

257. *See supra* note 40 and accompanying text.

naïve and unrealistic to deny that most complainants are at least dimly aware of some of these advantages when they make the decision to file. However, to refuse to allow a complainant with a genuine grievance to conduct a private prosecution purely because the ancillary litigation advantages may constitute ulterior motives, is to elevate a minor factor, the complainant's motives, over major goals, the orderly resolution of disputes and the attainment of justice.

The *Cuozzo* court unwisely regarded the ancillary litigation advantages as a compelling factor in its decision to dismiss a private prosecution:

Exercising its discretion, this court is of the opinion that the filing of a criminal action by a defendant or the defendant's attorney will interfere with both the administration and conduct of police activities as well as the conduct of vehicle and traffic matters in this court. The filing of a criminal action against a police officer on allegations of fact which arise out of the same transaction or occurrence from which a defendant is charged, places the police and the prosecuting police officers at a severe tactical disadvantage in court proceedings.

If Luceno's innocence is established at trial and if the police have in some way violated her rights by false arrest or otherwise, then Luceno's resourceful counsel can file separate and conventional litigation seeking redress. This court does not believe it would be proper to allow tactical diversions to be created against the orderly processing of vehicle and traffic matters by sanctioning what may be termed a criminal counterclaim or countersuit.²⁵⁸

The *Cuozzo* court's concerns are not appropriate ones for the judicial branch. The goal of obtaining justice should not be weighed against the smooth functioning of either the executive branch or the court itself. What the *Cuozzo* court is really contending, as indicated by its preference for "separate and conventional litigation," is that allowing the "criminal counterclaim" to proceed would put the prosecutor and the defendant on a virtually even level. "[P]lac[ing] the police and the prosecuting police officers at a severe tactical disadvantage in court proceedings" really means making all parties start out roughly equal, something that does not normally occur in criminal litigation.²⁵⁹ If there is probable cause to believe both parties committed a crime, there is no reason why they should not both start out equal. The sole reason not to allow such an even start is to encourage a dual system of justice that gives greater weight to police officers or other agents of the state than to ordinary citizens.

The *Cuozzo* court is quite correct, however, in recognizing the enormous power of these litigation advantages. Perhaps the court in these situations should have the discretion to order separate trials and direct the chronological order of those trials. The exercise of the court's discretion in this way should minimize any unfairness without blocking the complainant's access to the criminal courts entirely.

258. *People ex rel. Luceno v. Cuozzo*, 97 Misc. 2d 871, 876-77, 412 N.Y.S.2d 748, 751-52 (White Plains City Court 1978).

259. See *supra* note 40 and accompanying text.

In short, the existence of litigation advantages may require courts faced with private prosecutions to exercise their discretion creatively to reduce any unfairness; but the litigation advantages themselves should not be construed as ulterior objectives sufficient to block the litigation completely.

One reason why the complainant's harboring of ulterior motives should not in and of itself bar prosecution of the person against whom he is complaining is that the complainant's motives are unrelated to the putative defendant's factual and legal guilt. Simply because the complainant is motivated by sheer malice does not mean that the defendant is not guilty and that society does not have an interest in his punishment.

It is true that there is a "danger that private litigants actuated by malice will turn a prosecution into a private vendetta."²⁶⁰ However, courts deal with such problems every day in criminal cases brought by public prosecutors.

The most common answer to the malice problem is that the complainant can be impeached by his ulterior objective. Indeed, in *Read*, the criminal defense attorney not only cross-examined the complaining witness about the pending civil action and claim for \$225,000 in damages but also argued it strongly as the motive on summation.²⁶¹ As long as the complainant may be impeached regarding his ulterior motives, he is not in any different situation in a private prosecution than he would be in a criminal prosecution brought by the district attorney. In either case, the complainant's motivations and interests are known to the fact-finder, who can then decide the case on its merits.

3. *The State's Interest in Being Adequately Represented*

The third criterion identified by the *Kissling* court is "the People's interest in being adequately represented." Because of the cryptic nature of the court's opinion and the almost complete absence of judicial decisions discussing the *Kissling* standards, it is extremely difficult to be certain what the court intended. However, the words "adequately represented" are reminiscent of Disciplinary Rule 5-105(C) of the Code of Professional Responsibility ("the Code"), the import of which is directly pertinent to the situation of the attorney who is asked to serve as a private prosecutor.²⁶²

260. *People v. Birnberg*, 112 Misc. 2d 870, 874, 447 N.Y.S.2d 597, 600 (Crim. Ct. 1981).

261. *Read v. Sacco*, 49 A.D.2d 471, 472-73, 375 N.Y.S.2d 371, 374, 377 (App. Term 2d Dept. 1975). This defense strategy would likely be followed in any case where the complainant had filed a civil suit, whether the criminal case was being prosecuted by a private prosecutor or the district attorney:

"Evidence related to witness bias, prejudice or ulterior motivation is properly explored in detail during cross-examination at trial. Such material is never collateral and the right of defendants to probe the motive of their accusers is jealously guarded." *People v. Hill*, 122 Misc. 2d 895, 897, 471 N.Y.S.2d 826, 828 (Crim Ct. 1984) (citations omitted) (district attorney charged police officer with assaulting civilian; civilian had filed notice of claim against municipality and police department).

262. See *infra* note 279 and accompanying text.

The real difference between private prosecution cases and those brought by the district attorney is not the ulterior motives of the complainant, which may be present in cases prosecuted by the public prosecutor as well, but the role of the complainant's attorney. For the complainant's lawyer to act as the prosecuting attorney creates a conflict of interest which arises out of the different ethical mandates for lawyers with private clients, on one hand, and for public prosecutors, on the other. An attorney retained by a private client is compelled by the Code to act "within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."²⁶³ However, a public prosecutor is held to a different ethical standard; as a representative of the state, he is required by his oath of office "to seek justice, not merely to convict."²⁶⁴ One New York court has noted that this "differing standard of ethical conduct may present the private prosecutor with a conflict of competing interests as between the fiduciary duty of partisan loyalty to his client and the more abstract and metaphysical commandment that a prosecutor must pursue simple and impartial justice regardless of its result."²⁶⁵

One example of such conflict is shown in *People ex rel. Luceno v. Cuzzo*.²⁶⁶ In that case, Officer Cuzzo, involved in a traffic accident with Madelyn Luceno, filed a traffic information in which she was charged with changing lanes unsafely. Luceno, through counsel, in turn filed a "summons" charging Cuzzo with several vehicular violations, including speeding and following too closely, and sought the court's permission for Luceno's counsel to act as a private prosecutor of the charges against Cuzzo. In dismissing the action against Officer Cuzzo, the court expressed reservations about the ability of Luceno's counsel to be impartial and objective under these circumstances: "[I]t is virtually impossible to ask Luceno's defense attorney, or any defense attorney so situated, to act with objectivity and complete impartiality as a prosecutor in a criminal proceeding against a police officer who is responsible for the charge against his client. The conflict of interest here is explicit."²⁶⁷

263. MODEL CODE, *supra* note 235, at EC 5-1. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 1 (1983) ("[l]oyalty is an essential element in the lawyer's relationship to a client") [hereinafter MODEL RULES].

264. See also MODEL CODE, *supra* note 235, at EC 7-13 (providing specific rule to govern prosecutorial conduct and stating that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). See also MODEL RULES, *supra* note 263, at Rule 3.8 and comments.

265. *People v. Vial*, 132 Misc. 2d 5, 13-14, 502 N.Y.S.2d 930, 936 (Crim Ct. 1986) (citing, in part, *Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26, 401 N.Y.S.2d 191 (1977) (disqualifying attorney and his firm from representing plaintiff in breach-of-fiduciary-duty claim where attorney had represented one of defendants during period of time when alleged fraud occurred)).

266. 97 Misc. 2d 871, 412 N.Y.S.2d 748 (White Plains City Court 1978).

267. *Id.* at 877, 412 N.Y.S.2d at 752. Accord *People v. Vlasto*, 78 Misc. 2d 419, 427, 355 N.Y.S.2d 983, 990 (Crim. Ct. 1974) ("[t]o permit a complaining witness or his attorney to represent the People before a jury would negate the rules of fairness required of a prosecutor . . ."). Of course, a district attorney may have ulterior objectives as well. *People v. Birnbers*, 112 Misc. 2d 870, 874, 447 N.Y.S.2d 597, 600 (Crim. Ct. 1981). Indeed, he may even find himself in a conflict

Canon 5 of the Code states that "[a] lawyer should exercise independent professional judgment on behalf of a client."²⁶⁸ That professional judgment should be employed "solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."²⁶⁹

The concept of loyalty to the client includes the duty to preserve confidences and secrets of the client and to refrain from using such confidences and secrets to the detriment of the client without the client's consent.²⁷⁰ The lawyer must represent his client zealously,²⁷¹ unfailingly seeking "the lawful objectives of his client,"²⁷² and avoiding "[p]rejudice or damage" to him.²⁷³ In short, "a lawyer should always act in a manner consistent with the best interests of his client."²⁷⁴

A government prosecutor, however, has different responsibilities:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefits of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.²⁷⁵

Furthermore, the prosecutor may not bring criminal charges unless he believes them to be supported by probable cause.²⁷⁶

An attorney who serves as a private prosecutor must obey the same strictures that bind a public prosecutor.²⁷⁷ It is, therefore, obvious that he is going to be

of interest situation. *People v. Vial*, 132 Misc. 2d at 7, 502 N.Y.S.2d at 932 (it is a conflict of interest for one assistant district attorney to prosecute both complainant/defendants in cross-complaint situation).

268. MODEL CODE, *supra* note 235, at Canon 5.

269. *Id.* EC 5-1.

270. *Id.* DR 4-101. *See also* EC 4-1, EC 4-5.

271. *Id.* Canon 7. *See also* EC 7-1.

272. *Id.* DR 7-101(A)(1).

273. *Id.* DR 7-101(A)(3).

274. *Id.* EC 7-9.

275. *Id.* EC 7-13 (footnote omitted). *See also* DR 7-103(B); 1 STANDARDS FOR CRIMINAL JUSTICE § 3-1.1(b)(c) commentary at 3-7; NATIONAL PROSECUTION STANDARDS, *supra* note 205, at § 25.1 commentary at 417-19.

276. *Id.* *See also* MODEL CODE, *supra* note 235, at DR 7-103(A).

277. *People v. Van Sickle*, 13 N.Y.2d 61, 65, 192 N.E.2d 9, 11, 242 N.Y.S.2d 34, 37 (1963)

subject to various conflicts between his obligations to his private client and his obligations as a prosecutor. His duty to exercise his independent professional judgment solely on behalf of his client, his duty of undiluted loyalty to that client, and his duty of zealous advocacy on behalf of that client will all conflict with the prosecutor's duty to seek justice, not merely a conviction. The private lawyer's duty to preserve confidences and secrets of his client will inevitably clash with the prosecutor's duty to disclose information, obtained from his private client or elsewhere, that tends to show the innocence or diminished level of guilt of the defendant. In order to honor that command, the private prosecutor will have to disclose precisely that information the revelation of which is enjoined by Disciplinary Rule 4-101.

A lawyer in private practice hired to litigate a civil case is in an ethically difficult situation when asked to serve as a private prosecutor in a criminal case growing out of the same facts. There is a way, however, not discussed in the case law of private prosecution, of reconciling the conflict inherent in the role of the private prosecutor. The Code warns that once a lawyer has accepted employment, he should not "assum[e] a position that would tend to make his judgment less protective of the interests of his client."²⁷⁸ However, the Code allows a lawyer to represent clients with divergent interests if (1) "it is obvious he can adequately represent" both; and (2) after complete disclosure of the possible effects of the conflict, both clients agree to the representation.²⁷⁹ Therefore, when a lawyer comes before a court at the behest of a complainant and requests permission to represent the state as a private prosecutor, the judge should conduct the kind of inquiry held when multiple defendants in a criminal case wish to be represented by the same counsel.²⁸⁰ On the record and in open court, the judge should expressly inform the complainant of the ethical duties of a lawyer and the special ethical duties of a prosecutor. The judge should explain the potential conflicts of interest discussed above and further explain that where there is a conflict of interest between the role of lawyer for a private client and the role of prosecutor for the state, the lawyer must comply with the requirements of the latter. The court should explain these concepts fully and give specific examples of conflicts that are likely to arise in this situation.²⁸¹

(Van Voorhis, J., concurring in result); *Read v. Sacco*, 49 A.D.2d 471, 474-75, 375 N.Y.S.2d 371, 376 (App. Term. 1975); *People ex rel. Luceno v. Cuzzo*, 97 Misc. 2d 871, 875-76, 412 N.Y.S.2d 748, 750-51 (White Plains City Court 1978).

278. MODEL CODE, *supra* note 235, at EC 5-2. See also EC 5-14, EC 5-15, DR 5-105(A)(B).

279. *Id.* DR 5-105(C).

280. See *Holloway v. Arkansas*, 435 U.S. 475 (1978); *People v. Gomberg*, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975); FED. R. CRIM. P. 44(C) (1979).

281. The court should explain, for example, that normally a lawyer must not reveal information learned during the representation of a client if that information may be used to the detriment of the client. MODEL CODE, *supra* note 235, at DR 4-101. A prosecutor, however, must timely turn over to the defense all information which is indicative of the criminal defendant's innocence or lesser degree of culpability. *Id.* DR 7-103(B). Therefore, should the complainant inform his lawyer/prosecutor that, in an assault case for example, the complainant struck first, the lawyer would have to turn that information over to the defense, even though the turnover would not be in the best interest of the complainant.

After the court has explained to the complainant how the lawyer's dual role will inevitably compromise the lawyer's representation of the client's interests, the judge must ask the client if, under these circumstances, he consents to be represented by this lawyer. Such consent by the complainant must include an express statement that he understands that the lawyer's ethical duties as prosecutor must take precedence over his loyalty to his private client;²⁸² he must, in effect, waive his right to conflict-free representation. If the complainant consents, the next level of inquiry is to determine whether the lawyer's other client, the state, consents to such representation.

Because, by definition, there is no one else to speak for the state on this issue, the judge himself must make this decision. In making this decision, the only issue for the judge to consider is that expressed in the other prong of the test, whether the lawyer in this conflict-laden situation can "adequately represent" both the private complainant and the state.

In considering whether the lawyer can adequately represent the interests of both the private client and the state, the court must consider: (1) any interests that will compromise the lawyer's fidelity to each client; (2) the availability of an independent prosecutor; and (3) the possibility that if the court refuses to allow the lawyer to act as private prosecutor the interests of both the state and the civilian complainant in the criminal prosecution will be completely unrealized.

The judge's analysis of the first consideration in regard to the state's interest is straightforward. There should be few problems with the private prosecutor's loyalty to the state because both the lawyer and his private client have stated on the record in open court that they recognize and accept that the lawyer's responsibilities as prosecutor supervene his loyalties to the private client.²⁸³

The private client, on the other hand, is expressly granted less than the normal fealty inherent in the lawyer-client relationship. Significantly, by agreeing to use the same lawyer as counsel in a civil case and as private prosecutor, the only "damage" the complainant sustains is in the civil action. In the

282. The lawyer should also be required to affirm on the record his understanding and agreement that where his ethical responsibility to the State as prosecutor conflicts with his loyalty to his private client, the former must prevail.

283. Of course, some may regard this view as naive since it is the private client, not the State, who is paying the lawyer's fee, and it is only human to try to please whoever is actually paying the bill. See MODEL CODE, *supra* note 235, at DR 5-107, EC 5-21. The Model Code expressly recognizes this aspect of human nature:

Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

Id. EC 5-22. In this situation, however, where the lawyer has declared his position in open court and where the judge, aware of the unusual position of the lawyer, can monitor the lawyer's performance, the likelihood of the lawyer being seduced from his ethical responsibilities by the paying client seems significantly lower.

criminal action, the private prosecutor is subject to the same ethical restrictions as a public prosecutor; both represent the state, not the complainant. Hence, the complainant should receive similar treatment in a private prosecution as he would in one brought by the district attorney. In the civil case, however, the lawyer's duties of loyalty and confidentiality are diluted—indeed, superseded—by his ethical responsibilities as a prosecutor. This price may be an unavoidable one, given the lack of alternatives—the price of being allowed to go forward with a criminal prosecution.

The judge, in his analysis, should view “adequate representation” as a relative, not absolute, concept. The representation offered by the private prosecutor should be considered in context: the public prosecutor has decided not to press the complainant's case and not to represent the state in this matter. There is no one else available to do so.

There can be little question that, in terms of professional ethics, the best solution would be for the court to appoint an independent prosecutor to prosecute the criminal case. However, given the enormous cost of a procedure which would allow courts to appoint independent special prosecutors compensated by the state for the mine-run of misdemeanor complaints brought by civilian complainants whose applications for prosecution were rebuffed by the public prosecutor, it seems extremely unlikely that any jurisdiction would ever approve and fund such a system. Furthermore, if such a mechanism were approved, economic pressures would likely persuade judges to find reasons to avoid ordering prosecutions in cases that, but for the impact on the public fisc, the court would approve for prosecution.²⁸⁴ Thus, any such system to expand

284. The *Van Sickle* court stated:

In these courts there are certain to be situations, like the present, where the charges have not been preferred through public officials and where there would be no one but the complaining witness to press the charge which would otherwise be dropped by default. It would be impractical, nor do we consider that the statute requires that a lawyer be employed in every instance to act *ad hoc* under and with the consent of the District Attorney if the District Attorney or his office cannot be present. A threshold problem would almost always arise in such instances: who would compensate the lawyer?

People v. Van Sickle, 13 N.Y.2d 61, 65, 192 N.E.2d 9, 11, 242 N.Y.S.2d 34, 37 (1963) (Van Voorhis, J., concurring in result).

As one New York court expressed it when it opted for the approval of a private prosecutor over the appointment of a special prosecutor:

Considering the huge case load with which both the District Attorney and the courts of New York County are burdened, and given the limited nature of staff and Trial Parts related to this case load, the appointment of a [County Law] section 701 Special District Attorney would be unwarranted. We do not believe that the Legislature of this State, in passing County Law § 701, sought to bring about a situation as is here presented. If it were intended that in New York County every time there was a traffic offense, a sanitation offense, a peddling offense, a harassment offense or a disorderly conduct offense, that the District Attorney was required to wheel in his heavy artillery, then the members of the Legislature did not use common sense and simply did not remember the aged institution of the Magistrate's Courts.

People v. Vial, 132 Misc. 2d 5, 12-13, 502 N.Y.S.2d 930, 936 (Crim. Ct. 1986) (citations omitted).

citizen access to the criminal courts might well lead to the opposite result.

Therefore, in the absence of a system by which independent prosecutors are provided to prosecute misdemeanor complaints brought by private individuals but declined by the public prosecutor—a system in which the government would have to compensate these special prosecutors—if the complainant's lawyer is not allowed to proceed as a private prosecutor it is likely that the matter will go entirely unprosecuted. Both the state's and the crime victim's interests in the enforcement of the criminal laws will go unmet.

It may well be that the strongest argument for private prosecution is the argument from necessity, the lack of alternatives. New York courts have repeatedly recognized that District Attorneys' offices simply do not have the staff and the resources to prosecute all minor criminal cases.²⁸⁵ The public prosecutor must use his discretion in determining which cases to prosecute, leaving many unprosecuted.²⁸⁶ "Under these circumstances, a victim of an assault has little choice: he must either represent himself in a criminal prosecution or retain an attorney for that purpose."²⁸⁷ During World War II, necessity persuaded New York courts to allow attorneys for the federal Office of Price Administration to prosecute their own cases whenever local prosecutors declined to do so.²⁸⁸ If only public prosecutors can prosecute minor offenses, society's interest in enforcement of its criminal laws will inevitably be compromised:

Another and most serious consideration is that subsequent to the *James* case decision [reversing a conviction because, *inter alia*, the defendant had been prosecuted by a game law inspector, not admitted to the practice of law] there has been a cessation of prosecuting endeavor on the part of inspectors and game wardens. . . . District attorneys in the sparsely populated sections are not able to go forward with these small prosecutions and the Attorney-General has not sufficient staff. Literal interpretation [of the penal laws prohibiting the unauthorized practice of law] retards enforcement and leads to disregard of the game laws.²⁸⁹

285. See, e.g., *Van Sickle* 13 N.Y.2d at 64, 192 N.E.2d at 10, 242 N.Y.S.2d at 36; *People v. Montgomery*, 7 Misc. 2d 294, 296, 166 N.Y.S.2d 455, 458 (1957); *In re Coleman v. Lee*, 1 Misc. 2d 685, 148 N.Y.S.2d 753 (1956); *People ex rel. Bruckner v. Wyner*, 207 Misc. 673, 676, 142 N.Y.S.2d 393, 397 (1955). See also OP. ATT'Y GEN. 117, 119 (1958).

As the *Vial* court noted: "A recent article in the *New York Law Journal* April 28, 1986, publicized the work load of District Attorney Morgenthau's office as probably the highest in the United States with 84,564 misdemeanor cases for the year 1985 alone. The nearest borough was Kings County with 27,972 misdemeanor prosecutions." *Vial*, 132 Misc. 2d at 12 n.6, 502 N.Y.S.2d at 936 n.6. For a discussion of another district attorney's workload, see *Johnson v. Boldman*, 24 Misc. 2d 592, 595-96 (N.Y. Sup. Ct. 1960).

286. *People ex rel. Allen v. Citadel Management Co.*, 78 Misc. 2d 626, 631, 355 N.Y.S.2d 976, 978 (Crim. Ct. 1974).

287. *Read v. Sacco*, 49 A.D.2d 471, 475, 375 N.Y.S.2d 371, 376 (App Term., 2d Dep't 1975). *Accord People ex rel. Luceno v. Cuozzo*, 97 Misc. 2d 871, 876, 412 N.Y.S.2d 748, 751 (White Plains City Court 1978) ("[T]here may be matters which private persons should be allowed to prosecute because the District Attorney for one or more reasons will not or cannot act.").

288. *People ex rel. Kohler v. Scharer*, 185 Misc. 616, 618, 58 N.Y.S.2d 87, 89-90 (City Magistrate's Court N.Y., War Emergency Ct., Borough of Brooklyn 1945).

289. *People v. Black*, 156 Misc. 516, 520, 282 N.Y.S. 197, (Otsego County Ct. 1935).

Where enforcement of the criminal law is lax because the public prosecutor does not have the necessary resources to prosecute cases which ought to be prosecuted, both the crime victim and society suffer.²⁹⁰

Given these interests, it is the rare case where prosecution by a private prosecutor would be worse than no prosecution at all. Hence, in all but the most unusual of cases, it would be expected that the court would, on behalf of the state, "consent" to the dual representation. The only real alternatives to allowing the complainant's privately retained lawyer to prosecute the criminal case are self-representation by the complainant or disallowance of the prosecution entirely.

A *pro se* prosecution by a lay complainant would have all the problems inherent in a *pro se* criminal defense.²⁹¹ Furthermore, the likelihood is small that a lay complainant would be as mindful of the ethical responsibilities of a public prosecutor as a lawyer would be. In addition, the state, represented by the lay complainant, would be opposed by a skilled lawyer representing the criminal defendant.²⁹² Therefore, adequate representation of the state militates toward solutions other than self-representation by the complainant.²⁹³

Allowing the complainant's lawyer to serve as private prosecutor is, admittedly, an imperfect solution. The situation is, however, somewhat analogous to the plight of the civil plaintiff who can afford representation by counsel of his choice only if he enters into a contingent fee arrangement. While such fee arrangements, like private prosecutors, are not favored, they are accepted as a lesser evil in cases in which the alternative is a complete lack of prosecution of the cause of action.²⁹⁴ Disallowing the prosecution entirely seems the least palatable result. If the complainant is willing to give up certain benefits of the normal attorney-client relationship in order to be allowed to proceed with a criminal prosecution, surely that should be the complainant's choice. Given that choice, the presumption ought to be in favor of allowing the joint representation.

In determining whether or not to allow a private prosecution to proceed, judges should consider that, ulterior motives and conflicts of interest notwithstanding, the litmus test applied by appellate courts is not "a categorical rule of thumb query whether an attorney or public officer 'prosecuted.'"²⁹⁵ Instead, the proper test is whether the record indicates that complainant's counsel obeyed the same rules that a public prosecutor is required to obey and whether

290. See *supra* notes 31-37 and accompanying text.

291. See generally *Faretta v. California*, 422 U.S. 806 (1975) (holding that, regardless of problems inherent in allowing an individual to represent himself, if he knowingly and intelligently decides to forgo his right to counsel, he can conduct his own defense).

292. This is, of course, precisely what occurred in *Van Sickle*. *People v. Van Sickle*, 13 N.Y.2d 61, 63, 192 N.E.2d 9, 9, 242 N.Y.S.2d 34, 35 (1963) (Van Voorhis, J., concurring in result).

293. Of course, if the complainant were unable to retain counsel to represent the State in the criminal proceeding, the court should not disallow the prosecution on this ground alone.

294. MODEL CODE, *supra* note 235, at EC 2-20, EC 5-7.

295. *Van Sickle*, 13 N.Y.2d at 65, 192 N.E.2d at 11, 242 N.Y.S.2d at 37 (Van Voorhis, J., concurring in result).

the defendant has been prejudiced in any way by the complainant's attorney acting as private prosecutor.²⁹⁶

Defendants raise the question of legality, now and then, never before trial, but always after conviction. It is difficult to see what harm is caused to defendants or how they are prejudiced. Their objection amounts to the complaint that they were not prosecuted by one who is better trained, more skilled and experienced in prosecutions.²⁹⁷

Prejudice can be avoided and the private prosecutor made to adhere to the appropriate rules of behavior that bind the district attorney because the court supervises the course of litigation.²⁹⁸ Presiding over a private criminal prosecution should not be qualitatively different from presiding over any other criminal case. The A.B.A. defines the "general responsibility of the trial judge" as follows:

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(c) The trial judge should be sensitive to the important roles of the prosecutor and defense counsel. . . .²⁹⁹

296. *Id.* at 65, 192 N.E.2d at 11, 242 N.Y.S.2d at 37 (Van Voorhis, J., concurring in result); *Read v. Sacco*, 49 A.D.2d 471, 475, 375 N.Y.S.2d 371, 376-77 (App. Term., 2d Dep't 1975). Even *People v. Rodgers*, 205 Misc. 1106, 131 N.Y.S.2d 622 (1954), frequently cited as a case invalidating a conviction because it was prosecuted by complainant's private attorney, did not deviate from this standard. The court found substantial prejudice in that the record was replete with serious errors, indicating that the defendant did not get a fair trial and defendant's guilt was not proven beyond a reasonable doubt by competent evidence. *Id.* at 1108, 131 N.Y.S.2d at 623-24.

297. *People ex rel. Bruckner v. Wyner*, 207 Misc. 673, 142 N.Y.S.2d 393, 397 (Westchester County Court 1955) (village attorney, rather than district attorney, prosecuted). *Accord* *People v. Black*, 156 Misc. 516, 282 N.Y.S. 197 (1935). The *Black* court's reasoning is illuminating:

Who was hurt? Can the defendant, appellant, complain because he was not prosecuted by a more experienced and skilled person? Going before a layman justice, may he be heard on the mere ground that the case against him was presented by another layman, when he was ably represented by an admitted attorney of high standing?

Id. at 519, 282 N.Y.S. at 201.

298. However, no prejudice will lie if the trial court diligently monitors the proceeding with the same rules of fairness and of law which would bind the District Attorney if he were present. This Court is confident that a trial judge hearing this matter will be sensitive to the delicate balance necessary to afford all parties the fundamental fairness and substantial justice that due process requires.

People v. Vial, 132 Misc. 2d 5, 14, 502 N.Y.S.2d 930, 936 (Crim. Ct. 1986) (citation omitted).

299. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, § 6-1.1.

The court has the responsibility of safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. In addition it has the

Therefore, in order to bring about a fair and just result, the trial judge may question witnesses to ascertain significant and pertinent facts or to rectify an apparently misleading cross-examination. The judge may also instruct the jury on the applicable law from time to time and may, *sua sponte*, sever offenses or defendants from a trial.³⁰⁰

Insuring the adequate representation of the state and protecting the defendant against a prosecutor actuated by ulterior motive is not very different from the many other functions of a trial judge. Judges frequently must take action to protect witnesses, control the length and breadth of witness examination,³⁰¹ maintain order in the courtroom,³⁰² and deal with other problems that may arise. The trial judge may formulate rules governing the kind of conduct to which counsel and witnesses are expected to conform, as long as they are duly notified.³⁰³

Perhaps most directly analogous to the inquiry to be held by the court when requested to approve a criminal prosecution by someone other than a public prosecutor is the procedure a judge is to follow when a criminal defendant wishes to waive his right to counsel and defend himself:

- (a) A defendant should be permitted at the defendant's election to proceed in the trial of his or her case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
- (i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;
 - (ii) possesses the intelligence and capacity to appreciate the consequences of this decision; and
 - (iii) comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.³⁰⁴

Certainly the weighing of several competing factors when a criminal defendant claims the right to represent himself is far more sensitive and

obligation on its own initiative to correct real or apparent improprieties which would tend to lower the esteem for the system of justice which it is bound to uphold.

Vial, 132 Misc. 2d at 11-12, 502 N.Y.S.2d at 935 (citations omitted).

300. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 6-1.1; commentary at 7-8. The joinder and severance of defendants and offenses is another area of law which, of necessity, creates litigation advantages like those discussed *supra* at notes 38-40 and accompanying text. The court's discretionary act of severing defendants or offenses from an indictment is much akin to the mandating of separate trials and the order of those trials discussed *supra* in the text following note 259.

301. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at §§ 6-2.2, -2.3.

302. *Id.* § 6-3.3, -3.5, -3.8.

303. The trial judge, either before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

Id. § 6-3.1 (special rules for order in courtroom).

304. *Id.* § 6-3.6(a).

difficult to resolve than the inquiry that is suggested a court conduct prior to ruling on an application for approval of a private prosecution. This situation is analogous also because when a defendant elects to proceed *pro se*, "the court should take whatever measures may be reasonable and necessary to ensure a fair trial."³⁰⁵ In a private prosecution, the court, if it deems it appropriate, can take similar steps to ensure a just and fair trial for both the state and the defendant. In short, "[t]he court is in a better position to control the unusual case by the exercise of discretion than in fashioning an absolute rule that in all cases or in no cases can such private attorney proceed."³⁰⁶

Finally, it should be noted that *Kissling*³⁰⁷ made an application pursuant to the New York City Criminal Court Act section 50 appealable.³⁰⁸ Hence, if the lower court errs in its exercise of discretion, that error can be corrected by a higher court.

VI. THE ADVANTAGES OF JUDICIAL SCREENING OF CITIZEN COMPLAINTS

Section 50 of the N.Y.C.C.C.A. works well in theory, and, with legislative amendments, it could be a model for other jurisdictions. Charging, the process by which a prosecutor determines whether or not to initiate formal criminal proceedings is, as we have seen, a function which is left very much to his discretion.³⁰⁹ Screening, the other side of the coin, is the district attorney's decision to terminate formal proceedings. Screening is "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. It is an idea on morals, belonging to the twilight zone between law and morals."³¹⁰ If that discretion cannot be reviewed and

305. *Id.* § 6-3.6(b).

306. *People ex rel. Luceno v. Cuozzo*, 97 Misc. 2d 871, 876, 412 N.Y.S.2d 748, 751 (White Plains City Court 1978).

307. *People v. Kissling*, No. 17657 (N.Y. App. Term., 1st Dept. July 7, 1981).

308. The application in the Criminal Court in the *Kissling* case was clearly made pursuant to N.Y. Crim. Ct. Act § 50, although, curiously, the court never mentioned § 50. The conclusion that, despite the language of the court, the application was made pursuant to § 50 is supported by the court's accurate description of the Summons Part process, which is conducted pursuant to § 50, *see supra* note 151, its citation to *People v. Vlasto*, 78 Misc. 2d 419, 355 N.Y.S.2d 983 (Crim. Ct. 1974), and the fact that a Request to Appear, *see supra* note 163, rather than a complaint, had been issued. The lower court's decision, styled a "dismissal," was really a negative ruling on a § 50 application, and the Appellate Term's reversal and remand for a new hearing indicates that a trial court's refusal to approve the issuance of a complaint pursuant to § 50 is appealable. *Accord* *People v. Burgos*, N.Y.L.J., September 2, 1980 (N.Y. App. Term., 1st Dep't) (motion to dismiss appeal denied because complainant who had right to prosecute matter at trial had standing to litigate appeal); *Susser v. Fried*, 115 Misc. 2d 968, 970, 973, 455 N.Y.S.2d 930, 932, 934 (Civ. Ct. 1982); *People v. Birnberg*, 112 Misc. 2d 870, 447 N.Y.S.2d 597, 600 (Crim. Ct. 1981).

309. *See supra* notes 41-42 and accompanying text.

310. Pound, *Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960), quoted in NATIONAL PROSECUTION STANDARDS, *supra* note 205, at §§ 8.1-6 commentary at 126.

controlled, it can at least be standardized and made visible.³¹¹ The decision to charge or screen can also be demonopolized; the prosecutor can share that authority with the judiciary.

The common wisdom is that the prosecutor is far better suited to making this kind of decision than the judge. As one authority has stated:

[It] is widely asserted that in performing his screening function—both in its evidence-sufficiency and discretionary aspects—the prosecutor is more aware of the unique facts which characterize particular cases, and that this greater knowledge, coupled with his direct responsiveness to community attitudes, better qualifies him to assess both whether the suspect is probably guilty and convictable . . . and in what manner it is in the public interest to proceed against him if he is.³¹²

This position, however, may not withstand scrutiny. The district attorney may not have a greater command of the facts, for example, than a judge hearing an application for the issuance of a criminal complaint and the approval of a private prosecution. An assistant district attorney, frequently just a year or two out of law school,³¹³ has probably interviewed the complainant but did not put any witnesses on the stand and subject them to direct and cross-examination. Under a statute like N.Y.C.C.C.A. section 50, however, the judge would swear-in the complainant—and perhaps other witnesses as well—and hear the testimony subject to direct and cross-examination. In these cases, the judge's knowledge and understanding of the facts would likely be far superior to the prosecutor's.

The prosecutor's "direct responsiveness to community attitudes" is not necessarily a positive attribute; because of public pressures governmental officials may do things that are foolish and even improper. Assuming, however, that direct responsiveness is a positive characteristic, it is not self-evident that the prosecutor is more responsive than a judge. Some judges, like most prosecutors, are elected; consequently, they may be as responsive as prosecutors to their constituencies. However, the mere fact that a public official is elected does not mean he is responsive to the electorate. Surely if his policy decisions are not made known to the electorate, he need not feel the necessity of being responsive to his constituents' feelings on these issues. Because so much of what happens in a modern prosecutor's office is invisible to the public view,³¹⁴ including the screening out of certain kinds of cases, it is not at all clear that the prosecutor's office is so responsive. Judges, on the other hand, may be more vulnerable—and, hence, responsive—to community criticism and values, precisely because their work is done in courtrooms open to the public and the media and preserved on a stenographic

311. See *supra* notes 202-14 and accompanying text.

312. F. MILLER, PROSECUTION, THE DECISION TO CHARGE A SUSPECT WITH A CRIME 296 (1970), quoted approvingly in REPORT ON COURTS, *supra* note 204, at § 1.2 commentary at 26.

313. This point was made by the anonymous judge who was interviewed about the Summons Part at 346 Broadway. See *supra* note 156.

314. See *supra* notes 202-04.

record. In any case, under a statute such as N.Y.C.C.C.A. section 50, both the judge and the prosecutor would be more vulnerable because their positions on criminal justice issues would be far more visible; consequently, it is likely both would be more responsive.

Under a statutory scheme similar to N.Y.C.C.C.A. section 50, the facts of individual cases would be better known to judges, prosecutors, the media, and the public. As for the capacity to judge the sufficiency of evidence once the facts are known, that is a question of knowing the law and applying it to the facts. Judges must frequently make such decisions—when lawyers make motions to dismiss for failure to make out reasonable cause, a *prima facie* case, or guilt beyond a reasonable doubt. There is absolutely no reason to believe that judges would render less accurate decisions than prosecutors do.

Similarly, there is no evidence that judges would handle the discretionary aspects of the screening function less wisely than prosecutors. While some contend that judges do not make these kinds of decisions, in reality judges often make these decisions. For example, in addition to sentencing decisions in which judges must sensitively balance many considerations, judges must also decide under New York law whether prosecutions should be dismissed “in furtherance of justice.”³¹⁵

Another advantage of the statutory scheme proposed below is that it would not substitute the decision of a judge for that of a prosecutor; instead, it would provide a structure in which two different branches of government would be able to rule on whether a prosecution should go forward.³¹⁶ The judge's exercise of discretion is likely to be more trustworthy precisely because it occurs in open court, on the record, subject to criticism from the public, the media, and appellate courts.

Nevertheless, if the district attorney's discretion needs standards to guide it,³¹⁷ surely the exercise of judicial discretion could benefit from guidance as well. “By its very nature the exercise of discretion cannot be reduced to a formula. Nevertheless, certain guidelines for the exercise of discretion should be established.”³¹⁸ Unfortunately, the guidelines set down by the *Kissling* court are completely unedifying.

Fortunately, experience with New York's dismissal in the interest of justice statute may provide guidance in this area; the decision to dismiss in the interest of justice is, after all, the flip side of the decision to initiate a criminal prosecution, and both determinations require a similar exercise of discretion. In 1976, the New York Court of Appeals was faced with an appeal from the dismissal of an indictment by a lower court under the state's dismissal in the interest of justice statute.³¹⁹ The court stated:

315. See N.Y. CRIM. PROC. LAW § 170.40 (nonfelonies), § 210.40 (felonies) (McKinney 1982).

316. See *supra* text accompanying notes 218-22.

317. See *supra* note 202 and accompanying text.

318. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.9 commentary at 55.

319. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1974).

Without intending to reflect on the dismissal in this case, we are also obliged to take this opportunity to express discomfiture with CPL 210.40 in its present form. To the extent that the section now fails to prescribe specific criteria for the responsible exercise of the discretion granted by the section and fails to require the court to articulate the manner and extent to which the particular case meets such criteria, it is open to misuse and effective appellate review is made difficult, if not impossible. In our view while efforts of the judiciary to fill the void are commendable, the issue involves policy of a dimension more appropriate for legislative resolution. Most important, the history of criminal procedure in this State has been to add safeguards against misuse or abuse of authority in criminal courts of first instance. Those safeguards, experience has demonstrated, are most effective if there be appellate review, possible only if there are standards. Justice for victim and defendant merits no less. We invite the attention of the Legislature to this predicament.³²⁰

The legislature responded in 1979 with major revisions to the interest of justice dismissal sections of the Criminal Procedure Law.³²¹ The newly revised sections provided for dismissal where it was "required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in an injustice."³²² Further, when a court grants a dismissal in the interest of justice, it must state its reasons on the record.³²³

More importantly, the legislature set forth 10 factors which the court was required, "to the extent applicable," to consider:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (g) the impact of a dismissal on the safety or welfare of the community;
- (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
- (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.³²⁴

Such a legislative scheme erects a structure to guide the exercise of judicial discretion, less vulnerable to abuse and more susceptible of review by appellate courts. Such a scheme, directed at determining when a prosecution

320. *People v. Belge*, 41 N.Y.2d 60, 62, 359 N.E.2d 377, 377-78, 390 N.Y.S.2d 367, 368 (1976).

321. N.Y. CRIM. PROC. LAW §§ 170.40(1), 210.40(1).

322. *Id.*

323. *Id.* §§ 170.40(2), 210.40(3).

324. *Id.* §§ 170.40(1), 210.40(1).

should be terminated, might well be a model for legislation to assist judges in deciding when prosecutions should be initiated as well. The following statute and commentary constitute a proposed model.

VII. PROPOSED MODEL STATUTE FOR THE GOVERNANCE OF PRIVATE
CRIMINAL PROSECUTIONS AND RELATED MATTERS

[I] OTHER THAN BY APPLICATION TO A PUBLIC PROSECUTOR, GRAND JURY, OR THE EMPANELING JUSTICE THEREOF, THIS SECTION SHALL BE THE EXCLUSIVE METHOD OF INITIATING A CRIMINAL PROSECUTION.

Commentary

The purpose of this section is to make it crystal clear that, with two exceptions, this is the only way an aggrieved person may initiate a criminal prosecution. The first exception is the path used by civilian complainants most frequently, filing a complaint with the District Attorney's office (often through the police). Far more infrequently, an aggrieved person may take his complaint to the grand jury or the judge who empaneled it. This practice is recognized by the A.B.A.³²⁵

[II] THE RULEMAKING AUTHORITY FOR THE COURTS MAY MAKE RULES NOT INCONSISTENT WITH THESE PROVISIONS IN ORDER TO FACILITATE THE WORK OF THE COURTS.

[III] ALL HEARINGS CONDUCTED PURSUANT TO THIS SECTION SHALL TAKE PLACE IN A COURTROOM OPEN TO THE PUBLIC AND THE MEDIA. ALL SUCH HEARINGS SHALL BE RECORDED STENOGRAPHICALLY. AT THE CONCLUSION OF EACH HEARING, THE COURT SHALL MAKE FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND RENDER THEM IN WRITING OR ORALLY ON THE RECORD.

Commentary

The purpose of this section is to minimize the possibilities of abuse of discretion by maximizing the visibility of the process, requiring the articu-

325. Under some systems a citizen may take a complaint directly to a grand jury, and such a "safety valve" has much to commend it. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-2.1 commentary at 13. Direct citizen access to the grand jury appears to be legal in at least eight states: Alabama, *King v. Second Nat'l Bank and Trust Co.*, 234 Ala. 106, 173 So. 498 (1937); Georgia, *In re Lester*, 77 Ga. 143 (1886); Louisiana, *State v. Sullivan*, 159 La. 589, 105 So. 631 (1925), *State v. Stewart*, 45 La. Ann. 1164, 14 So. 143 (1893); Maine, *In re Petition of Thomas*, 434 A.2d 503 (1981) (within the discretion of the court having jurisdiction over the grand jury); Maryland, *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944), *Blaney v. State*, 74 Md. 153, 21 A. 547 (1891); Minnesota, *State ex rel. Wild v. Otis*, 257 N.W.2d 361 (1977), *cert. denied and appeal dismissed*, 434 U.S. 1003 (1978); Texas, TEX. CODE CRIM. PROC. ANN. art. 20.09 (Vernon 1977), *Butler v. Lilly*, 533 S.W.2d 130 (Tex. Civ. App. 1976), *Holt v. Yarborough*, 112 Tex. 179, 245 S.W. 676 (1922); and West Virginia, *State ex rel. Miller v. Smith*, 168 W. Va. 745, 285 S.E.2d 500 (1981). The greatest advantage of direct citizen access to the grand jury over the methods discussed in this Article is that direct grand jury access allows for prosecution of cases above misdemeanor level.

lation of reasons to support every decision, and requiring complete openness to the media and the public.

[IV] ALL DECISIONS OF THE COURT PURSUANT TO THIS SECTION SHALL BE APPEALABLE. DECISIONS UNFAVORABLE TO THE DEFENDANT SHALL BE APPEALABLE AFTER CONVICTION; DECISIONS UNFAVORABLE TO THE COMPLAINANT OR THE DISTRICT ATTORNEY SHALL BE INTERLOCUTORILY APPEALABLE.

Commentary

It is traditional procedure to disallow interlocutory appeals by the defendant in criminal cases; however, necessity requires that such appeals be available to the district attorney and the complainant because appeals heard after disposition of the case would be futile.

[V] PROCEDURES GOVERNING APPLICATIONS FOR THE ISSUANCE OF CRIMINAL COMPLAINTS.

[A] ANYONE WHO BELIEVES HE HAS BEEN THE VICTIM OF A CRIME MAY APPLY TO THE COURT FOR THE ISSUANCE OF A CRIMINAL COMPLAINT AGAINST ONE OR MORE RESPONDENTS.

[B] BEFORE ANY SUCH COMPLAINT IS ISSUED, THE COURT MUST:

[1] RECEIVE FROM THE COMPLAINANT, THE DISTRICT ATTORNEY, OR ANY OTHER SOURCE PROOF THAT THE COMPLAINANT HAS APPROACHED THE DISTRICT ATTORNEY WITH HIS COMPLAINT AND THAT THE DISTRICT ATTORNEY HAS DECLINED TO PROSECUTE. WHERE DOCUMENTARY EVIDENCE OF THIS IS LACKING, THE COURT MAY ACCEPT SWORN TESTIMONY TO THIS EFFECT FROM THE COMPLAINANT OR A WITNESS ON HIS BEHALF. IN EXTRAORDINARY OR EXIGENT CIRCUMSTANCES, THE REQUIREMENT OF PRIOR SCREENING BY THE DISTRICT ATTORNEY MAY BE WAIVED.

Commentary

This section sets up a general rule that the courts will not respond to a citizen complaint until the complainant has attempted to persuade the public prosecutor to prosecute the case. This requirement is consistent with A.B.A. Standard 3-3.4(d):

Where the law permits a citizen to complain directly to a judicial officer . . . , the citizen complainant should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be communicated to the judicial officer³²⁶

It is also consistent with the National Prosecution Standards, Standard 7.3(B).³²⁷ It would be useful if every district attorney who declined to prosecute a citizen's complaint informed the complainant of his right to apply to the court for the issuance of a complaint and provided the citizen with a form which would convey to the court the reasons why the district attorney has declined prosecution. However, in case the district attorney

326. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.4(d).

327. NATIONAL PROSECUTION STANDARDS, *supra* note 205, at § 7.3(B) commentary at 117-18.

does not provide the complainant with such a form, provision for an oral sworn statement to that effect by the complainant has been made. The statute also provides for dispensation from the requirement that the citizen first approach the district attorney with his complaint in extraordinary or exigent circumstances; certainly where violence is imminent court intervention should not be delayed by this requirement.

[2] ISSUE A REQUEST TO APPEAR INFORMING THE RESPONDENT THAT A CRIMINAL COMPLAINT MAY BE ISSUED AGAINST HIM AND THAT HE MAY BE HEARD, IN PERSON OR BY COUNSEL, IN OPPOSITION TO THE APPLICATION ON THE RETURN DATE.

[a] A REQUEST TO APPEAR IS NOT A SUMMONS, A SUBPOENA, OR A COURT ORDER. IT IS AN INVITATION TO APPEAR AND BE HEARD. FAILURE TO RESPOND IS NOT PUNISHABLE, EXCEPT BY ISSUANCE OF THE COMPLAINT BY DEFAULT.

[3] NOTIFY THE DISTRICT ATTORNEY THAT THE COMPLAINANT HAS APPLIED FOR THE ISSUANCE OF A CRIMINAL COMPLAINT AGAINST THE RESPONDENT, SPECIFYING THE GROUNDS. THE DISTRICT ATTORNEY MUST THEN BE INVITED TO BE HEARD ON THE MERITS OF THE APPLICATION ON THE RETURN DATE OF THE REQUEST TO APPEAR.

[4] NOTIFY THE COMPLAINANT THAT ON THE RETURN DATE OF THE REQUEST TO APPEAR HE MAY BE HEARD, IN PERSON OR BY COUNSEL, ON THE MERITS OF HIS APPLICATION.

[5] HOLD A HEARING ON THE RETURN DATE OF THE REQUEST TO APPEAR. AT THE HEARING,

[a] ALL PARTIES—THE COMPLAINANT, THE RESPONDENT, AND THE DISTRICT ATTORNEY—MAY BE REPRESENTED BY COUNSEL.

[b] THE COURT, IN ITS DISCRETION, MAY GRANT ANY PARTY SUBPOENA POWER FOR A PARTICULAR WITNESS, IF AFTER HEARING AN OFFER OF PROOF, IT DEEMS SUCH ACTION APPROPRIATE.

[c] EACH PARTY MAY CALL AND EXAMINE WITNESSES, CROSS-EXAMINE WITNESSES CALLED BY OTHERS, PRODUCE DOCUMENTARY EVIDENCE, AND ARGUE TO THE COURT ON THE MERITS OF THE MOTION.

Commentary

Subsections [2]-[5] are designed to guarantee full due process to all parties—the complainant, the respondent, and the district attorney. Subsection [2] draws from the practice in New York City of issuing documents³²⁸ that prevent harassment of innocent citizens since there is no penalty for their disobedience. At the same time, this practice insures that no complaint will be issued against a respondent without the respondent having had an opportunity to appear, participate in an evidentiary hearing, and argue against the issuance of the complaint. Subsection [3] gives the district attorney a second chance to be heard on this issue, beyond simply indicating the reasons why he chose not to prosecute. He may now go beyond that and state whether he believes the case should be prosecuted at all. Subsection [4] gives the complainant the opportunity to sustain the burden placed on him by the criteria outlined in section VI below. Subsection [5] is consistent with New

328. For a discussion of Requests to Appear see *supra* note 163 and accompanying text.

York's Criminal Procedure Law, which guarantees the parties to a criminal action the right to call, examine, and cross-examine witnesses.³²⁹ Subsection [5][b] allows the court to give a party subpoena power but only after hearing an offer of proof. In a proceeding where the respondent is summoned by a document with less legal force than a subpoena in order to avoid harassment, it would be foolishly ironic to allow harassment of witnesses by subpoenas without the court first inquiring into the necessity of the attendance of these witnesses.

[6] DECIDE, AFTER HEARING, PURSUANT TO THE CRITERIA SET FORTH IN SECTION VI BELOW, THAT IT IS IN THE INTEREST OF JUSTICE THAT A CRIMINAL COMPLAINT BE ISSUED.

Commentary

The National Advisory Commission on Criminal Justice Standards and Goals takes the position that, where a citizen can apply to a magistrate because the district attorney has declined to prosecute, the court may order a remedy only if it "determines that the decision not to prosecute constituted an abuse of discretion . . ."³³⁰ The Commission articulated the standard thusly:

[T]he reviewing court should [not] address itself to the same issue that the prosecutor resolved; that is, whether under the applicable criteria, formal proceedings should be pursued. Rather, the reviewing court should merely determine whether the prosecutor's resolution of the matter was so unreasonable as to constitute an abuse of discretion. The Commission contemplates that courts would be reluctant to overturn a prosecutor's decision to screen a defendant and that it is unlikely that the opportunity to appeal to the court would be used frequently.³³¹

The proposed legislation rejects the Commission's position and takes a very different approach. This legislation is based on the premise that there are a large number of cases that should be prosecuted but are not because of the limited resources of the District Attorneys' offices. Because the public prosecutor's decision to prosecute may be based on lack of resources or office policy not to prosecute certain kinds of cases, it is not necessary to find an abuse of discretion in order to conclude that a case the district attorney declined to prosecute ought, in fact, to be prosecuted. Unless the district attorney steps forward to expand on his position, his refusal to prosecute can be safely interpreted only as a decision that *his office* chooses not to prosecute the case. The standard adopted here requires the court to undertake a *de novo* consideration of whether a complaint should issue.

[VI] CRITERIA FOR ISSUANCE OF A CRIMINAL COMPLAINT.

[A] IN DETERMINING WHETHER OR NOT TO DIRECT THE ISSUANCE OF A CRIMINAL COMPLAINT, THE COURT SHOULD CONSIDER THE FOLLOWING FACTORS:

329. N.Y. CRIM. PROC. LAW § 60.15(1) (McKinney 1981).

330. REPORT ON COURTS, *supra* note 204, at § 1.2 (1973).

331. *Id.* commentary at 26.

[1] THE EVIDENCE OF GUILT, WHETHER ADMISSIBLE OR INADMISSIBLE AT TRIAL.

[a] NO COMPLAINT SHALL ISSUE BUT UPON PROBABLE CAUSE; IF THE QUANTUM OF EVIDENCE ADDUCED BY THE COMPLAINANT AMOUNTS TO PROBABLE CAUSE, IT RAISES A PRESUMPTION IN FAVOR OF ISSUANCE OF THE COMPLAINT.

[b] THE EVIDENCE NEED NOT BE ADMISSIBLE AT TRIAL.

Commentary

This subsection is an attempt to capture the quantitative aspect of "the underlying merit of complainant's accusation," as set forth in *People v. Kissling*.³³² It is placed first to underscore the importance of the quantum of evidence of guilt adduced by the complainant at the hearing. The language is taken verbatim from the standards governing dismissal in the interest of justice in New York.³³³ Consistent with constitutional and ethical standards,³³⁴ the court may not issue a complaint if there is not probable cause (reasonable cause) to believe the respondent committed a crime or offense.

The presence of probable cause also creates a strong presumption that the complaint should issue. This position is based on the assumption that enforcement of our criminal laws is a positive act³³⁵ and is consistent with the A.B.A.'s statement that "[a] prosecutor ordinarily should prosecute if, after full investigation, it is found that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty."³³⁶

The proposed statute does diverge from the A.B.A. position on the inclusion of inadmissible evidence to achieve probable cause.³³⁷ It does this for several reasons. First, the complaining witness probably will not have a lawyer³³⁸ and, therefore, will be unable to argue technical issues of admissibility. Second, admissible evidence may be developed, with or without counsel, further on in the litigation. Third, reasonable cause traditionally includes hearsay and other forms of inadmissible evidence,³³⁹ and probable cause is all that should be required at this stage of the case.³⁴⁰ Finally, a narrow, legalistic view focusing on the admissibility of evidence is inconsistent with the broader view of the issues reflected in the other criteria.

[2] THE QUALITY, NATURE, SERIOUSNESS, AND CIRCUMSTANCES OF THE OFFENSE.

[a] CASES WHICH PRESENT IMPORTANT PUBLIC ISSUES, RANK UNFAIRNESS OR INJUSTICE SHALL BE PROSECUTED.

332. See *supra* notes 228-36 and accompanying text.

333. N.Y. CRIM. PROC. LAW §§ 170.40(1)(c), 240.10(1)(c) (McKinney 1982 & Supp. 1988).

334. See *supra* notes 232-35 and accompanying text.

335. See *supra* notes 31-37 and accompanying text.

336. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.9 commentary at 55.

337. Other authorities are in accord with the A.B.A. position. REPORT ON COURTS, *supra* note 204, at § 1.1; NATIONAL PROSECUTION STANDARDS, *supra* note 205, at §§ 8.2(h), 9.3(13).

338. See *supra* note 200 and accompanying text.

339. *Brinegar v. United States*, 338 U.S. 160 (1949). See also N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney 1981) (probable cause "may include or consist of hearsay").

340. See *supra* notes 118-20 and accompanying text.

Commentary

This subsection attempts to capture the qualitative aspect of "the underlying merit of complainant's accusation," as set forth in *Kissling*.³⁴¹ "[T]he seriousness and circumstances of the offense" language is taken directly from New York's dismissal in the interest of justice criteria.³⁴² Subsection [a], which is derived from *People ex rel. Luceno v. Cuzzo*, is designed to indicate a presumption in favor of the issuance of a criminal complaint in cases with these characteristics.³⁴³

[3] THE LEGITIMATE INTERESTS OF THE COMPLAINANT.

[a] A CRIME VICTIM HAS A LEGITIMATE INTEREST IN THE ENFORCEMENT OF THE CRIMINAL LAW.

[b] NO CRIME VICTIM SHALL BE FORCED TO CHOOSE BETWEEN CIVIL AND CRIMINAL REMEDIES.

[c] NO COMPLAINANT WILL BE REFUSED ISSUANCE OF A CRIMINAL COMPLAINT MERELY BECAUSE HE HAS AN ANCILLARY MOTIVE FOR PROSECUTION.

[i] ANCILLARY MOTIVES INCLUDE THE PENDENCY OF A CIVIL ACTION OR THE STATUS OF THE COMPLAINANT AS A CRIMINAL DEFENDANT IN A RELATED MATTER.

Commentary

This section affirmatively recognizes the legitimate interests of the crime victim in the enforcement of our criminal laws. Consistent with the holding of *Kissling*, subsection [b] rejects the election of remedies doctrine.³⁴⁴ The thrust of these subsections, however, is to expressly reject the inferences in *Kissling*, that, *inter alia*, the pendency of a civil suit brought by the crime victim detracts from the appropriateness of that victim being a criminal complainant in a private prosecution. All three national and authoritative standards recognize the "possible improper motives" of the complainant.³⁴⁵ Nevertheless, this legislation charts a different course, and what the *Kissling* court refers to as an "ulterior objective"³⁴⁶ is recognized in the model statute as merely an ancillary motive.

Subsection [i] also explicitly recognizes that the complainant's status as a criminal defendant in a related matter should in no way operate to deprive

341. See *supra* notes 237-42 and accompanying text.

342. N.Y. CRIM. PROC. LAW § 170.40(1)(a) (McKinney 1982).

343. 97 Misc. 2d 871, 875, 412 N.Y.S.2d 748, 751 (White Plains City Court 1978).

344. *People v. Kissling*, No. 17657 (N.Y. App. Term. 1st Dep't July 7, 1981).

345. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.9(b)(iv); REPORT ON COURTS, *supra* note 204, at § 1.1(7); NATIONAL PROSECUTION STANDARDS, *supra* note 205, at § 9.3(5). The A.B.A. takes a hard line on these matters, 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.9 commentary at 22, but the National Advisory Commission's position shows more flexibility; "[w]hen formal proceedings are justified by the community's need for protection, the improper motivation of a complainant should not be a significant consideration." REPORT ON COURTS, *supra* note 204, at § 1.1 commentary at 22.

346. *People v. Kissling*, No. 17657 (N.Y. App. Term. 1st Dep't July 7, 1981). The actual language was taken by the *Kissling* court from *Read v. Sacco*, 49 A.D.2d 471, 375 N.Y.S.2d 371 (App. Term. 2nd Dep't 1975).

him of the issuance of a criminal complaint otherwise justified. This means that in cross-complaint situations, assuming that reasonable cause is demonstrated, the court should not be hesitant to bring the whole matter before the fact-finder, with neither side being disadvantaged by being prohibited from filing criminal charges against the other.

[4] THE IMPACT OF A FILING OR A DISMISSAL ON THE SAFETY OR WELFARE OF THE COMMUNITY.

[a] THE COURT SHOULD CONSIDER THE POSSIBLE DETERRENT VALUE OF THE PROSECUTION, INCLUDING BOTH SPECIFIC AND GENERAL DETERRENCE.

Commentary

It is axiomatic that in deciding whether or not to issue a criminal complaint the court should consider the impact on the safety and welfare of the community. Indeed, the National Advisory Commission's screening standards specifically take into account "the value of further proceedings in fostering the community's sense of security"³⁴⁷ The language in subsection [4] is taken from New York's interest of justice dismissal statute.³⁴⁸ The National District Attorneys Association recognizes the role of deterrence in screening and charging decisions,³⁴⁹ and the National Advisory Commission expressly recognizes general deterrence and specific deterrence as factors to be considered in the screening process.³⁵⁰

It should be noted that this provision is not limited to crimes of violence; the use of the term "welfare" in the disjunctive in subsection [4] is intended to indicate a wider application. In that sense it echoes subsection [2][a]'s concern with important public issues.

[5] THE IMPACT OF A FILING OR A DISMISSAL UPON THE CONFIDENCE OF THE PUBLIC IN THE CRIMINAL JUSTICE SYSTEM.

[a] THE COURT SHOULD KEEP IN MIND THE PUBLIC'S CONCERN WITH THE PERCEPTION OF THE EVENHANDED ADMINISTRATION OF JUSTICE AND CONSIDER WHETHER A DISMISSAL WOULD ENCOURAGE THE VIEW THAT CITIZENS NEED NOT OBEY THE LAW, THEREBY ENCOURAGING ACTS THAT VIOLATE THE SOCIAL COMPACT.

[b] THE SOCIAL STATION, STATUS, CELEBRITY, OR PUBLIC OFFICE OF THE RESPONDENT SHALL NOT BE A FACTOR IN THE DETERMINATION WHETHER OR NOT TO ISSUE A CRIMINAL COMPLAINT.

Commentary

The public is, and should be, concerned with the evenhanded application of justice. Too often the public perceives the rich, the well-born, and the well-connected as able to escape the full and even reach of the law. Such perception encourages lawlessness among a cynical public. The National Advisory Commission has recognized "the value of further proceedings in

347. REPORT ON COURTS, *supra* note 204, at § 1.1(5).

348. N.Y. CRIM. PROC. LAW §§ 170.40(1)(g), 240.10(1)(h) (McKinney 1982 Supp. & 1988).

349. NATIONAL PROSECUTION STANDARDS, *supra* note 205, at §§ 8.2(d), 9.3(10).

350. REPORT ON COURTS, *supra* note 204, at § 1.1(3) to .1(4).

fostering the community's sense of . . . confidence in the criminal justice system" as a factor to be considered in the screening process.³⁵¹

The language of subsection [5] is drawn from New York's dismissal in the interest of justice standards.³⁵² Subsection [b] incorporates the explicit message that no one shall be protected from criminal prosecution simply because of wealth, position, connections, or public office. The legislation adopts the position that "social, economic or educational status of a defendant are specious arguments to the enforcement of our criminal laws. Recent history, particularly of the so-called Watergate era, demonstrates that persons in the highest of places are not and should not be immune from indictment and possible conviction."³⁵³ Subsection [b] is also designed to guard against any unjustified reluctance to issue a criminal complaint against a public official or police officer.

[6] ANY OTHER RELEVANT FACT INDICATING THAT THE ISSUANCE OF A CRIMINAL COMPLAINT WOULD OR WOULD NOT SERVE A USEFUL PURPOSE.

[a] SUCH OTHER RELEVANT FACTS MAY INCLUDE

[i] COOPERATION BY THE RESPONDENT WITH LAW ENFORCEMENT IN ORDER TO ARREST OR CONVICT OTHERS.

[ii] A HISTORY OF NONENFORCEMENT OF THE STATUTE CONCERNED.

[b] THIS SECTION MAY NOT BE USED SIMPLY TO AVOID THE UNPLEASANT DUTY OF ISSUING A CRIMINAL COMPLAINT.

Commentary

This section is a catch-all provision, designed to allow courts to consider unusual circumstances that could not have been foreseen by the drafters of the legislation. Once again, the language is derived from New York's dismissal in the interest of justice statute.³⁵⁴

Subsection [i] recognizes that many offenders will not cooperate with the authorities unless they are given something in return, frequently a promise of nonprosecution. This concern has been recognized by the A.B.A.,³⁵⁵ the National Advisory Commission,³⁵⁶ and the National District Attorneys Association.³⁵⁷

Subsection [ii] acknowledges that it may be unfair to prosecute someone for violating a statute that is never enforced. The National District Attorneys Association has likewise recognized this concern,³⁵⁸ as has the National Advisory Commission.³⁵⁹ Simply because the statute has a history of nonen-

351. *Id.* at § 1.1(5).

352. N.Y. CRIM. PROC. LAW §§ 170.40(1)(h), 240.10(1)(8) (McKinney 1982 & Supp. 1988).

353. *People v. O'Neill*, 85 Misc. 2d 130, 132, 379 N.Y.S.2d 244 (Sup. Ct. 1975) (denying motion to dismiss charges of selling cocaine against academically, athletically, and socially prominent college student despite pleas from "personages high in the administrative hierarchy at Columbia University").

354. N.Y. CRIM. PROC. LAW §§ 170.40(1)(j), 240.10(1)(j) (McKinney 1982 & Supp. 1988).

355. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 205, at § 3-3.9(b)(vi).

356. REPORT ON COURTS, *supra* note 204, at § 1.1(10).

357. NATIONAL PROSECUTION STANDARDS, *supra* note 205, at §§ 8.2(e), 9.3(9).

358. *Id.* §§ 8.2(k), 9.3(6).

359. REPORT ON COURTS, *supra* note 204, at § 1.1(8).

forcement does not automatically mean that no action should be taken against the respondent; the court will have to weigh this factor along with all the other factors.

Finally, subsection [b] warns that this catch-all provision may not be used by judges simply to avoid doing an unpleasant duty, that of issuing a criminal complaint.

[VII] DISPOSITION OF COMPLAINT ORDERED BY CRIMINAL COURT.

[A] IF THE COURT ORDERS THE ISSUANCE OF A CRIMINAL COMPLAINT, THE COURT MAY:

- [1] REFER THE MATTER TO THE DISTRICT ATTORNEY FOR PROSECUTION; OR
- [2] PROCEED DIRECTLY TO CONSIDER WHETHER THE MATTER IS APPROPRIATE FOR PRIVATE PROSECUTION, PURSUANT TO SUBSECTION [VIII].

[B] IN DECIDING THE ISSUE RAISED IN SUBSECTION [VII][A], THE COURT SHOULD CONSIDER:

- [1] THE FUTILITY OF SUCH A REFERRAL IN LIGHT OF ANY STATED POLICIES OF THE DISTRICT ATTORNEY CONCERNING THE PROSECUTION OF CERTAIN TYPES OF CASES;
- [2] THE VIEW OF THE DISTRICT ATTORNEY ON THIS PARTICULAR CASE;
- [3] THE VIEWS OF THE COMPLAINANT;
- [4] THE VIEWS OF THE RESPONDENT;
- [5] ITS OWN KNOWLEDGE OF THE CASE, AND PARTICULARLY
 - [a] THE DISTRICT ATTORNEY'S REASONS FOR DECLINING PROSECUTION IN THE FIRST PLACE;
 - [b] THE DISTRICT ATTORNEY'S PRIOR ACTIONS AND COURSE OF CONDUCT IN THIS CASE;
 - [c] ANY CHANGED CIRCUMSTANCES;
 - [d] ANY CONNECTION OR WORKING RELATIONSHIP BETWEEN THE DISTRICT ATTORNEY'S OFFICE AND THE RESPONDENT.

Commentary

Once the court has ordered the issuance of a criminal complaint, it must decide whether to refer the matter back to the District Attorney's office for prosecution or to immediately consider private prosecution. Subsection [B] sets out the criteria by which the court is to make its decision. These criteria are mostly self-explanatory, but [5][d] is designed to allow the court to take into account the fact that some prosecutor's offices are disinclined to prosecute public officials or those the district attorney works with on an ongoing basis, like police officers.³⁶⁰

[C] IF THE CASE IS REFERRED TO THE DISTRICT ATTORNEY AND HE AGAIN DECLINES TO PROSECUTE, THE COURT SHOULD IMMEDIATELY PROCEED TO CONSIDER THE APPROPRIATENESS OF THE CASE FOR PRIVATE PROSECUTION, PURSUANT TO SECTION [VIII].

[D] IF THE COURT REFERS THE MATTER TO THE DISTRICT ATTORNEY AND HE STATES THAT HE WISHES TO PROSECUTE, THE COURT MAY, CONSISTENT WITH THE FACTORS SET FORTH IN SUBSECTION [B] ABOVE,

360. See *supra* notes 23-29 and accompanying text.

- [1] DISALLOW THE DISTRICT ATTORNEY'S REQUEST AND ORDER A PRIVATE PROSECUTION: OR
- [2] ALLOW THE DISTRICT ATTORNEY TO PROSECUTE.

[VIII] STANDARDS FOR CONSIDERATION OF PRIVATE PROSECUTION.³⁶¹

[A] APPROVAL OF THE ISSUANCE OF A CRIMINAL COMPLAINT CREATES A PRESUMPTION OF APPROVAL OF PRIVATE PROSECUTION IF

- [1] THE DISTRICT ATTORNEY DECLINES TO PROSECUTE; OR
- [2] THE COURT DISQUALIFIES THE DISTRICT ATTORNEY FROM PROSECUTION, PURSUANT TO SECTION [VII][D][1].

[B] BEFORE APPROVING A PRIVATE PROSECUTION, THE COURT SHOULD CONDUCT THE FOLLOWING INQUIRY:

- [1] THE JUDGE SHOULD INFORM THE COMPLAINANT AND HIS LAWYER OF THE FOLLOWING INFORMATION:

- [a] THE NORMAL ETHICAL DUTIES OF A LAWYER TO A PRIVATE CLIENT.
- [b] THE ETHICAL DUTIES OF A PROSECUTOR REPRESENTING THE STATE.
- [c] THAT THE TWO DISTINCT SETS OF ETHICAL DUTIES ARE LIKELY TO CONFLICT.

- [2] THE JUDGE MUST GIVE SPECIFIC EXAMPLES OF HOW SUBSECTIONS [1][a] AND [1][b] ARE LIKELY TO CONFLICT UNDER THE PRECISE CIRCUMSTANCES OF THE CONTEMPLATED PRIVATE PROSECUTION.

- [3] THE JUDGE MUST THEN INFORM THE COMPLAINANT AND HIS LAWYER THAT, WHERE THE DUTIES CONFLICT, SUBSECTION [1][b] MUST PREVAIL OVER SUBSECTION [1][a] FOR A PRIVATE PROSECUTOR.

- [4] THE JUDGE MUST THEN ASK THE LAWYER TO AFFIRM HIS UNDERSTANDING OF AND AGREEMENT WITH THESE PRINCIPLES.

- [5] THE JUDGE MUST THEN ASK THE COMPLAINANT IF, HAVING HEARD ALL THE ABOVE, HE WISHES HIS PRIVATELY RETAINED ATTORNEY TO BE THE PRIVATE PROSECUTOR IN THIS CASE.

[C] IF THE COMPLAINANT ANSWERS THE QUESTION IN SUBSECTION [B][5] IN THE AFFIRMATIVE, THE JUDGE MUST PROCEED TO DETERMINE WHETHER THE LAWYER CAN ADEQUATELY REPRESENT BOTH THE COMPLAINANT AND THE STATE.

- [1] IN DETERMINING WHETHER OR NOT THE ATTORNEY CAN ADEQUATELY REPRESENT THE INTERESTS OF THE PRIVATE CLIENT, THE JUDGE MUST CONSIDER

- [a] ANY INTEREST WHICH WILL COMPROMISE THE LAWYER'S FIDELITY TO HIS CLIENT.

- [i] THE CLIENT'S CONSENT TO SUCH JOINT REPRESENTATION SHALL BE CONSTRUED AS A WAIVER OF CONFLICT-FREE REPRESENTATION.

- [b] THE AVAILABILITY OF ALTERNATIVE PROSECUTORS.

- [i] THE UNAVAILABILITY OF THE PUBLIC PROSECUTOR GIVES RISE TO A STRONG PRESUMPTION THAT, UNDER THE CIRCUMSTANCES, A PRIVATE PROSECUTOR WOULD REPRESENT THE CLIENT ADEQUATELY.

- [AA] THE COURT'S REJECTION OF REPRESENTATION BY THE PUBLIC PROSECUTOR SHALL BE CONSTRUED AS UNAVAILABILITY.

- [2] IN DETERMINING WHETHER OR NOT THE ATTORNEY CAN ADEQUATELY REPRESENT THE INTERESTS OF THE STATE, THE JUDGE MUST CONSIDER

- [a] ANY INTEREST WHICH WILL COMPROMISE THE LAWYER'S FIDELITY TO THE STATE.

- [i] THE LAWYER'S STATEMENT OF UNDERSTANDING AND ACCEPTANCE IS STRONG PRESUMPTIVE EVIDENCE THAT THE STATE'S INTERESTS WILL NOT BE COMPROMISED.

361. See *supra* notes 262-94 and accompanying text.

[b] THE AVAILABILITY OF ALTERNATIVE PROSECUTORS.

[i] THE UNAVAILABILITY OF THE PUBLIC PROSECUTOR GIVES RISE TO A STRONG PRESUMPTION THAT, UNDER THE CIRCUMSTANCES, A PRIVATE PROSECUTOR WOULD REPRESENT THE STATE ADEQUATELY.

[AA] THE COURT'S REJECTION OF REPRESENTATION BY THE PUBLIC PROSECUTOR SHALL BE CONSTRUED AS UNAVAILABILITY.

[D] IF THE COURT FINDS REPRESENTATION OF THE STATE BY THE COMPLAINANT'S LAWYER TO BE ADEQUATE, THE COURT SHALL OFFICIALLY CONSENT ON THE PART OF THE STATE TO REPRESENTATION BY SAID ATTORNEY.

[E] IF THE COURT FINDS REPRESENTATION OF THE STATE BY THE COMPLAINANT'S LAWYER TO BE INADEQUATE, THE COURT SHALL OFFICIALLY REFUSE TO CONSENT ON THE PART OF THE STATE TO REPRESENTATION BY SAID ATTORNEY.

[F] IF THE COMPLAINANT CONSENTS TO THE JOINT REPRESENTATION AND THE COURT FINDS THAT THE COMPLAINANT'S LAWYER CAN ADEQUATELY REPRESENT THE INTERESTS OF BOTH THE STATE AND THE COMPLAINANT, THE COURT SHALL AUTHORIZE THE COMPLAINANT'S LAWYER TO ACT AS PRIVATE PROSECUTOR.

[G] WHERE THE COMPLAINANT HAS NO COUNSEL BUT WISHES TO PROSECUTE THE CRIMINAL CASE HIMSELF, REPRESENTATION BY A LAY COMPLAINANT SHALL BE JUDGED BY THE SAME STANDARDS. THE COMPLAINANT SHALL NOT BE DISQUALIFIED SOLELY BECAUSE HE IS A LAY PERSON OR BECAUSE HE HAS AN INTEREST IN THE PROCEEDING.

[IX] SUPERVISION OF PRIVATE AND PUBLIC PROSECUTIONS.

[A] WHENEVER A CRIMINAL CASE HAS ARISEN PURSUANT TO THIS SECTION, THE COURT SHALL RETAIN JURISDICTION TO SUPERVISE THE LITIGATION.

[B] RULES CONCERNING PRIVATE PROSECUTIONS.

[1] THE COURT HAS DISCRETION TO CONTROL THE LITIGATION.

[a] THE JUDGE MAY ORDER SEPARATE OR JOINT TRIALS; HE MAY ALSO DIRECT THE CHRONOLOGICAL ORDER OF THEM.

[2] THE PRIVATE PROSECUTOR SHALL BE HELD TO THE SAME ETHICAL STANDARDS A DISTRICT ATTORNEY IS REQUIRED TO OBEY.

[3] THE DISTRICT ATTORNEY MAY APPEAR AT ANY TIME DURING THE PENDENCY OF A PRIVATE PROSECUTION TO ARGUE FOR THE DISQUALIFICATION OF THE PRIVATE PROSECUTOR OR THE TERMINATION OF THE PRIVATE PROSECUTION.

[a] BOTH THE PRIVATE PROSECUTOR AND THE COMPLAINANT SHALL HAVE A RIGHT TO BE HEARD IN RESPONSE TO SUCH AN APPLICATION.

[b] IF IT DEEMS IT APPROPRIATE, THE COURT MAY HOLD AN EVIDENTIARY HEARING ON THE APPLICATION.

[C] RULES CONCERNING PUBLIC PROSECUTIONS WHICH HAVE ARISEN UNDER THIS SECTION.

[1] IN ANY CRIMINAL CASE THAT HAS ARISEN UNDER THIS SECTION, AT ANY TIME AFTER THE DISTRICT ATTORNEY SHALL HAVE AGREED TO PROSECUTE

[a] THE COMPLAINANT OR HIS COUNSEL MAY APPLY TO THE COURT TO HAVE THE DISTRICT ATTORNEY REPLACED AS PROSECUTOR.

[i] THE DISTRICT ATTORNEY SHALL HAVE THE RIGHT TO BE HEARD IN OPPOSITION TO THE APPLICATION.

[b] THE COURT, ON ITS OWN MOTION, MAY REPLACE THE DISTRICT ATTORNEY WITH A PRIVATE PROSECUTOR.

[i] BEFORE ANY SUCH REPLACEMENT PROCEDURE IS EFFECTED, THE DISTRICT ATTORNEY SHALL HAVE A RIGHT TO BE HEARD IN OPPOSITION.

[2] IN ANY CASE THAT HAS ARISEN UNDER THIS SECTION, THE DISTRICT ATTORNEY MAY NOT DISMISS THE CASE OR ENTER INTO DISPOSITION OF THE CASE WITHOUT THE APPROVAL OF THE COURT.

[a] THE COMPLAINANT OR HIS COUNSEL SHALL HAVE A RIGHT TO BE HEARD BEFORE ANY SUCH CONSENT IS GIVEN.

