

## Prosecutorial Discretion - A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse

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## PROSECUTORIAL DISCRETION—A RE-EVALUATION OF THE PROSECUTOR'S UNBRIDLED DISCRETION AND ITS POTENTIAL FOR ABUSE

Within the substantive and procedural areas of criminal law exists an implied power, known even to the most uneducated layman, which by its inherent potential has an unusual capacity for misuse or abuse. This implied power has been tagged with the innocuous label of *prosecutorial discretion*. Although discretionary power exists and permeates many areas of the executive and judiciary, none is potentially more dangerous than that of the public prosecutor. It is the purpose of this comment to examine a situation which is ripe for re-evaluation and reform. The area of prosecutorial discretion stands in sharp contrast to the traditional constitutional principles of checks and balances and to the growing awareness of civil rights and liberty. The inherent potential for abuse by an office which is not subject to review, except in most unusual circumstances, ominously threatens the adversary system of criminal justice. Consider, for example, the early morning raid on several sleeping citizens by a *special* prosecutor's task force which resulted in the death of two persons.<sup>1</sup> Over two years and seven investigations later the Cook County State's Attorney and thirteen others were indicted and charged with "obstructing justice."<sup>2</sup> An in depth discussion of this particular topic is outside of the scope of this paper, but it does serve to exemplify a situation which exists and a power which, if unchecked, can be abused.<sup>3</sup> The

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1. On December 4, 1969 Fred Hampton and Mark Clark were killed by gunfire in an early morning raid on Chicago's West Side by such a *special* prosecutor's task force. See Chicago Daily News, Chicago Tribune, and Chicago Sun Times for December 4 and following editions.

2. On August 24, 1971 a sealed indictment by a *special* grand jury, with attorney Barnabas Sears acting as a special prosecutor, was opened at the direction of the Illinois Supreme Court. The indictment was delayed due to unusual circumstances, unusual legal problems and unusual implications of the case. A special session of the Supreme Court of Illinois was needed to order the opening of the sealed envelope containing the indictment. See Chicago Daily News, Aug. 24, 1971, at 1.

3. Note, however, that these indicted persons have not at this time been tried. In fact, several of the defendants have refused to plead contending that the indictment is invalid. See Chicago Tribune, Sept. 1, 1971, at 1.

significance of this incident is indicated by the extensive coverage of this indictment by the mass media which generally ignores most legal proceedings.

The expanse of any inquiry and the many varied perspectives available to this type of analytical subject could out of necessity fill volumes before reaching a workable and digestible discussion. Therefore, a basic understanding of the underlying principles of criminal law, the processes it follows, *i.e.*, the procedures used to effectuate these underlying principles, and the complex interrelationship of both of these as they exist in practice today,<sup>4</sup> is required. This comment proceeds on the premise the reader possesses this basic understanding of substantive and procedural criminal law, and therefore, focuses primarily on the abuse of prosecutorial discretion and the remedies therefor.

#### DISCRETION DEFINED

Discretion can be reasonably defined as the power of free decision.<sup>5</sup> A public officer has discretion whenever the effective limits on his power permit him to make a choice among possible alternative courses of action or inaction.<sup>6</sup> A prosecutor derives his authority or power to exercise his discretion *by law*.<sup>7</sup> It is "an authority to act in certain conditions or situations in accordance with an official's or an official agency's *own* considered judgment or conscience."<sup>8</sup>

Theoretically, absolute discretion, or implied absolute discretion (where no express limitations are apparent) has the potential to be exercised freely, without conditions precedent or subsequent. In reality, however, the scope or extent of all power is restricted or limited to some extent, directly or indirectly, legally or morally, etc. The limitations of a prosecutor's discretion are somewhat nebulous, and in general, undefined.<sup>9</sup>

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4. See BASSIOUNI, *CRIMINAL LAW AND ITS PROCESSES* (1969).

5. WEBSTER'S COLLEGE DICTIONARY (1965).

6. DAVIS, *DISCRETIONARY JUSTICE* 4 (1969). Davis' book offers an indication of the growing awareness of the problems that uncontrolled discretion creates. The book is a current source on the subject of official discretion, its scope, and implication. Note also, that as late as 1965 it had been observed: "Despite the enormous importance of the decision whether or not to prosecute, there has been an amazingly small amount of material published in this area. . . . [N]o serious study of the prosecutorial discretion has appeared in print in the past three decades." Kaplan, *The Prosecutorial Discretion—A Comment*, 60 *Nw. U.L. REV.* 174, 175 (1965).

7. See generally LaFave, *The Prosecutor's Discretion in the United States*, 18 *AM. J. COMP. L.* 532 (1970).

8. *Id.* at 532 n.1.

9. Compare text accompanying *infra* note 70.

He has the authority by law to enforce certain laws<sup>10</sup> by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion. This type of unlimited discretion implies by its very nature that a difference of opinion could arise as to *how* to make the choice.

Before discussing the source of this power it is necessary to note, with heavy emphasis, certain independent factors which have a profound impact on the prosecutor's decision-making process. The overcrowding of the criminal courts by the increasing number of cases,<sup>11</sup> while physical facilities and judicial staff remain more or less constant,<sup>12</sup> has forced plea bargaining<sup>13</sup> and a form of mass justice upon our criminal system as a necessity for survival.<sup>14</sup> This problem will be discussed later with respect to a major argument in support of prosecutorial discretion and again with respect to its potential for abuse. Suffice it for now to say that the present circumstances influence certain, if not all, practices and decisions made by a prosecutor. The influence of overcrowding is difficult to measure, but, as will be noted later, its effect is great.

Another factor which greatly influences the prosecutor's decision is politics.<sup>15</sup> A by-product of our electoral system is the requirement that elected officials must remain popular enough to be re-elected.<sup>16</sup> A prosecutor often has to curry the favor of other executive, legislative, or judi-

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10. Note the loose and vague language as regarding the duty of and limits on the prosecutor. In addition, note the numerous and varied laws at the disposal of the prosecutor.

11. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, 25-41 (1967) [hereinafter called PRESIDENT'S COMMISSION].

12. "The criminal caseload has more than doubled within the past decade, while the size of the criminal bench has remained constant." N.Y. Times, Feb. 12, 1968, at 41, col. 2.

13. "Only the guilty plea system has enabled the courts to process their caseloads with seriously inadequate resources." Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968).

14. "Plea bargaining is not only legal but vitally necessary to prevent the collapse of criminal justice in overloaded metropolitan court systems such as Chicago's. Bargaining is forced on the courts by the crush of defendants." Chgo. Sun Times, May 7, 1971 at 3, col. 3.

15. See generally Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477 (1959).

16. Note the typical campaign promises of political candidates for the elective State's Attorney office that they will "get" the crime syndicate, dope peddlers, rioters, etc., and restore "law and order."

cial officials to perform his duties effectively. The effect of politics on the prosecutor's conduct is illustrated by the growing criticism in the newspapers and mass media of various prosecutors for their "grandstanding" tactics in making arrests and achieving convictions.<sup>17</sup> Does the success of having a ninety-seven percent conviction rate<sup>18</sup> imply that "justice is being done" or that votes are being won? In addition to the "vote getting" influence,<sup>19</sup> there is the additional problem of "machine" politics,<sup>20</sup> and intra-office politics.<sup>21</sup> These many varied influences significantly affect the prosecutor's decision making process. Of these influences, many are non-objective, if not totally subjective. Some are desirable and some are not. As will be demonstrated there are few restraints on these influences and little chance for review in cases of abuse.

#### SOURCE OF THE POWER

The first inquiry into any power should be an analysis of its source. Was it created by statute, constitution, executive policy, case law, or does it merely exist as implied and incidental to some other power or duty? A detailed inquiry into this area would require a lengthy discussion, which for the analytical purposes here can be satisfied by a comparison of a few of the state and federal policies. Most statutes, such as that of Illinois,<sup>22</sup> simply provide that the duty of the state's attorney:

shall be (1) to commence and prosecute *all* actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county, may be concerned.<sup>23</sup> (emphasis added)

(2) To institute and prosecute all actions and proceedings in favor of or for the

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17. The Chicago newspapers are presently having a "field day" criticizing State's Attorney Edward Hanrahan and Illinois Bureau of Investigation Chief Mitchell Ware. Ware was severely criticized for taking television cameramen and reporters on a mass "round-up" of drug offenders and those possessing illegal weapons in Southern Illinois. See generally Chicago Daily News, Chicago Sun Times, and Chicago Tribune, April, 1971.

18. The claim of Mitchell Ware in defense of the criticism of his methods see note 17 *supra*, Chicago Daily News.

19. For an interesting comment of the effect on State's Attorney Hanrahan's political future, see *Hanrahan Politically Dead: Say Key Dems*, Chicago Daily News, Aug. 25, 1971 at 1, col. 4.

20. For an interesting survey of the problem see Chicago Tribune Task Force Report, May 15-22, 1971. See *County Criminal Courts Ruled by Sports System*, Chicago Tribune, May 16, 1971, at 1, col. 4. See also MOLEY, POLITICS AND CRIMINAL PROSECUTION (1929).

21. For further discussion, see text accompanying *infra* note 48.

22. See appendix for a brief summary of Illinois laws on the subject.

23. ILL. REV. STAT. ch. 14, § 5 (1969).

use of the state, which may be necessary in the execution of the duties of any state officer.<sup>24</sup>

(12) To attend to and perform any other duty which may, from time to time, be required of him by law.<sup>25</sup>

This language is more or less typical of the legislative direction for the duties and conduct of its prosecutor, *i.e.*, state's attorney.

The federal rules are equally as general and indefinite by defining the duties of the district attorney as simply to: "(1) prosecute for *all* offenses against the United States; (4) . . . unless satisfied on investigation that justice does not require the proceeding."<sup>26</sup> At this point it should be noted that both the Illinois and Federal rules state *all* offenses or actions are to be prosecuted. The intent of the legislature, as evidenced by these statutes, is that the prosecutor, as representative of the people, should prosecute *all* violators of the law. The duties and conduct of the prosecutor, as set forth in the statute,<sup>27</sup> say nothing about compromise or adjustment, bargaining with defendants, and mediation in quarrels or crime prevention.<sup>28</sup> A literal reading of the statutory authorization implies that one might expect the prosecutor to prosecute *all* crimes against *all* violators. A reading of the statute confirms this, because nowhere is there an express affirmative provision for prosecutorial discretion.

Viewing most statutes or code provisions as directory, *i.e.*, affirmatively by mandate or negatively by prohibition, one can reasonably assume that the "discretionary power" arose through court interpretation. Courts throughout the country have interpreted statutes so as to permit substantial and rather unrestrained discretion in the decision of whether or not to prosecute,<sup>29</sup> and generally, hold that the prosecutor is "vested" with broad discretion to protect the public from crime both by statute<sup>30</sup> and by the authority existing at common law.<sup>31</sup> At common law the prosecuting attorney had absolute control of the criminal prosecution.<sup>32</sup> He was charged by law with a substantial amount of discretion in prose-

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24. ILL. REV. STAT. ch. 14, § 4 (1969).

25. *Id.*

26. 28 U.S.C. § 547 (1964).

27. *Supra* notes 23-26.

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

29. See generally Annot., 155 A.L.R. 11 (1945). See also DAVIS, *supra* note 6, and La Fave *supra* note 7 for further discussion.

30. 28 U.S.C. § 547 (1964).

31. *Fay v. Miller*, 183 F.2d 986 (D.C. Cir. 1950).

32. *Wilson v. County of Marshall*, 257 Ill. App. 220 (1930).

cuting offenders and could commence public prosecutions in his official capacity or discontinue them, when in his judgment, the ends of justice were satisfied.<sup>33</sup> His conduct and acts were not purely ministerial, but were held to involve a large measure of discretion as a minister of justice.<sup>34</sup> In fact, the whole area of the accusatorial process is characterized by relatively unbridled official discretion.<sup>35</sup> From the time a crime is reported or observed until (and if) an accused is arrested, charged, jailed or the case is otherwise disposed of, the officials of the government have broad discretion.<sup>36</sup>

The sources of prosecutorial discretionary power thus derive from: (1) the implication of statutes; (2) the common law; (3) ambiguous substantive criminal laws—laws that are often inconsistent, overlapping, confusing, complex and archaic; and (4) intentional legislative over-generalization resulting in vagueness, lack of specificity, and over-generalization designed to prevent the use of legal loopholes. Thus, without guidelines, the enforcement agencies can choose any of several laws to prosecute or interpret any one statute to suit their case at hand. The purpose of broad general laws is to aid the prosecutor in difficult situations and to prevent a defendant from escaping due to some technical loophole or lack of ability of the drafter of the law. This "sword," however, can cut both ways.

The general arguments in favor of this discretion of the police and prosecutor before trial are generally based on the rationale that discretion is necessary. If a prosecutor or the police were bound by strict guidelines or standardized criteria in decision making, a greater injustice would result because of the tremendous burden on the courts, rather than prosecutor, to decide the borderline or "grey-area" cases. Discretion is thus necessary to quickly dispose of the obviously faulty case.<sup>37</sup> The argu-

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33. *People v. Wabash, St. L. & P. Ry.*, 12 Ill. App. 263 (1883).

34. *People v. Newcomer*, 284 Ill. 315, 120 N.E. 244 (1918).

35. See Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962).

36. See generally LA FAVE, *ARREST; THE DECISION TO TAKE A SUSPECT INTO CUSTODY*, 72-73 (1965); SKOLNICK, *JUSTICE WITHOUT TRIAL* 233-34 (1966); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Kadish, *supra* note 35, at 909-13.

37. The argument that absolute discretion is necessary is rebutted by a comparison to the West German system, where the discretionary power of prosecutors is so slight as to be almost nonexistent; almost everything they do is closely supervised. "The most important difference being that: whenever the evidence that the defendant has committed a serious crime is reasonably clear and the law is not in doubt, the German prosecutor, unlike the American prosecutor, is without discre-

ment continues that "if he (the prosecutor) had a thousand problems no two will be exactly alike."<sup>38</sup> Discretion thus permits the early disposition and screening of cases in which the accused is apparently innocent, or, for other reasons to be discussed, the case would be a waste of time and money to pursue.

In addition to the argument of earlier disposition and screening, the prosecutor should have the discretion based on the particular facts before him to decide (1) whether the suspect should be charged at all, and (2) if so, with what offense or offenses should he be charged. This power of discretion is necessary in order to allow the prosecutor a choice of weapons sufficiently flexible to cover any single course of conduct.<sup>39</sup> Even if criminal laws were framed with exquisite specifications, it would still be necessary for the human beings who administer the criminal laws to exercise judgment.<sup>40</sup> With the tools at hand it appears that discretion is forced upon the prosecutor:

because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is select the cases for prosecution and select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.<sup>41</sup>

#### FACTORS INVOLVED IN THE DECISION TO PROSECUTE

Possessing (1) the power to abstain from prosecution, and (2) the power to selectively prosecute, the prosecutor must base his decision on certain criteria. For analytical purposes, however, these two should be distinguished, dependent upon the parties involved or affected. The discretion to abstain from prosecution is primarily the concern of the general public while the power to selectively prosecute is the direct concern of the defendant and involves issues of equal protection.<sup>42</sup> This prob-

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tionary power to withhold prosecution. This means that selective enforcement, a major feature of the American system, is almost wholly absent from the German system. When a doubt seems to require a discretionary choice, the German prosecutor does not resolve the doubt; he almost always presents a doubtful case to the judge, who determines the sufficiency of the evidence and the proper interpretation of the law. In America, the prosecutor makes the choice whether doubtful or not." DAVIS, *DISCRETIONARY JUSTICE* 188-90, 224-25 (1969) as cited in HALL and KAMISAR, *MODERN CRIMINAL PROCEDURE* (1969) at 755. See also DAVIS, *supra* note 6.

38. *Supra* note 28, at 772.

39. See generally Arnold, *Law Enforcement-An Attempt at Social Dissection*, 42 *YALE L.J.* 1 (1932).

40. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, 290-91 (1968).

41. Jackson, *The Federal Prosecutor*, 31 *J. CRIM. L.C. & P.S.* 3, 5 (1940). Compare the West German system where there is little discretion. See *supra* note 37.

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



lem will arise again concerning abuse of discretion and its remedies. The factors to be discussed also involve the selection of the criminal charge.<sup>43</sup>

Basically, the prosecutor bases his decision to prosecute on both subjective and objective factors. Subjective factors usually involve the question: "Will justice be done by my decision?" Objective factors involve the question of whether there is sufficient evidence to convict the accused. In practice these factors, *i.e.*, *subjective and objective*, are not distinguished, but for purpose of discussion and analysis, a few examples should be set out to illustrate the complexity of the decision and factors involved in arriving at it.

The President's Commission<sup>44</sup> has suggested several factors that *may* be weighed in determining whether to adopt a non-criminal disposition. They include such factors as:

- (1) the seriousness of the crime;
- (2) the effect upon the public sense of security and justice if the offender were to be treated without criminal conviction;
- (3) the place of the case in effective law enforcement policy where deterrent factors may loom large, *e.g.*, tax evasion, white collar crimes, first conviction juvenile offenses;
- (4) whether the offender has medical, psychiatric, family, or vocational difficulties;
- (5) whether there are agencies in the community capable of dealing with his problem;
- (6) whether there is reason to believe that the offender will benefit from and cooperate with a treatment program;
- (7) what the impact of criminal charges would be upon the witnesses, the offender, and his family.<sup>45</sup>

These somewhat collateral and subjective factors should be distinguished from objective evidentiary factors because they involve personal, ethical, and moral considerations while an evidentiary factor is more "legal" in that it involves the consideration of express legal standards, *e.g.*, admissibility of evidence. Note that these subjective factors will again come into play in the area of selecting the appropriate charge, in plea bargaining, and in sentence recommendation. These factors alone—although there is no evidence to prove it—could be the basis for the decision to prosecute or not. One of the major problems in the area of potential abuse of discretion involves this exact question, *i.e.*, whether any decision should be totally subjective.

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43. See generally Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957).

44. *Supra* note 11.

45. *Supra* note 11.

In some cases the invocation of the criminal process against the marginal offender may do more harm than good. What will the effect be of bringing charges against an offender burdened by economic, physical, mental, or educational disadvantages? Will the effect on the accused be an injustice outweighing any benefit of his punishment? To label a person as a criminal may set in motion a course of events that will increase the probability of his becoming or remaining a criminal. The attachment of the stigma of criminality may be so prejudicial as to ruin the future of the offender by foreclosing what legitimate opportunities he may have had.<sup>46</sup> The courts have generally affirmed the prosecutor's discretionary power to determine whether the prosecution shall be commenced or maintained on matters of public policy wholly apart from any question of probable cause.<sup>47</sup>

Objective considerations involve such questions as: (1) is there sufficient evidence to win; (2) is there sufficient evidence to prove the case beyond a reasonable doubt that the defendant committed *the* crime charged; (3) will the witness be available and cooperate; (4) what is the strength of the defendant's case; (5) what will be the probable result based on the knowledge of or expectation of the judge or jury; (6) are there any alternative remedies available?

These questions, although subjective also, involve the application of the prosecutor's legal experience and education to the given legal possibilities. These factors involve the question of "legal sufficiency" whereas the previously mentioned subjective factors involve moral or ethical considerations. The "objectivity," however, is an elusive standard for which, at present, there are no express tests or guidelines to follow.

A prosecutor's office which has guidelines or express criteria for determining (1) whether to prosecute and (2) what charge to select is the exception rather than the rule. The Los Angeles County District Attorney has compiled a list of reasons for refusing to file a complaint which may aid our discussion at this point.<sup>48</sup> Reasons for refusal are:

- (1) Departmental policy
- (2) No Corpus Delicti
  - (a) no specific intent
  - (b) no criminal act

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46. For a further discussion see PRESIDENT'S COMMISSION, *supra* note 11.

47. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965). Compare to *Cates, Can We Ignore Laws?—A Discretion Not to Prosecute*, 14 ALA. L. REV. 1 (1961); Comment, *Private Prosecution: A Remedy For the District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955).

48. See generally, *supra* note 42.

- (3) No connecting evidence
  - (a) a statement problem
  - (b) witness problem
  - (c) physical evidence problem
- (4) Insufficient evidence
  - (a) facts weak
  - (b) evidence not available
  - (c) incomplete investigation
  - (d) witnesses not available
  - (e) evidence inadmissible
    1. illegal detention
    2. fruit of the poisoned tree
    3. search warrant problem
    4. search & seizure problem
    5. warrant of arrest
    6. Miranda plus
- (5) Lack of jurisdiction
- (6) Statute of limitations
- (7) Offense—misdemeanor
  - (a) filed
  - (b) referred
- (8) Interest of justice.<sup>49</sup>

The prosecutor's office does not usually have an express policy concerning offenses not to prosecute, but may informally have a policy not to prosecute certain types of offenses. The President's Commission suggests that the following are offenses not likely to be prosecuted:

- (1) domestic disturbances;
- (2) assaults and petty thefts in which the victim and offender are in a family or social relationship;
- (3) statutory rape when both the boy and girl are young;
- (4) first offense car thefts, the "joyride";
- (5) checks drawn upon insufficient funds;
- (6) first offense shoplifting, particularly where restitution is made;
- (7) where the criminal acts involve offenders suffering from emotional disorders short of legal insanity;
- (8) cases involving annoying or offensive behavior other than a dangerous or serious crime, *e.g.*, drunkenness, disorderly conduct, minor assault, vagrancy, and petty theft.<sup>50</sup>

These factors, even if not expressly set down, generally appear to have an informal effect on the prosecutorial decision.

The prosecutor, while considering these preceding factors—the weight

49. *Supra* note 42 at 531.

50. PRESIDENT'S COMMISSION, *supra* note 11, at 5-8.

of the evidence, the nature of the crime, the nature of the defendant, etc.—must also consider what the probable outcome will be when and if he goes to trial. A recent empirical study has shown that judges acquit the defendant for the same reasons juries do.<sup>51</sup> Juries may acquit the defendant for the following reasons:

- (1) they sympathize with the defendant as a person;
- (2) they apply personal attitudes as to when self defense should be recognized;
- (3) they take into account the contributing fault of the victim;
- (4) they believe the offense is *de minimis*;
- (5) they take into account the fact that the statute violated is an unpopular law;
- (6) they feel the defendant already has been punished enough;
- (7) they feel the defendant was subjected to improper police or prosecution tactics;
- (8) they refuse to apply strict liability statutes to inadvertent conduct;
- (9) they apply their own standards as to when mental illness or intoxication should be a defense;
- (10) they believe the offense is accepted conduct in the subculture of the defendant and victim.<sup>52</sup>

The informality and lack of express control on the discretion of the prosecutor are best described in the words of a prosecutor:

Although many different assistants made decisions as to whether to prosecute different cases, there tended to be a strong consensus as to which cases should and which should not be prosecuted. This was due to several factors: the assistants shared a common perception of their role; each new assistant had been taught the standards for prosecution by the other, more experienced hands; assistants often discussed their decisions and asked the advice of each other; and finally, prosecutorial decisions were constantly being checked by the litigative process.<sup>53</sup>

This reflection tends to indicate the void of express departmental policies. As a generality, this learning process and informal policy standard are followed nationwide.

The prosecutor above related that there are two basic questions to be answered before initiating prosecution. The first is whether the prosecutor believed the defendant was guilty.<sup>54</sup> It has been suggested that the

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51. See NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL*, ch. 9-12, 14 (1966). Compare to the CHICAGO CRIME COMMISSION, *ANNUAL REPORT 1970—CRIME TRENDS 1971*, which found the conviction rate by juries to be 85% while the conviction rate by judges acting without juries was less than 50%.

52. KALVEN & ZEISEL, *THE AMERICAN JURY*, ch. 15-27 (1966).

53. Kaplan, *The Prosecutorial Discretion—A Comment*, 60 *Nw. U.L. Rev.* 174, 177 (1965). The implication of this statement is that there is really *no standard* except those set individually or as a group.

54. *Id.* at 178.

majority, if not all, felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt. Of course, to reach this decision, the assistant might rely on much more than the evidence he could introduce at trial.<sup>55</sup>

The second major question is whether "in light of the habits of the judges and juries in the area, the case could be expected to result in a conviction. . . ." <sup>56</sup> In this regard "prosecution would almost never be commenced unless the chances of success seemed better than fair."<sup>57</sup> Assistants viewed this conviction rate as important because by retaining a high rate of convictions they encouraged guilty pleas, one of the principal means of hoarding the scarce resources of the prosecutor's time and effort.<sup>58</sup>

In addition to these "governmental" factors, the prosecutor was influenced by personal factors. "If the assistant making the decision expected to try the case himself, his previous record—often a matter of status within the office—would be at stake."<sup>59</sup> He also had to

be careful to stay in the good graces of the U.S. Attorney, who, holding essentially a political position, was very sensitive to the criticism of the press, the judges, and the defense bar, all of whom were quick to note a rising number of acquittals and ascribe this to either incompetence in the staff or to overzealousness in the choice of targets for prosecution. The feeling that it was important to make certain that the office came under no undue criticism applied with additional force where the defendant was prominent in the community.<sup>60</sup>

These factors, although not readily admitted and most often denied by most prosecutors, are a good example of the potential for abuse and miscarriage of the purpose for prosecutorial discretion. These factors exemplify conditions affecting the prosecutor's decision but have nothing to do with the culpability of the defendant, the strength of the evidence, etc. These types of factors are the most criticized and should be restricted or defined in some way.<sup>61</sup>

In weighing the decision to prosecute, the prosecutor often looks to the schedule of assignment for judges. When a judge who is known for light

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55. *Id.* at 178. The unanswered question is "evidence concerning what?" Character, personality, moral convictions, religion, political beliefs, etc. The admission that the prosecutor bases his decision on non-legal factors, *i.e.*, subjective factors, confesses to the potential for abuse that can follow. See discussion in text accompanying *infra* notes 59-66.

56. *Id.* at 180.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 181.

61. See *County Criminal Courts Ruled by Spoils System*, Chicago Tribune, May 16, 1971, at 1, col. 4, for an example of the influence and effects of "politics" within the prosecutor's office in Cook County.

sentences is in a position to receive the pleas of guilty, the number of pleas rise and the prosecutor can reasonably expect to terminate the prosecution without trial.<sup>62</sup> He would also have to judge the possibility that the case might come before a judge who for one reason or another might be unsympathetic to the police or prosecutor.<sup>63</sup>

In addition to the personality of the judge, the prosecutor may be influenced by the defense attorney. A borderline case might be prosecuted if the defendant's attorney is an unskilled trial lawyer but declined if the trial ability of the defendant's attorney is well known.<sup>64</sup> However, more important than abilities are the habits of the defense attorney.<sup>65</sup> An assistant could consider whether the prospective defense attorney is known to have his clients plead guilty, banking on the court's mercy, rather than to hope for the benefit of the doubt from the jury.<sup>66</sup> Where the defense attorney has such a predisposition to pleading guilty, the chances of successfully ending the case is further increased where a good "deal" could be offered for such a plea. Hence, the availability of a substitute offense for one with a higher maximum sentence, or a promise of a lighter sentence, or a charge of only one count where multiple counts are available all contribute to the "bargain" in an effort to terminate the case swiftly.

The preceding factors have been included at this point to emphasize that generally there are no restrictions on what factors can be used to make the decision to prosecute, how these factors should be weighed, etc. These latent factors do not theoretically belong with the legitimate factors, *e.g.*, the matter of evidence, but they are recognized as salient factors by most authorities. The problem will arise later with regard to abuse, potential for abuse, and possible remedies.

At this point, one might conclude that the prosecutor has totally unbridled discretionary power. Within reasonable limits this is probably true. The courts and legislature have not as yet come forth with any effective techniques to maximize the advantages of discretion and minimize its potential for abuse.<sup>67</sup> Unlike the adjudicatory phases of the criminal system where there are a plethora of safeguards, the courts have not applied due process or equal protection to the pre-accusation stage.<sup>68</sup> The

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62. *Supra* note 53, at 185.

63. *Supra* note 53, at 185.

64. *Supra* note 53, at 186.

65. *Supra* note 53, at 186.

66. *Supra* note 53, at 186.

67. *See generally supra* note 42.

68. *See generally supra* note 42.

prosecuting attorney has several opportunities as the case develops to make a discretionary decision.<sup>69</sup> How he makes this decision is generally uncontrolled, except by his oath of office,<sup>70</sup> the canon of ethics for lawyers,<sup>71</sup> and his personal ethical and moral convictions.

The courts passing upon this question seem to agree that a duty rests upon a prosecuting attorney to prosecute. "[B]ut this duty is not absolute, but qualified, requiring of him only the exercise of a sound discretion . . . wherever he, in good faith and thinks that a prosecution would not serve the best interest of the state. . . ."<sup>72</sup> The state's attorney in his official capacity is a representative of all the people, including the defendant, and it is as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen.<sup>73</sup> His duty is not only to secure convictions but to see that justice is done.<sup>74</sup> His desire to win the case should be subordinated to his duty to do justice,<sup>75</sup> for it is as much the duty of a prosecuting attorney to see that a person on trial is not deprived of his statutory or legal rights as it is to prosecute him for the crime with which he may be charged.<sup>76</sup> It is the duty of a prosecutor holding a quasi-judicial position not only to prosecute the guilty but also to protect the innocent.<sup>77</sup>

#### CHALLENGING THE PROSECUTOR'S DISCRETION

Within this broad framework of liberal discretionary power, on the one hand, and the nebulous restrictions placed upon the prosecutor to protect the guilty and innocent alike lies the crux of the problem. How can a citizen, be he an accused or not, effectively stop the initiation of what may be an unjustified prosecution, or force the prosecution to proceed or initiate action when it delays or refuses to proceed? At this point in time there is no definite answer to either problem. To facilitate discussion, the problem can be subdivided into questions of (1) forcing a prosecu-

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69. See generally Klein, *District Attorney's Discretion Not to Prosecute*, 32 L.A. B. BULL. 323 (1957).

70. See e.g., ILL. REV. STATS. ch. 14, §§ 1, 4, 5 (1969).

71. See e.g., A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY (1969).

72. See generally Annot., 155 A.L.R. 11 (1945).

73. *People v. Oden*, 20 Ill. 2d 470, 170 N.E.2d 582 (1960).

74. *In re Guardianship of Angell*, 26 Ill. App. 2d 239, 167 N.E.2d 711 (1960).

75. *Johnson v. United States*, 356 F.2d 680 (8th Cir. 1966), cert. denied, 385 U.S. 857 (1966); *Calo v. United States*, 338 F.2d 793 (1st Cir. 1964); *Griffin v. United States*, 183 F.2d 999 (D.C. Cir. 1950); *Pierce v. United States*, 86 F.2d 949 (6th Cir. 1936).

76. *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914).

77. *United States v. Kline*, 221 F. Supp. 776 (D. Minn. 1963).

tion against the will of the prosecutor, (2) attempting to stop the prosecution after it has begun, or (3) altering the decision of the prosecutor in some respect, *e.g.*, as to the charge selected or sentence recommended, etc. At a later time, the problem of specific remedies will be discussed. For present discussion purposes, a few general propositions will be set out.

First, can an individual, after filing a complaint and objecting to the prosecutor's inaction, go into court and force the prosecutor to prosecute? The answer is generally no, a court will not force a prosecutor to prosecute.<sup>78</sup> The courts consistently have held that the disposition of all criminal action rests solely in the honest discretion of the prosecutor; if he prosecutes or refuses to prosecute based on corrupt motives, the only remedy is a collateral proceeding to remove him from office or to bring criminal charges against him.<sup>79</sup>

Second, where there is a choice as to which of two applicable statutes shall be the basis of the indictment, can the prosecution be forced to choose the harsher or the lesser of the two? The answer is, again, that the choice is solely discretionary with the prosecutor.<sup>80</sup>

Third, if a prosecutor will not bring or continue the action, can a private individual take his place? The answer is, again, generally *no*, because the courts have held the prosecutor to be a quasi-judicial officer, vested with the duty to protect the people and prosecute at the same time.<sup>81</sup> He is charged with seeing that no innocent man suffers as well as seeing that no guilty man escapes. A private prosecutor, possibly, cannot remain objective and unprejudiced as required in the interest of justice. The individual is, however, not denied his vindictive remedy because he can still go into the civil courts and sue for actual or nominal damages.

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78. *United States v. Cox*, *supra* note 47; *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963). Compare *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). Can the right of administrative review be extended to prosecutorial conduct or nonaction as in *Hardin*? See also DAVIS, *ADMINISTRATIVE LAW* (1970). Administrative review could be used to substantiate arguments supporting the workability of review of discretion. See *e.g.*, *Wong Wing Hang v. Immigration and Naturalization Service*, *infra* note 92.

79. *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945).

80. *Hutcherson v. United States*, 345 F.2d 964 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 894 (1965). *Accord*, *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); *Clemons v. United States*, 137 F.2d 302 (4th Cir. 1943); *Deutsch v. Aderhold*, 80 F.2d 677 (5th Cir. 1935).

81. See *Brower v. State*, 26 Okla. Crim. 49, 221 P. 1050 (1924); Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 *YALE L.J.* 209 (1955).



Fourth, can a person go into the federal courts to prevent or force a prosecution? Again, the answer is *no*. The federal courts are powerless to interfere with the prosecutor's discretionary power and cannot compel him to prosecute a complaint or forego an action, whatever his reasons for acting.<sup>82</sup> There is a great reluctance historically for the courts, both legal<sup>83</sup> and equitable,<sup>84</sup> to interfere with the organization and operation of the other branches of the government.<sup>85</sup> Public policy seems to require that public officers be protected<sup>86</sup> under the traditional doctrine of separation of powers. As the Constitution has divided the government into the executive, legislative, and judicial branches, no branch may exercise any power properly belonging to another, except as expressly directed or permitted.<sup>87</sup>

In addition to the reluctance to interfere with the executive branch, some decisions have held that there is no remedy against the prosecutor in any case. In *Lawley v. Warren*,<sup>88</sup> the state's attorney, the first assistant state's attorney, and the foreman of an Illinois grand jury, as a member thereof, were, at the time of the return of the indictments against the accused, "judicial officers"; as such, they were protected by the same immunity applicable to judges, and an action could not be maintained against them in the federal district court under the Civil Rights Act<sup>89</sup> on the ground that they had wrongfully procured indictments against the accused.<sup>90</sup> By way of contrast, in actions for malicious prosecution, courts have held that one wrongly accused does have a cause of action, the theory being that it is the duty of the prosecutor to prosecute only those whom he thinks may be guilty, and he exceeds his jurisdiction and loses

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82. *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961). See also cases cited *infra* note 91 and compare to Private Prosecution, *infra* note 92.

83. *Coleman v. Miller*, 307 U.S. 433 (1939) (a proceeding in Mandamus).

84. *Spies v. Byers*, 287 Ill. 627, 122 N.E. 841 (1919). Due to the historical concept of separation of powers, the courts are prohibited from interfering with the other branches of the government in the legitimate exercise of their powers. *Id.* at 630, 122 N.E. at 842.

85. See generally Comment, *supra* note 42, at 521.

86. *Baker, The Prosecuting Attorney: Legal Aspects of the Office*, 26 J. Crim. L.C. & P.S. 647, 648 (1935).

87. See *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926) (Mandamus refused for these reasons).

88. 216 F.2d 74 (7th Cir. 1954).

89. 42 U.S.C. § 1985 (1964); ILL. CONST. art. 2, § 8, art. 6, § 22.

90. See also *Jennings v. Nester*, 217 F.2d 153 (7th Cir. 1955), *cert. denied*, 349 U.S. 958 (1955). *Peckam v. Scanlon*, 241 F.2d 761 (7th Cir. 1957), a state's attorney and judge were to be immune from a suit for damages and equitable relief. *Phillips v. Nash*, 311 F.2d 513 (7th Cir. 1962); *Smith v. Dougherty*, 286 F.2d 777 (7th Cir. 1961); *Swift v. Lynch*, 267 F.2d 237 (7th Cir. 1959).

his immunity when he deliberately and maliciously prosecutes without cause.<sup>91</sup>

#### CRITICISM AND POTENTIAL FOR ABUSE

Prosecutorial discretion can be criticized for many reasons, the most basic of which is that it is solely discretionary in nature.<sup>92</sup> Prosecutors are limited only by "the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others."<sup>93</sup> The exercise of such uncontrolled authority can be only as perfect as the human beings who exercise it.<sup>94</sup> Human beings by their nature are not always rational, unbiased, and ethical. Without any controls or limitations, the exercise of such power rests solely with the men possessing it. Within a society which is cognizant of human shortcomings and which attempts to protect itself by expressing as a societal political premise that "a government of laws and not men" is to be the governing doctrine, the prosecutorial discretion appears as a red-flag exception. Nowhere is it more apparent that our government is a government of men, and not laws, than in the power and authority vested in the prosecutor.<sup>95</sup> With such power the prosecutor could be described as "the most powerful official in local government."<sup>96</sup>

In effect, the consequence of unbridled prosecutorial discretion is that the state's attorney has the power to choose his cases, and thus, can choose his defendants. Therein is the most dangerous power of the prosecutor: the possibility that he "will pick the people that he thinks he should get, rather than pick cases that need to be prosecuted."<sup>97</sup>

This potential for abuse becomes more intense with the current controversy over military surveillance of civilians, F.B.I. wire tapping, and the preparation of dossiers for persons with minimal notoriety:<sup>98</sup>

91. *Leong v. Carden*, 23 Hawaii 362 (1916); *See also* *Carpenter v. Sibley*, 153 Cal. 215, 94 P. 879 (1908); *Parker v. Huntington*, 7 Gray 36 (Mass. 1856); *Skeffington v. Eylward*, 97 Minn. 244, 105 N.W. 638 (1906). *Contra*, *Watts v. Gerking*, 111 Ore. 641, 228 P. 135 (1924).

92. *See* earlier discussion as to definition and scope of any discretionary power, *supra* notes 5-8. *But compare* *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2nd Cir. 1966) where "reasonable, substantial, and probative evidence on record" was necessary.

93. "Discretion"—BLACK'S LAW DICTIONARY (4th ed. 1968), and sources cited *supra* notes 5-8.

94. *See* Mills, *The Prosecutor: Charging and Bargaining*, U. ILL. L.F. 511, 512 (1966).

95. *See generally supra* note 28, at 771.

96. *Supra* note 28, at 771.

97. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3, 5 (1940).

98. *See e.g.* MILLER, *THE ASSAULT ON PRIVACY—COMPUTERS, DATA BANKS, AND*

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost everyone. In such a case, it is not a question of discovering the commission of the crime and then looking for the man who has committed it, it is a question of picking a man and then searching the law books, or putting an investigation to work, to pin some offense on him.<sup>99</sup>

Without expanding on this point at length, a great potential for abuse is at once apparent. The very human elements of ambition, dishonesty, greed, lust for power, laziness, and bigotry have room for development within such a potential.<sup>100</sup>

The worst abuses of discretion occur in connection with those offenses that are just barely taken seriously, such as consensual sex offenses. It is here that a great possibility of abusive discretion exists—to pay off a score, to provide a basis for extortion, or to stigmatize a defendant.<sup>101</sup> Vague statutes which are open for interpretation can be used to bring a prosecution against almost anyone. Desuetudinal statutes, whose function has long since passed, can be used to charge a person, subject him to the time, expense, and delay of our criminal process, and cause him irreparable bad publicity in the community.<sup>102</sup>

Continuous abuse of discretion “breeds general disrespect of the law.”<sup>103</sup> It may create an atmosphere or condition “making easy the arbitrary, discriminatory, oppressive and unequal application” of the laws.<sup>104</sup> It creates a fertile bed for corruption “conducive to the development of a police state—or at least, a police-minded state.”<sup>105</sup>

#### DEFENSES AND REMEDIES FOR THE WRONGFUL EXERCISE

Within the present framework of prosecutorial discretion, there are two basic methods of attacking an abuse by the prosecutor. The first is to

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DOSSIERS (1971); *Surveillance Surveyed*, NEWSWEEK, vol. 77, March 8, 1971, at 54; *The Bogg's File*, NEWSWEEK, vol. 77, May 3, 1971, at 29; *The Invisible Intruders*, SATURDAY REV., vol. 54, Jan. 30, 1971, at 20; Miller, *The Dossier Society*, Chicago Tribune, May 23, 1971, at 22.

99. *Supra* note 97, at 5.

100. “Also there is no office where an able and honest public servant can be more effective.” *Supra* note 95, at 771.

101. PACKER, *THE LIMITS OF CRIMINAL SANCTION*, 290-91 (1968).

102. See generally Benfield, *The Abrogation of Penal Laws by Non-enforcement*, 49 IOWA L. REV. 389 (1964) for defenses to such actions. Some examples of such desuetudinal statutes are laws which forbid the sale of candy cigarettes, prohibit kite flying, and ban the exhibition of films depicting a felony.

103. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960).

104. *Id.* at 429.

105. *Id.*

defend against the charge within the criminal proceeding. The second is to collaterally attack the proceeding or exercise of the discretion petitioning another court for injunctive relief, a writ of mandamus, a writ of prohibition, a writ of habeas corpus, and so on. The two methods of relief have been distinguished due to the differences in probability of success of the method, the court's attitude as to the method chosen (*e.g.*, the courts are very reluctant to grant an injunction), the rights of the parties affected, and who is in fact affected, *i.e.*, one particular defendant or a classification of defendants, such as Negroes. These two methods deal with a direct attack or defense of the criminal action. They are comparable in that the same grounds would be asserted for defending the action as would be used in seeking an injunction, mandamus, etc., but they are distinguishable as to tactical methods.

Before discussing the two basic methods of collateral and direct defense, it must be noted that there are potential actions against the individual prosecutor for abusing his discretion. If the conduct by the prosecutor is criminal in nature, he may be subject to indictment.<sup>106</sup> The possibility of a criminal indictment is rare due to the inherent police power of the prosecutor to use "reasonable" force or other methods in the performance of his duties.

If the abuse involves obvious, flagrant, or unethical conduct on the part of the prosecutor, the accused can sue civilly for actual or nominal damages under traditional tort law, *e.g.*, malicious prosecution. These actions, however, necessitate going into court again—this time on the civil side rather than criminal. Justice is not swift on the civil dockets and usually no direct relief is obtainable for the burden of carrying on a defense of the criminal action. This remedy, therefore, needs no further mention. Suffice it to say, for the reasons to be stated later, that unless the case is clearly exceptional, the wronged party still will not obtain adequate relief for the trouble to which he was subjected.

In addition to the wrongfully accused having a civil cause of action, the traditional remedies of impeachment,<sup>107</sup> suspension, or disbarment are available for flagrant and gross abuses. These cases of abuse are unfortunately common and include such situations as the prosecutor being dis-

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106. See, *e.g.*, Chicago Sun Times, May 17, 1971, at —, col. —, suggesting that the State's Attorney, Hanrahan, and others should be indicted for a raid on the residence of several Chicago Black Panthers. In fact, he and thirteen others were indicted for obstructing justice on Aug. 28, 1971.

107. See DeLong and Baker, *The Prosecuting Attorney, Provisions of Law Organizing the Office*, 23 J. CRIM. L.C. & P.S. 926, 953-57 (1933).

barred for taking money, refusing to prosecute,<sup>108</sup> splitting fees with a defense attorney,<sup>109</sup> failing to prosecute and losing or destroying files and records to prevent further prosecution by another prosecutor,<sup>110</sup> or for using his power to initiate prosecution to extort money, abandon claims, and help a co-conspirator collect fees by threat of prosecution,<sup>111</sup> and so on *ad nauseum*. These situations, directly and blatantly involving abuse of discretion, are distinct from the situation where the prosecutor simply chooses to exercise his discretion in an arbitrary manner. Most cases are borderline cases and this remedy would probably not be applicable.

The first basic method of relief is merely to defend the action, utilizing as a defense the fact that discretionary abuse taints the action. This method can best be covered within the context of traditional appellate review procedures. Constitutional questions, denial of due process, equal protection questions, etc., could be raised by a motion to dismiss,<sup>112</sup> a motion to quash,<sup>113</sup> a motion in arrest of judgment, a motion for a new trial, or post conviction habeas corpus, or by going through the traditional appellate review. The problem inherent in this method is that it is slow, expensive, and involves quite extensive legal work. In cases of harassment or clear abuse, this method would not be adequate because the prosecutor's object would be fulfilled, *i.e.*, to drag the defendant through the system. Note also that defenses of this type are usually available only to those who can afford counsel. The poor or illiterate have to rely on overworked public defenders or legal aid.

In addition to the effectiveness of direct defense, there is some disagreement as to how the evidence of discriminatory enforcement may be introduced. In *People v. Utica Daw's Drug Co.*,<sup>114</sup> the court held that the introduction of such evidence should not have been made to the jury but rather to the court via a motion to dismiss or motion to quash, because the claim of discriminatory enforcement does not involve the ques-

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108. *People ex rel. Colorado Bar Ass'n v. Anglim*, 33 Colo. 40, 78 P. 687 (1904).

109. *In re Lyons*, 162 Mo. App. 688, 145 S.W. 844 (1912).

110. *In re Simpson*, 9 N.D. 379, 83 N.W. 541 (1900).

111. *Attorney General v. Pelletier*, 240 Mass. 264, 134 N.E. 407 (1922).

112. *Moses v. Kennedy*, *supra* note 78; *People v. Utica Daw's Drug Co.*, 16 App. Div. 12, 225 N.Y.S.2d 128 (1962); *People v. Paine Drug Co.*, 39 Misc. 2d 824, 241 N.Y.S.2d 946 (1963); *People v. Pam*, 38 Misc. 2d 296, 238 N.Y.S.2d 363 (1963).

113. *People v. Harris*, 182 Cal. App. 2d 837, 852 (1960); *People v. Winters*, 171 Cal. App. 2d 876, 342 P.2d 538 (1959); *People v. Walker*, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964).

114. *Supra* note 112.

tion of guilt or innocence of the defendant, which is the province of the jury, but is a matter of law. The court recognized its validity as a defense but reversed because of the erroneous manner in which it was raised. The cases are divided on this issue, but it is sufficient at this time to recognize that discretionary abuse is a defense, the only remaining question being the manner in which it can be raised.<sup>115</sup> This question will be noted subsequently.

There are several circumstances in which abusive discretion is readily apparent, at least to the accused. For example, what if a state or city has an ordinance requiring that all laundries in wooden buildings be licensed by a municipal board, but this board as a policy denied licenses to Chinese? The prosecutor has the duty to enforce "all" laws, statutes, ordinances, etc., but he has the discretion to abstain for various reasons, *e.g.*, if he feels the law is unfair, discriminatory, unconstitutional, too severe, etc. Assume that this is not the situation here, and the prosecutor chooses not to prosecute these licensing violations, but he chooses to prosecute only Chinese people who operate laundries in wooden buildings without licenses issued by a board which probably would not have issued the license to these people in the first place. What can a Chinese person do in this situation?

The example above is the landmark 1886 case of *Yick Wo v. Hopkins*,<sup>116</sup> which established the principle that the equal protection clause guarantee prohibits the discriminatory administration of statutes. Yick Wo was denied a license but began operation of a laundry in a wooden building without a license. At trial he offered to prove that two hundred other Chinese were denied permits, while eighty non-Chinese were granted them. The lower court held for the government, denying Yick Wo the defense of discriminatory enforcement. The Supreme Court, instead of voiding the ordinance because it provided insufficient standards and put arbitrary power in the hands of the board, or getting into the real cause of the problem, prosecutorial discretion, chose to hold the conviction invalid because it discriminated against Chinese. The Court, although having a perfect opportunity to set standards for such situations, did not choose to limit discretionary power or interfere with the operation of the other branches of the government. Instead, it wrote:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by a public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in

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115. See for further discussion Annot., 4 A.L.R.3d 393, 414 (1965).

116. 118 U.S. 356 (1886).

similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>117</sup>

This language does not set definite standards, but it does express the principle that an accused has a defense to discriminatory enforcement.

How does one, after alleging discriminatory enforcement, prove it? The answer appears to be unsettled and confused at this time. The burden is placed entirely on the defendant, and the prosecution does not have to allege or prove that it has acted in a nondiscriminatory manner. The defendant's burden of proving discriminatory conduct is a heavy one; moreover, there is uncertainty as to what specific evidence will suffice to prove his allegation. It is unlikely that he will be able to obtain direct proof, or amass other persuasive evidence sufficient to support any inference of intent to discriminate. The courts have held that (1) it is insufficient to show that other offenders have not been prosecuted;<sup>118</sup> (2) that there has been a laxity of enforcement;<sup>119</sup> or (3) that there was sufficient evidence of the existence of intentional or purposeful discrimination based on an unjustifiable standard of race, religion, or other arbitrary classification.<sup>120</sup> In support of his contention of intentional discrimination, and not mere laxity of enforcement, the defendant is entitled to introduce evidence of nonenforcement as relevant to his contention.<sup>121</sup> The burden is still, however, on the defendant to establish by a clear preponderance of the evidence that his contention is true.

This proof, *i.e.*, that the defendant was selectively chosen to be prosecuted, does not necessarily mean that the "discrimination" against him is unconstitutional. It may be justified when (1) the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law and establish its validity, or (2) a striking example or a few examples are sought in order to deter other violators, as a part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary.

Although the courts are confused or hesitant at this time to set up a definite standard, the principle has been established that discrimination, if deliberate and intentional is violative of the equal protection clause.<sup>122</sup>

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117. *Id.* at 373-74.

118. *Moss v. Hornig*, 314 F.2d 89 (2d Cir. 1963).

119. *Wade v. City & County of San Francisco*, 82 Cal. App. 2d 337, 186 P.2d 181 (1947); *People v. Utica Daw's Drug Co.*, *supra* note 112.

120. *Oyler v. Boles*, 368 U.S. 448 (1962); *People v. Utica Daw's Drug Co.*, *supra* note 112.

121. *People v. Harris*, *supra* note 113.

122. *See* cases cited *supra* notes 117-20 and *Edelman v. California*, 344 U.S. 357, 359 (1953); *Ah Sin v. Wittman*, 198 U.S. 500, 506 (1905); Comment,

This, coupled with the tendency in recent years to assure the defendant in a criminal case that he cannot constitutionally be convicted if law enforcement officers dealt with him "unfairly" at any stage of the proceedings,<sup>123</sup> leads to the general principle that if a defendant can prove discriminatory conduct he may be able to gain a dismissal or acquittal of the charges against him. Although the effectiveness of the defense of prosecutorial discrimination is somewhat diluted by its present state of uncertainty in the courts, it is nevertheless a weapon which should be employed to attempt to ward off a discriminatory prosecution.

At this point, the inherent problems of prosecutorial motive will be considered. How does one prove motive? Is motive relevant? Can a prosecutor's motive be a defense to discriminatory enforcement? Because a prosecutor has the judicially approved power to make the decision to prosecute based on a variety of factors, he can theoretically choose his defendants.<sup>124</sup> Does the selective enforcement of the laws mean that the prosecution is inherently discriminatory because a particular person has been chosen to be prosecuted? Although enforcement statistics and proof of substantial violations by others may establish partial or total nonenforcement except against the individual involved, this would seem insufficient to establish the necessary intent to discriminate.<sup>125</sup> Attempts to inferentially establish a possible motive for police discrimination have failed.<sup>126</sup>

Is there an abuse of discretion where the primary motive of the prosecutor relates to matters other than the commission of the particular crime for which the defendant is being prosecuted?<sup>127</sup> An example of such a situation is where "prosecutions have been motivated by personal grudges of public officials"<sup>128</sup> toward an individual. Was James Hoffa singled out for prosecution by the United States Attorneys because he told Robert

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*The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLO. L. REV. 1103, 1108 (1961).

123. See e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *People v. Utica Daw's Drug Co.*, *supra* note 112. Compare *Burns, Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969).

124. See text accompanying *supra* footnotes 53-66.

125. See *Eubanks v. Louisiana*, 356 U.S. 584, 588 (1958); *Hill v. Texas*, 316 U.S. 400, 404 (1942); *Smith v. Texas*, 311 U.S. 128, 131 (1940).

126. *United States v. Palermo*, 152 F. Supp. 825 (E.D. Pa. 1957) where the defendant in a tax suit alleged he was singled out for prosecution because he was suspected of other crimes; *Society of Good Neighbors v. Van Antwerp*, *infra* note 134, where personal animosity was alleged.

127. See generally *Freedman, The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1034-35 (1967).

128. *Id.* at 1035.



Kennedy "that he was nothing but a rich man's kid who never had to earn a nickel in his life."<sup>129</sup> During Robert Kennedy's term as Attorney General "there were more prosecutions filed against James Hoffa than there were civil rights cases in the entire state of Mississippi, and more prosecutions against officers of the Teamster's Union than there were civil rights cases in the entire country."<sup>130</sup>

Consider also situations where a prosecutor makes repeated attempts to convict an unpopular figure, such as Al Capone. If a prosecutor considers that such a person is dangerous but cannot be successfully "put away" for offenses he is suspected to have committed, is it ethical and proper to search his past and prosecute him for anything that can be found, e.g., income tax evasion? "Some prosecutors consider it proper to subject him [Al Capone] to prosecutions for a variety of other crimes, ranging from traffic offenses to tax evasion, for which he would not be investigated and charged were it not for his notoriety."<sup>131</sup>

One extreme example is *People v. Darcy*,<sup>132</sup> where the defendant, a Communist, was convicted of perjury for statements made in an election registration affidavit regarding the defendant's use of an assumed name and incorrect place of birth. The court held that the evidence of non-prosecution of hundreds of thousands of identical violators did not prove discrimination. In fact, the common practice upon discovery of such violations was to notify them by post card and ask them to correct the error. Furthermore, Darcy was extradicted from Pennsylvania, while thousands of similar mistakes by others were not prosecuted at all.<sup>133</sup> This case and others<sup>134</sup> indicate that motive is relevant, but proving motive appears to be practically impossible.<sup>135</sup> In light of the impracticality, if not impossibility of proving prosecutorial motive, the method of direct defense is an ineffective tool against discriminatory prosecution, unless perhaps, the selective prosecution pattern reveals clear cut racial discrimination.

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129. *Id.*

130. *Id.* at 1035, n.25.

131. *Id.* at 1034.

132. 59 Cal. App. 2d 342, 139 P.2d 118 (1943).

133. *Id.* at 358 (dissenting opinion).

134. *Edelman v. California*, 344 U.S. 357 (1953), where defendant was continually prosecuted for espousing unpopular political and economic views in park speeches when others were not prosecuted for the same conduct. *United States v. Lenske*, 66-2 U.S. Tax Cas. 9686 (9th Cir. 1966); *See also Society of Good Neighbors v. Van Antwerp*, 324 Mich. 22, 36 N.W.2d 308 (1949).

135. Note the failure of Hoffa and Capone to even raise this defense because it is almost impossible to prove.

## COLLATERAL DEFENSES

Within the context of selective enforcement, equal protection, and discrimination, are there methods more effective than direct defense to ward off prosecutorial abuse? The equitable remedy of an injunction would be clearly advantageous in such situations.<sup>136</sup> It permits (1) a unique flexibility allowing "custom tailoring" to form the decree to fit the situation, and (2) an adjudication of the charge prior to the criminal action, thus eliminating the risks involved in defending a prosecution after the action has been initiated.<sup>137</sup>

Because injunctive relief is equitable in nature, the equitable requirements of an inadequate remedy at law, involvement of a property right, and feasibility and practicality of enforcement, as well as the equitable defenses must be considered. Due to the historical background of the application of an injunction, there is a deep-rooted reluctance in the Anglo-American legal system to permit its use in the criminal court process.<sup>138</sup> Reasons for this lie in equity's historical role: (1) it acts only to protect property rights;<sup>139</sup> (2) it will not act if there is an existing and adequate remedy at law, *i.e.*, in the actual defense of the criminal law action the same ground for the injunctive relief can be asserted to bar the conviction;<sup>140</sup> (3) it takes into consideration that the threat of an injunction would hamper the performance and freedom of the government enforcement agencies in fulfilling their duties;<sup>141</sup> (4) it fears that through an injunction guilty persons would escape prosecution and flouting of the law would be encouraged.<sup>142</sup>

The type of injunction sought could present additional problems. If the injunction is interlocutory, to maintain the status quo between the parties until the trial on the merits, there probably would not be a general

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136. Note, *Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 67 (1967).

137. Moscovitz, *Civil Liberties and Injunctive Protection*, 39 ILL. L. REV. 144 (1944).

138. On the question of the reasons for the reluctance to enjoin criminal prosecutions, see generally Note, *Equity: Enjoining Criminal Prosecutions*, 37 CALIF. L. REV. 685 (1949), Note, *Equity—Injunction Against Criminal Proceedings*, 31 MICH. L. REV. 128 (1932).

139. See generally *Gee v. Pritchard*, 2 Swanst. 402 (1818); KERR, INJUNCTIONS (2d ed. 1880).

140. See *Fenner v. Boykin*, 271 U.S. 240 (1926); *Cambell v. Medalie*, 71 F.2d 671 (2d Cir. 1934), cert. denied, 293 U.S. 592 (1934); *Buffalo Gravel Corp. v. Moore*, 194 N.Y. Supp. 225 (1922).

141. See *ex rel. Freebourn v. District Court*, 85 Mont. 439, 279 P. 234 (1929).

142. See *People v. Darcy*, *supra* note 132; *Society of Good Neighbors v. Van Antwerp*, *supra* note 134.

resistance to issuance. An example might be to prevent police harrassment until the first of a series of similar prosecutions is settled by the criminal court. If the injunction sought is to be permanent, *e.g.*, to never prosecute the defendant, or mandatory, *e.g.*, to require the prosecutor to drop the specific charges, there would probably be a great reluctance to issue the injunction. The type of injunction and what is sought by it would thus greatly effect its chances of being granted.

As a general rule equity will not interpose to prevent prosecutions in criminal courts. Equity will generally leave the person to his defense at the trial and will not prejudge the case.<sup>143</sup> Equity will, however, protect persons by restraining a prosecution when it is "necessary and incident" to the protection of rights which equity recognizes.<sup>144</sup> Subject to the traditional equity conditions, injunctions have been granted to protect personal rights even if property rights are not involved.<sup>145</sup> Freedom, to be sure, is a personal right, and therefore, it may be within the scope of equitable protection.

The courts, however, remain divided on the applicability of injunctive relief. It seems clear that the Constitution prohibits purposeful discrimination in the enforcement of the laws. A party who is the subject of such discrimination may assert it to defeat prosecution, and in certain circumstances, he may enjoin its continuation.<sup>146</sup> Such relief "must be regarded as an extraordinary rather than usual remedy."<sup>147</sup> It appears that if the constitutionality of a statute is in question injunctive relief will be granted.<sup>148</sup> In *Downing v. California State Board of Pharmacy*,<sup>149</sup> the court by dictum stated: "If law enforcement officers attempt to enforce

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143. See *Ferguson v. Martineau*, 115 Ark. 317, 171 S.W. 472 (1914); *People v. Superior Court of the City and County of San Francisco*, 190 Cal. 624, 213 P. 945 (1923), where the court denied injunctive relief contending that there is an adequate remedy at law by appeal to the governor for a pardon. Whether such a remedy is in fact adequate, as these courts assume, is highly questionable.

144. *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 241 (1946).

145. *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955).

146. The Supreme Court has stated that if a continuing threat of discriminatory enforcement is shown then an injunction would be granted. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588 (1961), (but the Court declined to grant the injunction because the question was moot).

147. *The Right to Nondiscriminatory Enforcement of State Penal Laws*, *supra* note 122.

148. See *Moss v. Hornig*, 314 F.2d 89 (2d Cir. 1963); *City of Evansville v. Gaseteria*, 51 F.2d 232 (7th Cir. 1931); *Wade v. San Francisco*, 82 Cal. App. 2d 337, 186 P.2d 181 (1947); *Covington v. Gausepohl*, 250 Ky. 323, 62 S.W.2d 1040 (1933).

149. 85 Cal. App. 2d 30, 36, 192 P.2d 39, 42 (1948).

a criminal statute arbitrarily and in a discriminatory manner, such action may be restrained by the courts."<sup>150</sup> The courts, however, deny injunctive relief in similar situations for such reasons as: (1) the person must come into equity with clean hands in order to be entitled to relief and since a violator of a statute does not have "clean hands," he is not entitled to the injunction;<sup>151</sup> (2) there is an adequate remedy at law;<sup>152</sup> (3) no property right is involved;<sup>153</sup> (4) certain procedural requirements are not satisfied, such as pleadings which are not stated with precision and certainty.<sup>154</sup> Some courts have gone so far as to hold that the defense of discriminatory enforcement is available only where violations were relatively minor, being merely *malum prohibitum*,<sup>155</sup> and not for an offense *malum in se*.<sup>156</sup> The boundaries thus appear to remain undelineated with the probable weight against granting an injunction.

The federal courts, on occasion, have granted injunctive relief against prosecution and threats of prosecution. In *Dombrowski v. Pfister*,<sup>157</sup> for example, the Supreme Court held that an injunction against the enforcement of certain state criminal statutes could properly issue. The facts of that case demonstrated that the plaintiffs, members of a civil rights group in Louisiana, were subjected to harassment and threats of prosecution by state officials to discourage them from exercising their constitutional rights. However, in a recent series of cases<sup>158</sup> the Supreme Court tight-

150. However, the court found this not to be the case and reversed the order granting an injunction.

151. See *Society of Good Neighbors v. Van Antwerp*, *supra* note 134; 28 U.S.C. § 547 (1964).

152. *Supra* note 140 and 143.

153. See *Jackie Cab Co. v. Chicago Park Dist.*, 366 Ill. 474, 9 N.E.2d 213 (1937).

154. *Id.*; *Highland Sales Corp. v. Vance*, 244 Ind. 20, 186 N.E.2d 682 (1962); 28 AM. JUR. *Injunctions* § 265 (1959).

155. *People v. Harris*, *supra* note 113; *People v. Winters*, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959) (both for gambling).

156. *People v. Darcy*, 59 Cal. App. 2d 342, 139 P.2d 118 (1943) (for perjury); *People v. Montgomery*, 47 Cal. App. 2d 1, 117 P.2d 437 (1941) (for pandering).

157. 380 U.S. 479 (1965).

158. *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971). See also *Shaw v. Garrison*, 328 F. Supp. 390 (E.D. La. 1971). The prosecutor, Garrison, had brought charges against Shaw of conspiring to assassinate President Kennedy. Shaw was acquitted at the trial, but Garrison subsequently sought an indictment for perjury based upon Shaw's testimony at his trial. Shaw then petitioned the federal district court for an injunction restraining Garrison from prosecuting him. The court granted the requested relief, finding that the prosecutor was acting in bad faith, and that if relief were withheld Shaw would suffer irreparable harm from multiple litigation and harassment.

ened the reins of the *Dombrowski* doctrine, and strongly indicated that in the area of state criminal enforcement, federal abstention should be the rule and not the exception.

The writ of prohibition is another possible remedy for the abuse of prosecutorial discretion. As yet there are no cases where it has been used to bar a criminal prosecution. A writ of prohibition is used only in cases of extreme necessity where the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal.<sup>159</sup> It is generally used as a command to an inferior court, ordering it to cease the prosecution of an action for the reason that the action or some collateral matter arising therein is not within its jurisdiction.<sup>160</sup> The reluctance of the courts to grant the writ makes the use of this writ unfeasible except in extreme emergencies.

Another possibility for relief is mandamus, a command by a court to a public official to do a particular act. In situations where the prosecutor refuses to prosecute, or desires to enter a *nolle prosequi*, or has dropped the charges where there is sufficient evidence to go to trial, a writ of mandamus can be used to engender an immediate judicial determination. The courts, however, have refused to issue a writ of mandamus for the reason that in the matters of investigation and prosecution the prosecutor's power is discretionary and beyond the control of the court.<sup>161</sup> Ordinarily, officers clothed with the discretion as to the manner of performing a duty cannot be required to perform it in a particular manner, but may be compelled by mandamus to act.<sup>162</sup> Mandamus will not lie to regulate a general course of official conduct<sup>163</sup> or to enforce the performance of the official's duties so as to prevent further violations of laws which it is that official's duty to enforce.<sup>164</sup> Thus, it appears that mandamus may be used to compel the exercise of a discretionary duty or power but not the way in which the officer shall exercise the discretion.<sup>165</sup> Also, in the absence of a clear abuse of discretion, a writ of mandamus cannot be issued

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159. See e.g., *Niagra Falls Power Co. v. Halpin*, 45 N.Y.S.2d 421, 424, 181 Misc. 13, 16 (1943); *State ex rel. Levy v. Savord*, 143 Ohio St. 451, 453-54, 55 N.E.2d 735, 736 (1944).

160. *Alexander v. Crollott*, 199 U.S. 580 (1905).

161. *Taliaferro v. Locke*, 182 Cal. App. 2d 752, 756, 6 Cal. Rptr. 813, 815 (1960).

162. *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926).

163. *People ex rel. Bartlett v. Busse*, 238 Ill. 593, 87 N.E. 840 (1909) (to enforce Sunday closing laws).

164. *Id.*

165. *Gustafson v. Wethersfield Township High School Dist.* 191, 319 Ill. App. 255, 49 N.E.2d 311 (1943).

to compel performance of prosecutorial duties when the prosecutor has demonstrated a reasonable exercise of his discretion.<sup>166</sup> The ultimate question, then, is what is a "clear abuse" and what is a "reasonable" exercise? The courts have held that mandamus will not lie to compel the prosecutor to prosecute every charge of a crime that may be made by an individual desiring the prosecution of a third person.<sup>167</sup> The courts have rationalized that nothing could be more demoralizing to "efficient administration of the criminal law in our system of justice than to require the prosecutor to dissipate its efforts in personal grievances, fanciful charges, and idle prosecutions."<sup>168</sup> Just as a court cannot compel a prosecutor to prosecute, it cannot compel him to institute a suit against his will and judgment.<sup>169</sup>

Court decisions have denied interference with the prosecutor's decision of whether to charge, and after charging, whether to prosecute. Suppose, for example, that the prosecutor did charge, did prosecute and is in a position to recommend a sentence to the judge. Can mandamus or injunction force him to seek the maximum sentence or the minimum sentence? The answer appears to be *no* for the same reason as before, *i.e.*, the courts will not interfere with the reasonable exercise of an official's discretion. There appear to be no cases on point so the question will be one of first impression if and when it arises.

#### PROSECUTORIAL DISCRETION IN PLEA-BARGAINING, ITS EFFECT ON THE SYSTEM

The topic of plea bargaining is intentionally left until last because this area best exemplifies the subject of this comment, *i.e.*, that changing circumstances compel a re-evaluation of the prosecutorial discretion. The rationale of the previous areas of discretion, *e.g.*, the decision to prosecute or not, also imply that the potential for abuse is great, but the courts have not chosen to limit plea bargaining as yet. It becomes readily apparent:

that the available safeguards are only barely if at all, sufficient to protect due process when the prosecutor bargains with the defendant. The potentials and mo-

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166. *People ex rel. Strozier v. Kennelly*, 342 Ill. App. 515, 97 N.E.2d 126 (1951).

167. *Supra* note 161, at 755, 6 Cal. Rptr. at 816.

168. *Supra* note 161, at 755, 6 Cal. Rptr. at 816.

169. *Boyne v. Ryan*, 100 Cal. 265, 34 P. 707 (1893). Note the possibility in such situations of the use of *qui tam* actions where a person could sue in or on the behalf of the state or people.

tives for abuse are present and all that remains is the opportunity; in the absence of more effective protections, that opportunity may all too often knock.<sup>170</sup>

The practice of plea bargaining has created not only the opportunity for abuse as stated above but it appears to have tainted the whole area of criminal justice.

Few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty.<sup>171</sup> Such a device tends to raise a doubt or question as to the quality of criminal justice that results from such a bargain. It has been stated that:

[t]he rule for the administration of the criminal law provides that all offenders should be treated equally. No defendant should receive more or less punishment than another who committed a similar offense and the rich and powerful should be prosecuted as vigorously as the poor and weak.<sup>172</sup>

In the practice of plea bargaining, equality seems to have been lost in the shuffle. The defendant with a high paid, well-known criminal lawyer has a far better chance of receiving more in return for his guilty plea than a poor, black, uneducated person defended by the over-worked public defender, who often knows nothing more about the case than what he has seen in the file a few minutes before trial.

The crush of cases on the courts has made plea bargaining "virtually necessary to prevent the collapse of criminal justice in the overloaded metropolitan court systems."<sup>173</sup> This continuing crush of cases has changed the principal role of criminal court judges and prosecutors from trial conductors to bargaining brokers.<sup>174</sup> Our system of criminal justice has come to depend upon a steady flow of guilty pleas.<sup>175</sup> There are simply not enough judges, prosecutors, or defense counsels to operate a system in which defendants must go on trial.<sup>176</sup>

There are three major types of plea bargaining devices: (1) sentence recommendation, (2) a guilty plea to a lesser included offense, and (3) the dismissal of charges for certain considerations, such as a promise to become a prosecution witness.<sup>177</sup> These three devices are designed to

170. BASSIOUNI, *CRIMINAL LAW AND ITS PROCESSES* 464 (1969).

171. *Bargaining Forced on the Courts by the Crush of Defendants*, Chicago Sun Times, May 7, 1971, at 32, col. 1, quoting from the 1967 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE.

172. *Supra* note 28.

173. *Supra* note 171, at 32, col. 3.

174. *Supra* note 171, at 32, col. 1.

175. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT* (1967).

176. *Id.*

177. *Supra* note 170, at 459.

give the prosecutor the latitude to deal with most circumstances in order to see that "justice is done." The fundamental purposes of sentencing are: (1) punishment, (2) rehabilitation, and (3) deterrence. How do the devices available and the purpose of sentencing square-up under the present system? The answer is *not well*.

No defendant should bargain for a plea if he is in fact innocent of the charges. Therefore, the assumption is that all defendants who bargain should be in fact guilty. Yet the bargaining defendant is likely to receive a lighter sentence than the defendant who goes to trial. Knowing this, is not the defendant who prefers to go on trial, but fears the harder sentence, indirectly coerced into pleading guilty? If so, is not his constitutional right to a trial being abridged?<sup>178</sup>

Our adversary system of criminal justice is designed so that the prosecutor prosecutes, the defendant defends, and the judge or jury decides who is more persuasive. Hopefully, from the evidence and testimony of both sides justice will be the ultimate result. What is the practical effect on this adversary system of a defendant who pleads guilty and a judge who "rubber stamps" the prosecutor's sentence recommendation? The practical effect appears to be that there are not three legally distinct, separate parties.

When a prosecutor grants a concession in exchange for a plea of guilty, he may be acting in any or all of several different roles, which are:

- (1) administrative—to dispose of each case in the fastest, most efficient manner in interest of getting his and the courts' work done,
- (2) advocate—to maximize the number of convictions and the severity of sentences imposed after conviction,
- (3) judge—to do right things in view of the defendant's social circumstances or in view of peculiar circumstances of his crime arguing that this is accomplished with a guilty plea,
- (4) legislator—granting concession because the law is too harsh not only for this defendant but all defendants.<sup>179</sup>

A guilty plea is intended to take into account the purpose of sentencing, *i.e.*, punishment, rehabilitation, and deterrence. If a particular defendant deserves a lesser sentence, then the court should consider mitigating circumstances to reduce the sentence. In the practice of plea bargaining there is:

[t]he implicit belief that a guilty plea is a showing of the defendant's rehabilitative potential and therefore justifies a less severe sentence, or that a defendant deserves considering for speeding the administration of justice, may result in penalizing the defendant who 'hinders' justice by pleading not guilty. To 'hinder' justice in this sense is to demand one's constitutional right to trial by the court or jury. To delay

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178. *Supra* note 170, at 460.

179. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).



the administration of justice means to place yet another case on the court's already crowded docket. In effect, it is the defendant who is being penalized, not only for the assertion of a right given him by the state itself, but also for the state's own inefficiency and penury in the administration of justice.<sup>180</sup>

It is doubtful that this effect is consonant with the spirit of the adversary system.

The scope of plea bargaining in the criminal courts is exemplified by a few statistics. A few years ago, it was stated that:

Not including the cases dismissed by the prosecutor on his own motion, approximately 70-80% of all remaining defendants plead guilty. Ordinarily, this decision is based on negotiations between the prosecutor and the defense counsel, and the defendant usually pleads guilty to a lesser offense than those originally charged.<sup>181</sup> In 1970, in Cook County, only 870 cases were settled by a bench or jury trial. More than four times as many defendants—3,693 of them—elected to plead guilty in negotiated settlements.<sup>182</sup> This has led to a situation known as "bargain day"—the period at the end of the month when some judges hand out light sentences to spruce up their case disposition records.<sup>183</sup> Both defendants and defense attorneys know that for a lenient sentence the best time to confront the judge would be at the month's end.<sup>184</sup> As to whether this is proper, a former assistant state's attorney has stated: "It's wrong when the ends of justice are not truly served. But it is right in the sense that another case has been disposed of and the court system has moved another case away from potential collapse."<sup>185</sup> In view of this, the guilty plea practice is justified because it is certain in result, saves the state time and expense, and frees the energy of the prosecutor for the investigation of other crimes and the trial of highly important cases.<sup>186</sup>

A theoretical threat of collapse hangs over the criminal court system. This threat is illustrated by a recurring bad dream experienced by one prosecutor. In the dream, each prisoner awaiting trial in County Jail exercises his right to request an immediate jury trial. In the event such mass requests occurred, the court system would collapse within 120 days—the statutory time limit for meeting such trial demands. An estimated two out of three prisoners making such requests would have to be freed because the courts could not accommodate their case.<sup>187</sup>

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180. *Supra* note 170, at 461.

181. HALL, *MODERN CRIMINAL PROCEDURE* 11 (1965).

182. *Supra* note 171, at 32, col. 2.

183. *Supra* note 171, at 32, col. 2.

184. *Supra* note 171, at 32, col. 2.

185. *Supra* note 171, at 32, col. 2.

186. *Supra* note 28, at 787.

187. *Supra* note 171, at 32, col. 2.

The secondary effect of plea bargaining is a lessening of respect for the law by all citizens. Robbery by a lethal weapon is a serious offense in all jurisdictions, and carries a severe penalty. "Imagine the surprise (and contempt) of the person robbed when he learns that his assailant served a few months in jail or paid a fine for assault."<sup>188</sup> The attitude of the public and respect for the law are surely tainted. In a survey on "What Ails American Justice," seventy-five percent of those polled felt that convicted criminals are let off too easily.<sup>189</sup> Sixty-eight percent felt the accused people are not brought to trial promptly.<sup>190</sup> Forty percent of the people felt that lenient judges are the blame for crime.<sup>191</sup> Sixty-two percent felt that letting criminals off too easily is more disturbing than the prospect that constitutional rights may be inadequately protected.<sup>192</sup>

Despite the potential abuses inherent in plea bargaining, the Supreme Court, in the recent case of *North Carolina v. Alford*,<sup>193</sup> apparently acquiesced in this procedure. Defendant Alford, originally charged with first-degree murder, later accepted the prosecutor's offer of pleading guilty to a reduced charge, second-degree murder. Subsequently, defendant brought a habeas corpus action, contending that his guilty plea was induced by fear and coercion. The Court's failure to grant Alford the requested habeas corpus relief signaled that plea bargaining will be tolerated, if not encouraged by our nation's highest tribunal in the future.

#### CONCLUSION

If plea bargaining, as has been indicated, is symptomatic of an ailing system of criminal justice, how does this relate to prosecutorial discretion? Stated as simply as possible, prosecutorial discretion has probably saved the system from a premature and total collapse. The purpose and goal of liberal prosecutorial discretion, has been subverted and perhaps irreversibly altered to meet the exigencies of the moment. Where the courts, at an earlier time and under less compelling circumstances, upheld prosecutorial discretion because it allowed the prosecutor the opportunity to "see that justice is done" without going to court, the courts today uphold the same discretion, because without it, there can be no justice at all—the system would collapse. If the prosecutor did not have the power

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188. *Supra* note 28, at 788.

189. *The Public: A Hard Line*, Newsweek, vol. 77, Mar. 8, 1971 at 39.

190. *Id.* at 39.

191. *Id.* at 39. See also the Chicago Crime Commission, *supra* note 51, which charges that Cook County judges are "overly lenient."

192. *Supra* note 189, at 39.

193. 400 U.S. 25 (1970).

to drop cases, charge the accused with lesser included offenses, or bargain pleas, the system would grind to a halt.

The time has come to re-evaluate prosecutorial discretion and amend it to some degree. The prosecutor's power to "prejudge" cases by agreeing to guilty pleas in exchange for concessions on his part is not an executive function and never has been. Judging a defendant's guilt and sentencing him is a judicial function. A list of the decisions now subject to the prosecutor's discretion, which were never intended to be within his domain, could go on *ad infinitum*, as demonstrated throughout this comment. The purpose of this comment is not to imply that the prosecutor will necessarily misuse or abuse his expanded discretion; but, that the present circumstances have forced the power of prosecutorial discretion into areas and purposes for which it was never intended. If the prosecutor is to assume new functions within his veil of prosecutorial discretion, then perhaps it would be wiser and safer to define the scope and function within which prosecutorial discretion can properly operate.

It is now time to weigh the social benefits of our present system of criminal justice against the social cost. The concern revolving around the integrity of the process focuses on the potential abuses implicit within the general system "that to some degree at least *encourages* plea bargaining,"<sup>194</sup> and *permits wide* discretionary powers in order to *insure its own existence*. Due to such pressing circumstances that face our criminal courts today it is time to re-evaluate the discretionary power of the prosecutor because "nothing can destroy a government more quickly than its failure to observe its own laws . . . ."<sup>195</sup>

John A. Lundquist

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194. *Supra* note 170, at 463.

195. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). See Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969).