Prosecutorial Discretion at the Complaint Bureau Level

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PROSECUTORIAL DISCRETION AT THE COMPLAINT BUREAU LEVEL

The public prosecutor has wide and substantially uncontrolled power of ignoring offenses or offenders, of dismissing proceedings in their earlier stages . . . .1

I. INTRODUCTION

Virtually every public prosecutor or district attorney in the United States has wide-ranging discretion in the investigation and prosecution of criminal offenses.2 The subject office of this article, the New York County District Attorney's Office, is little different in this regard.3

This comment will explore the philosophical and legal bases for prosecutorial discretion. It will focus on the actual operation of the New York County District Attorney's Office with regard to the exercise of discretion, and on suggestions for reform.4 The discussion will concentrate neither on the various equal protection arguments5 made against the abuses of discretion, nor on the assorted claims of prosecutorial discrimination6 in the exercise of discretion.

II. PHILOSOPHICAL AND LEGAL BASIS OF DISCRETION

Before beginning the discussion of the philosophical and legal bases of discretion, it is necessary to arrive at a working definition and understanding of discretion itself. In one case, the United States Supreme Court defined it as the equitable decision of what is just and proper under the circumstances; the liberty or power of acting without other control than one's judgment.7

3. Nearly all of the information concerning the operation of the New York Office was gathered during the author's summer internship in the Complaint Bureau. He would like to express his gratitude to the assistant district attorneys (hereinafter referred to as A.D.A.'s) who assisted him in obtaining the information for this comment.
7. S.S. Styria v. Morgan, 186 U.S. 1, 9 (1901).
another case, the Court defined discretion as the power or right conferred upon an officer to act officially under certain circumstances according to the dictates of his own judgment and conscience, uncontrolled by the judgment or conscience of others. Charles D. Breitel, Chief Judge of the New York Court of Appeals, has written:

By discretion, one refers, of course, to the power to consider all circumstances and then determine whether any legal action is to be taken. And if so taken, of what kind and degree, and to what conclusion.

Professor LaFave has defined discretion as “‘an authority conferred by law to act’ one way or another according to one’s ‘own considered judgment and conscience.’” Professor Davis believes that “a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.” The American Bar Association has written that, “[b]y its very nature, the exercise of discretion cannot be reduced to a formula.”

While each of the above characterizations of discretion is not the exact equivalent of the other, they all endow the official with the relatively unencumbered power of free choice among various courses of action. We can base the definition of discretion on this common ground.

Some authors believe that all decisions to charge cannot be called discretionary. Frank W. Miller has posited that there are two basic grounds on which the decision to charge or investigate is based. One is non-discretionary (in a strict sense), and concerns sufficiency of evidence. The other ground is discretionary, and focuses on non-evidentiary factors. For example, the judgment whether a prosecution or investigation would be in the over-

Prosecutorial Discretion is a discretionary decision. The discretionary decisions can be separated into two sub-categories: (1) the power to abstain from prosecution, and (2) the power to prosecute selectively. While these distinctions may prove useful in the theoretical analysis of prosecutorial discretion, in practice prosecutors tend to combine both “discretionary” and “non-discretionary” grounds under the general heading of discretion. Both grounds can and must be considered by prosecutors in deciding whether or not to begin a prosecution.

The principle of *nullum crimen sine lege, nulla poena sine lege,* dominates western legal thought. This principle has been woven into the concept of the Rule of Law. As Glanville Williams has noted, the “law” in Rule of Law “means a body of fixed rules; and it excludes wide discretion even though that discretion be exercised by independent judges.” Thus stated, it has become accepted, at least in Anglo-American law, that a prosecutor cannot prosecute someone by “legal analogy.” The crime for which a person may be prosecuted must be written down in the statutes at the time the alleged criminal activity actually occurs. As a prosecutor cannot legally move against a citizen except in accordance with a valid existing criminal statute, it is only within this vast panoply of statutes that he can exercise his discretion. While the prosecutor’s abuse of his discretion can cause

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16. Cf. id. at 531 (describing “legal” and “extra-legal” factors).
17. “[T]here must be no crime or punishment except in accordance with fixed, predetermined law . . . .” G. WILLIAMS, CRIMINAL LAW 575 (2d ed. 1961).
20. J. HALL, supra note 19, at 36, 49.
21. This statement is not meant to include all possible criminal offenses. Some minor crimes are not codified, and in all cases, the prosecutors, as well as the judges of common law countries are generally confined by the precedents of past cases. See also G. WILLIAMS, supra note 17, at 575.
24. Therefore, the public, as well as the prosecutor, must expect that certain people guilty of “evil” acts will on occasion fall outside the scope of legal sanction. See J. HALL, supra note 19, at 64.
immediate, unfortunate problems, the principle of discretion itself does not run afoul of *nullum crimen sine lege, nulla poena sine lege.*

Dean Pound has written that the criminal law is but one element in the means of controlling society.\(^{25}\) Judge Breitel has commented that the problem of curtailing those who would injure society is an administrative one, and in view of the fact that a key element of administration is discretion,\(^{26}\) discretion must be included in the prosecution of the criminal law.\(^{27}\)

However, laying aside these notions of administration, it is quite obvious that discretion must be exercised, once we view the expanse of our criminal statutes. The ABA Project on Standards for Criminal Justice has commented:\(^{28}\)

The breadth of criminal legislation necessarily means that much conduct which falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act which occurs. Some violations occur in circumstances in which there is no significant impact on the community or on any of its members [citation omitted]. A prosecutor must adopt a first-things-first policy, giving his greatest concern to those areas of criminal activity that pose a threat to the security and order of the community.

Quite plainly, as the layman so often observes, there is a law covering nearly every aspect of human conduct. Very often, in an attempt to limit discretion, or to paint bright lines demarcating criminal conduct, legislators will enact new, more precise laws. Such efforts usually result in less than complete success. As Dean Pound observed:\(^{29}\)

In periods when reliance is put upon strict law, the desire to eliminate discretion leads to attempts to meet the demands of exceptional cases by an elaborate apparatus of exceptions to rules and of qualifications and detailed provisos... As might have been expected, however, such ambitious codes have uni-

\(^{25}\) R. Pound, supra note 1, at 3-5. See also Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543, 544 (1960).

\(^{26}\) See generally K. Davis, Administrative Law §§8, 47, 240 (1958).

\(^{27}\) Breitel, supra note 9, at 428.

\(^{28}\) ABA Project on Standards for Criminal Justice, supra note 12 §3.9.

\(^{29}\) R. Pound, supra note 1, at 40 - 41.
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formly come to nought. No lawmaker has been able to foresee more than the broad outlines of the clash of interests or more than the main lines of the courses of conduct to which the law even of his own time must be applied. Moreover, a legal system which seeks to cover everything by a special provision becomes cumbrous and unworkable.

Obviously the legislature does not pass laws with the expectation that such laws will not be enforced. Yet, as Judge Breitel, viewing the prospect of the total enforcement of the average penal code, has remarked:31

If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing rules and taboos. By comparison, a primitive tribal society would seem free, indeed.

Other writers have made similar observations on the subject of complete or full enforcement.32 Quite clearly then, the goal of total enforcement is neither desirable nor feasible. An enraged public would never countenance such a program. And, without the support of the public, no popularly elected prosecutor would remain in office very long.33

Those who are somewhat critical of prosecutorial discretion do not generally demand full enforcement.34 Instead, they mount strong arguments against the possible abuses inherent in selective prosecution. Given the enormous array of potential offenses, a

30. K. Davis, supra note 11, at 188-190; F. Miller, supra note 13, at 281; Abrams, supra note 4, at 18-19.
31. Breitel, supra note 9, at 427.
32. See T. Arnold, The Symbols of Government 160 (1935); F. Miller, supra note 13, at 153; H. Packer, The Limits of the Criminal Sanction (1968); Arnold, Law Enforcement—An Attempt at Social Dissection, 42 Yale L.J. 1 (1932); LaFave, The Prosecutor's Discretion in the United States, 18 Am. J. Comp. L. 532, 533 (1970). Professor Kadish has observed:

[D]iscretionary judgment is the product of the inevitable need for mediation between generally formulated laws and the human values contained in the varieties of particular circumstances in which the law is technically violated.

34. See generally, K. Davis, supra note 11; F. von Hayek, The Constitution of Liberty (1960); Goldstein, supra note 25.
district attorney can, if he has the time, is so disposed, and is willing to take his chances, prosecute a potential political opponent or personal enemy for some unheard of or rarely prosecuted violation. One commentator has noted.\(^{35}\)

The worst abuses of discretion in enforcement occur in connection with those offenses that are just barely taken seriously, like most consensual sex offenses. Here, especially in the case of fornication and adultery, enforcement is so sporadic as to be just one step short of complete cessation. And it is here that the greatest danger exists of using enforcement discretion in an abusive way: to pay off a score, to provide a basis for extortion, to stigmatize an otherwise deviant or unpopular figure.

Some authorities have expressed similar fears,\(^{36}\) and others have noted that the prosecutor's power to exercise leniency\(^{37}\) is accompanied by his power to prosecute in a discriminatory fashion.\(^{38}\) Those who are more favorably disposed toward the exercise of discretion are equally concerned with its potential abuse. Aside from reforms\(^{39}\) and the safeguards inherent in the judicial process which check prosecutorial discretion—due process of law, the grand jury, defense attorneys, and legal actions in the nature of mandamus—we eventually must rely upon the integrity and honesty of the people either elected or appointed as prosecutors.\(^{40}\)

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36. In situations like prostitution, prohibition, even abortion, there is an ambivalence in public attitudes that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchical diversity. . . .
MODEL PENAL CODE §2.04 (5), Comment (Tent. Draft No. 1, 1953). Dean Pound noted:
From beginning to end of a prosecution we must rely upon the discretion of officials. But in criminal law the dangers involved in discretion are obvious. All discretion is liable to abuse, and the consequences of abuse, affecting the general security on the one side, and life or liberty on the other side, are much more serious than in civil controversies.
R. Pound, supra note 1, at 75. Judge Breitel has observed that discretion, makes easy the arbitrary, the discriminatory, and the oppressive. It produces inequality of treatment. It offers a fertile bed for corruption. It is conducive to the development of a police state—or, at least, a police-minded state.
Breitel, supra note 9, at 429.
37. See, e.g., id. at 430 wherein Judge Breitel wrote:
The discretion here justified is that which may ameliorate or avoid the effective application of the literal criminal rule. . . . It is the discretion that the . . . prosecutor has— not to prosecute, but to not prosecute . . . .
38. K. Davis, supra note 11, at 170.
39. See text accompanying notes 112-121, infra.
40. "There is little that is hard and fast in this area, and the exercise of such authority can only be as perfect as the human beings that exercise it." Mills, The Prosecutor:
Faced with the necessity for prosecutorial discretion, we must scrutinize its accompanying advantages and disadvantages. The elements of discretion that some commentators applaud are the very ones that raise the ire of others. The discretion that allows a district attorney to refrain from prosecution or to prosecute selectively also allows the district attorney to prosecute or investigate in a discriminatory manner. This is a problem which

Charging and “Bargaining,” 1966 U. ILL. L. F. 511, 512. “[W]e are driven, in the end, to the unsatisfying conclusion that the whole matter ultimately turns on impalpable and indefinable elements of judicial spirit or attitude.” Cf. C. ALLEN, LAW IN THE MAKING 503, 529 (6th ed. 1951). But see K. DAVIS, supra note 11, at 190-95, wherein Professor Davis discusses the prosecutorial system in West Germany. See also F. MILLER, supra note 13, at 162 n.28.

If we have to contend with the imperfections of a prosecutor, why should we not permit a private citizen to prosecute a wrong committed against him if the public prosecutor declines to? See Comment, Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction, 65 YALE L. J. 210 (1955). This position has some historical basis. Under old English law, a private person could prosecute his own case. However, in the United States, the people have decided “that a criminal act is committed upon society as a whole and that society is the proper vindicator,” Lezak, The Prosecutor’s Discretion —The Decision to Charge, in THE PROSECUTOR’S DESKBOOK 25 (P. Healy & J. Manak eds. 1971). As the representative of the people in criminal prosecutions, the public prosecutor, in the long run, less likely to be motivated by desires for revenge or personal gain than a number of private prosecutors. Thus, reliance on a public prosecutor makes for a more consistent standard of justice.

41. The following authorities have offered these comments about the necessity for prosecutorial discretion:

The need for discretion arises in part because of the difficulty of encompassing within necessarily general rules the myriad circumstances that may be deemed relevant to a pending decision.

Abrams, supra note 4, at 3.

Discretion too must play its role very early—at the inception of a criminal matter. Criminal proceedings, by their very nature, are summary and often effected in immediate pursuit of the wrong and the wrongdoer.

Breitel, supra note 9, at 431.

[There is] a need to individualize justice. . . . Individualized treatment of offenders, based upon the circumstances of the particular case, has long been recognized in sentencing, and it is argued that such individualized treatment is equally appropriate at the charging stage so as to relieve deserving defendants of even the stigma of prosecution.

LaFave, supra note 10, at 534.

Every case must be treated individually because every case contains complicating factors, or elements of either mitigation or aggravation that require the exercise of prosecutorial discretion.


42. Orvill C. Snyder has posed the question, “How is [the] selection to be made?” He answers it on the basis of the “principle called economy of punishment.” Snyder, supra note 33, at 173.

43. K. DAVIS, supra note 11, at 170.
will be faced as long as we desire to dull the sharp edge of the law. Some legal remedies are available to cope with the excessive abuses of prosecutorial discretion. However, if we wish to enjoy the tangible benefits of discretion and to minimize its abuses, then resorting to controls on its exercise, rather than dependence on remedies, will afford the best results.

Prosecutorial discretion rests on a legal basis that is less controverted than its philosophical basis. Courts all over the country have given their imprimatur to the discretion employed by public prosecutors. Many courts have held that a district attorney is a quasi-judicial officer, and as such, is vested with broad discretion in handling all criminal matters in his county. Because of this broad brush of discretion, courts have further held that a decision by the prosecutor either to prosecute or to desist therefrom is essentially unreviewable.

It is this last position, rather than the claim that the decision to prosecute rests solely with the district attorney, that has brought the critics of prosecutorial discretion to their feet. Professor Davis has carefully articulated the flaws in the bench's arguments for the unreviewability of a prosecutor's decisions. He claims that the judicial position runs contrary to "more than a hundred Supreme Court decisions spread over a century and three-quarters." The Supreme Court has held that both the laws


45. The cases passing upon this question seem to be agreed upon the proposition that a duty rests upon a district or prosecuting attorney to prosecute the violators of the criminal laws of the state whom he knows or has reason to be guilty of such violations [citations omitted] but that duty is not absolute, but qualified, requiring of him only the exercise of a sound discretion, which permits him to refrain from prosecuting, or having commenced a prosecution, to enter a nolle prosequi, whenever he, in good faith and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof. Annot., 155 A.L.R. 10 (1945). Accord, State ex rel. Ronan v. Stevens, 93 Ariz. 375, 381 P.2d 100 (1963). See also Tinder v. Music Operating, Inc., 237 Ind. 33, 142 N.E.2d 610 (1957).

46. See, e.g., Ganger v. Peyton, 379 F.2d 709, 714 (4th Cir. 1967); Griffin v. United States, 295 F. 437, 439, 440 (3rd. Cir. 1924).


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passed by the legislative branch and many of the acts of the executive branch are susceptible of judicial review. Yet, in the field of prosecutorial discretion, the lower courts paradoxically hold that, as the prosecutor is a member of the executive department, it would violate the separation of powers to review his or her decisions.

Even the staunchest defenders of the free exercise of prosecutorial discretion would have to grudgingly acknowledge the truth of Professor LaFave's remark that "[a]s for judicial review, it is probably true that courts have exercised undue restraint in responding to the challenges of prosecutorial discretion." The courts should exercise more initiative in reviewing a district attorney's exercise of discretion. At the least, they should be willing to entertain such reviews. The instances when a court would disagree with a prosecutor's decision would no doubt be few, and it can hardly be seriously argued that an occasional judicial glimpse into the world of prosecutorial discretion would strip prosecutors of their independence and power. Nothing approximates the invigorating effects of a breath of fresh air or ray of sunlight into a closed room or office. Occasional judicial reprimand may have a tonic effect on the exercise of discretion far out of proportion to the actual number of cases litigated. The precedents for review of executive decisions exist—all that is presently blocking a modicum of judicial review of prosecutorial discretion is the inertia of the bench.

The New York statutes defining the powers of the district

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50. The District Attorney's Office is not a branch of the court, subject to the court's supervision. It is a part of the executive department, separate and apart from the judicial department. The District Attorney, and he alone, must determine the policies of that office. On the District Attorney rests the responsibility to determine whether to prosecute, when to prosecute and on what charges to prosecute.


Construing the U.S. Const. art. II, §§ 1, 3, one court stated:

It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.


51. LaFave, supra note 10, at 559.
52. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902), cited in K. Davis, supra note 11, at 211 n.27.
attorney resemble those of her sister states and the federal government. The principal New York statute, County Law §700, reads:

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

New York courts have been in the foreground, based on this statute, in giving nearly total license to prosecutorial discretion. In 1959, one New York court, faced with a challenge to the exercise of discretion, held:

Just because a crime has been committed, it does not follow that there must necessarily be a prosecution for it lies with the District Attorney to determine whether acts which may fall within the literal letter of the law should as a matter of public policy not be prosecuted.

In a similar vein, the lower New York courts have mirrored the reluctance of other courts to review the exercise of prosecutorial discretion. They have held that the district attorney is a quasi-judicial officer who therefore has wide discretion in the manner in which his duty shall be performed, and unless he is acting or about to act in excess of his jurisdiction, his discretion cannot be interfered with by the courts.

53. See, e.g., CAL. GOV. CODE §26500 (West 1968) ("The district attorney is the public prosecutor. He shall attend the courts, and conduct on behalf of the people all prosecutions for public offenses"); CAL. GOV. CODE §26501 (West 1968) ("The district attorneys shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed."); ILL. ANN. STAT. ch. 14, §5 (Smith-Hurd Supp. 1974) (The state’s attorney "shall . . . commence and prosecute all actions, suits, indictments, and prosecutions, civil and criminal, in the circuit court for his county."); WIS. STAT. ANN. §69.47 (1957) ("The district attorney shall: (1) prosecute or defend all actions, applications or motions, civil or criminal.").
55. N.Y. COUNTY LAW §700 (McKinney 1972).
56. Hassan v. Magistrates’ Court, 20 Misc. 2d 509, 514, 191 N.Y.S. 2d 238, 243 (Sup. Ct. Queens County 1959), cert. denied, 364 U.S. 844 (1960). At this juncture, it might be helpful to note that the average citizen who reads the statutes empowering the district attorney might believe that the statutes command him to prosecute all criminal violations, thus leaving no legal room for discretion. As we have seen, however, the courts have read discretion into the statutes. See Baker, supra note 33, at 770, 771; Comment, supra note 11 at 489; Comment, supra note 15, at 521.
57. Application of Coleman, 1 Misc. 2d 685, 148 N.Y.S. 2d 753 (Sup. Ct. Chenango 1956); accord, People v. Mazza, 43 Misc. 2d 627, 251 N.Y.S. 2d 715 (Oneida County Ct.
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One New York court has hedged this broad leave to act by conditioning its approval of the district attorney's wide discretion to cases where there is an actual and reasonable exercise of discretion within the bounds of the office's jurisdiction.58 The courts have never quite shed light on or defined what an actual and reasonable exercise of discretion is, but an ambitious court could set standards. Obviously, an act of discretion which baldly violates the equal protection clause, or is blatantly discriminatory, is unreasonable.59 In the absence of judicially established standards, however, no one can predict with certainty what other conduct constitutes an unreasonable exercise of prosecutorial discretion.

III. THE NEW YORK COMPLAINT BUREAU: AN OVERVIEW

In order to better understand the exercise of discretion employed by the New York Complaint Bureau, it will be helpful to describe its jurisdiction, operations, and resources.

A. The Scope of the Complaint Bureau's Jurisdiction

The New York County District Attorney's Office is limited, by law,60 to conducting all prosecutions for crimes and offenses committed in New York County. In practical terms, the office does not engage in the prosecution of civil suits—prosecution of criminal activity is its single objective. The Complaint Bureau's jurisdiction is, technically, demarcated by §700 of the County Law,61 but in practice it is generally limited to all forms of larceny and some types of assault. There are many difficult problems with regard to jurisdiction,62 especially concerning bad check and larceny with withholding cases.63 Naturally, the Bureau is also

60. N.Y. COUNTY LAW §700 (McKinney 1972).
61. The text of §700 appears in the text accompanying note 55 supra.
62. The Complaint Bureau usually views the site of the transfer of possession or title of the property in question as the key element in establishing jurisdiction. Difficulties arise in cases where contractual obligations accrued in the Bureau's jurisdiction, yet the transfer of the property occurred in another county.
63. For discussion of these crimes see notes 90-97 and accompanying text infra.
limited in its prosecutions by the different statutes of limitation applicable to felonies and to misdemeanors. Unlike civil law, where the statute may begin to run upon discovery of the harm or injury, the statute in criminal cases begins to run immediately upon commission of a crime.

The office has concurrent jurisdiction with a number of other law enforcement agencies. Various forms of larceny or fraud perpetrated upon consumers in New York County can be investigated by both the New York State Attorney General's Office and the New York County District Attorney's Office. Certain kinds of larceny involving fraudulent stock schemes can be investigated by both the Securities and Exchange Commission and the District Attorney's Office (of course, the D.A.'s Office pursues violations of state law while the S.E.C. pursues those of federal law).

The greatest area of concurrent jurisdiction is shared with the police department. Many forms of criminal activity can be investigated by both agencies. Upon being apprised of a possible larceny or robbery, the Complaint Bureau determines the complexity of the prospective investigation. If it is determined that a simple robbery has occurred, the A.D.A. will tell the complainant to file a formal complaint with the police precinct which has jurisdiction over the area in which the criminal activity occurred. However, if the A.D.A. discerns a larceny, he will generally exercise his discretion to keep the complaint with the Bureau, and will then begin his own investigation. Basically, if the A.D.A. believes the case is relatively straightforward, then the investigation may be turned over to the police as the appropriate agency. If the case looks relatively complicated, and an arrest is not imminently foreseeable, the Bureau will retain jurisdiction.65

By deciding which agency will begin the investigation, the Complaint Bureau exercises one form of prosecutorial discretion every day. With regard to the "simple" robbery, not only does the Bureau believe that the police have all the necessary resources and expertise for investigation and arrest, but it also believes it

64. This is a police form known as a UF-61.
Many of them come because they are referred to the state's attorney's office by the police themselves on the theory that financial and legal investigations are not criminal investigations within the proper scope of police activity. Others are brought because the complainants themselves recognize that the case requires a different kind of inquiry than the police are qualified to give.
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unwise to expend staff and resources in such a manner. The Bureau finds itself so short of personnel, that it could not function at all if it retained jurisdiction over every simple crime that comes to its attention. The Bureau makes an attempt to marshal its forces and to allocate them in a manner that reaps the greatest number of successful investigations and prosecutions.\(^6\) ("Successful" does not necessarily mean conviction— it can be any other settlement that is acceptable to both the Bureau and the complainant). This is what is known as selective enforcement. The Bureau finds itself forced to implement such a policy because of the staggering number of crimes and its limited resources.\(^7\) It can implement such a policy only because of prosecutorial discretion.

B. The Day-to-Day Operation of the Bureau

The Complaint Bureau in New York County is the bureau that citizens contact when they wish to speak to the District Attorney. The citizens may wish to complain about sloppy garbage removal, a wave of burglaries sweeping a neighborhood, city road gangs making potholes and filling them in in order to waste time, the witnessing of a brutal rape, the District Attorney's political aspirations, or fears of undue influence over a relative in the making of a will. The large majority of these complaints, comments, and inquiries are made by telephone.\(^6\) Some of those who call are chronic callers—those people who, for example, claim that a band of homosexual drug addicts live in the apartment above theirs, and are using X-rays to paralyze them. Others openly state that they are seeking civil legal advice—something the A.D.A.'s are prohibited from dispensing. Others allege criminal activity in other jurisdictions, and still others allege criminal activity in New York County. The A.D.A.'s, employing their discretion, advise only the last group of these callers to visit the District Attorney's Office and to speak with an A.D.A. about their problem. No complaints are investigated until the complainant speaks in person to an A.D.A..\(^6\) The other callers—even the chronics—are handled with rare diplomacy and goodnatured-

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6. Successful investigations and prosecutions often have a salutary effect on the level of compliance with the law. One New York court has held that the deterrent effect of a prosecution is a valid standard for the exercise of discretion. See People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 21, 225 N.Y.S. 2d 128, 136 (4th Dep't 1962).


68. Baker, supra note 33, at 776, 782; Baker and DeLong, supra note 65, at 16.

For example, despite the press of complaints, those callers who are informed that their complaints are civil in nature are also told that, if they so wish, they may come to the District Attorney’s Office and discuss the matter in person with an A.D.A. The Bureau also receives many telephone calls from police officers on subjects ranging from questions of law to authorizations for arrest. The A.D.A.’s try to assist the officers, but will generally not authorize any arrests over the telephone. The Bureau receives anywhere between seventy-five and one hundred seventy-five telephone calls of all kinds each day.

The Bureau also does mail duty for the entire Office. The amount of mail can range between fifteen and fifty pieces each week. Except in those instances where no return address can be found, each letter receives a written response from the A.D.A. assigned to mail duty. If, in the opinion of the A.D.A. answering the mail, an allegation of criminal conduct within the Bureau’s jurisdiction has been made, the complainant will be advised to call the Bureau in order to discuss the matter further.

Additionally, the Bureau interviews complainants who walk in off the street. The number of complainants varies between twelve and twenty-five each day. Each complainant is interviewed by an A.D.A. in his office. The A.D.A. makes the initial determination whether a criminal violation has transpired and if so, if it occurred within the Office’s jurisdiction. He will then assess the tangible proof, and witnesses, if any, and decide whether to investigate further. If the A.D.A. decides not to, the complainant can write to the Bureau Chief asking for a review of the decision. Usually the complaint is civil in nature and the complainant is given the name and telephone number of the agency from which he should seek redress.

The A.D.A. fills out a complaint card for every complainant interviewed. The information on it includes the date, the complainant’s name and address, the potential defendant’s name and address, the witnesses (if any), the type of case—civil or criminal—the facts of the case, the disposition—investigation opened or declined—any referrals made, and the A.D.A.’s name. The card is cross-listed by complainant and defendant in a central filing room. Thus, there is an official record of every complaint made to the Bureau.

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70. Cf. id. at 17.
71. For an in depth explanation of the factors the A.D.A.’s use in deciding whether or not to investigate any further, see section IV infra.
The Bureau also fulfills a very important public relations function. It provides a sympathetic official "ear" for the aggrieved citizen. Even when a citizen is told his complaint is civil, and that the office can do nothing for him, he often derives some satisfaction by having told his or her complaint to a receptive public official. The complainant also derives satisfaction from seeing a complaint card with the details of his problem filled out and officially filed. This is a relatively little noticed aspect of the Bureau, but one which apparently helps build community support.

C. The Resources of the Complaint Bureau

If the decision is made to begin an investigation, the Bureau has a number of resources at its disposal. Since the function of the Bureau is primarily investigatory, rather than formally accusatory, the resources are primarily geared for investigation. The Bureau can call on the New York City Police Department Detectives assigned to the District Attorney’s Detective Squad for undercover work, observation, and arrest. Or the Bureau can in addition call on the services of the squad of Investigators who also do undercover work. The Bureau has the indirect weapon of a subpoena issued by the grand jury. Often, the mere mention of the grand jury is coercive enough to provide the Bureau with the information it requires for its investigation.

The Bureau also has the power of the pen. If the discretionary decision to begin an investigation is made, the Bureau does not wish to proceed in an ex parte manner. The A.D.A. in charge of the case will mail a #15 or complaint letter to the prospective defendant, advising him that a complaint has been made against him with the office, and that he should contact the undersigned at his earliest possible convenience. This usually suffices—often, the prospective defendant calls the office within hours or minutes of receiving the letter. Sometimes, a second letter will be mailed, and at other times a telephone call will have to be made. In the

73. F. Miller, supra note 13, at 270 n. 26.
74. The Bureau does have a formally accusatory role in that it can order the arrest of a defendant.
76. See F. Miller, supra note 13, at 272.
77. Compare the procedure in New York County with the ones described in Brezner, How the Prosecuting Attorney’s Office Processes Complaints, 27 Dev. Law. 3 (1959); and Comment, supra note 13, at 524 n. 21.
78. The letter is called a #15 because that is the number of the paragraph on the list of stock paragraphs and replies.
rare circumstance of outright defiance, a complete re-evaluation of the case is made, and after conferring with the Bureau Chief and other A.D.A.'s, a decision is made whether to pass the evidence to the Indictment Bureau for submission to the grand jury, or to order the detectives to arrest the defendant immediately. If the decision is made to arrest, the detectives will generally allow the defendant to come along of his own accord. If not, the detectives will effect the arrest. Thus, the power of the pen is backed by the power of the law.

IV. THE STANDARDS USED IN DETERMINING WHETHER OR NOT AN A.D.A. WILL BEGIN AN INVESTIGATION

Many commentators have drawn lists of factors that figure in a prosecutor's decision to charge a suspect with a crime. Nearly all of these reasons can be applied to the Complaint Bureau's decision to begin an investigation. Professor LaFave has noted three general considerations and five slightly particularized situations where the prosecutor has decided not to charge (or investigate): 79

1. Because of legislative overcriminalization.
2. Because of limitations in available enforcement resources.
3. Because of a need to individualize justice.
   A. When the victim has expressed a desire not to prosecute.
   B. When the costs of prosecution would be excessive, considering the nature of the violation.
   C. When the mere fact of prosecution would, in the Prosecutor's judgment, cause undue harm to the offender.
   D. When the offender, if not prosecuted, will likely aid in achieving other enforcement goals.
   E. When the harm done by the offender can be corrected without prosecution. 80

The American Bar Association Project on Standards for Criminal Justice has compiled a more specific, rather comprehen-

79. LaFave, supra note 10, at 533-35.
80. In regard to situation "A", this occurs even in an office that does not take complaints (as a normal matter) from the police. In one case, a man came to the Bureau complaining that his erstwhile girlfriend had burglarized his apartment. While a relatively strong case could have been made against her, the complainant stated that he did not want her put in jail—he only sought the return of his appliances and clothing. A # 15 letter was sent to the prospective defendant. The complainant never returned, and the matter was dropped. It can be assumed that the letter achieved its desired effect.
sive list of factors to be considered by the prosecutor in exercising his discretion:

a. The prosecutor should first determine whether there is evidence which would support a conviction.
b. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:
   (i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
   (ii) the extent of the harm caused by the offense;
   (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
   (iv) possible improper motives of the complainant;
   (v) prolonged non-enforcement of a statute, with community acquiescence;
   (vi) reluctance of the victim to testify;
   (vii) cooperation of the accused in the apprehension or conviction of others;
   (viii) availability and likelihood of prosecution by another jurisdiction.

These standards are helpful, but only to a certain extent, in understanding the reasons for a decision not to investigate. The New York County Complaint Bureau has its own informal standards for the exercise of discretion which are more adapted to its investigatory role. The factors considered by it when exercising discretion are:

1. Has a crime been committed? Has there been an actual violation of the penal law—has a statute been contravened? If not, there need be no further investigation by the Bureau. The A.D.A.’s are advised to refer to the statutes themselves in each case. The complainant will be advised by the A.D.A. of the true, legal nature of his complaint and his available remedies. If the complaint is civil, the complainant does not receive civil advice—merely the advice to consult with a private attorney or Legal Aid if he cannot afford to retain private counsel.

2. Has the crime complained of been committed within the Bureau’s jurisdiction? This is a most important consideration.

81. ABA Project on Standards for Criminal Justice, supra note 12, at §3.9.
because many people, in and out of New York City, believe that the New York County District Attorney's Office is the appropriate office for all of New York City\(^2\)—not just Manhattan. The Bureau's jurisdiction is restricted to the island of Manhattan and a miniscule area of Bronx County. Rather than have the complainant waste his and the A.D.A.'s time, this question is generally the second to be asked. The A.D.A.'s refrain from commenting upon the validity of the complaint or its eventual outcome in order not to undermine the position of the A.D.A. in the appropriate jurisdiction.

3. \textit{If a crime has been committed, does the prosecution have to prove a specific criminal intent on the part of the defendant?} If so, does the A.D.A. believe that he can discover sufficient evidence to prove in court that the defendant had the requisite mens rea? If he does not believe he can meet the burden of proof, he can exercise his discretion not to investigate. This sometimes occurs in certain types of larceny cases.\(^3\)

4. \textit{Does the A.D.A. believe that the person accused by the complainant is actually the offending party?} Very often, a complainant enters the Bureau with assorted allegations of wrongdoing against a dozen people, only one of whom may be remotely connected with his or her grievance. The A.D.A. will not employ indiscriminate dragnet tactics to locate a totally unknown suspect. This does not mean that the A.D.A. will investigate only if the complainant presents him with a list of names and addresses—it means that there must be some clue or bit of information that will lead the A.D.A. in the right direction.

5. \textit{Is the act complained of one which office policy requires not be prosecuted?} Not infrequently, cases concerning violation of disorderly conduct, loitering, public intoxication, vending without a license statutes, and others of a like nature, are being appealed by defendants. During the pendency of the appeal, Office policy often demands that the Bureaus not begin any investigations or prosecutions of conduct violative of the appealed statute until the matter is decisively adjudicated. This policy protects those citizens who might be prosecuted and convicted of violations of unconstitutional laws.

6. \textit{Does the complainant have the evidence needed to substantiate his charges?} Will an investigation have any chance of

\(^2\) New York City is comprised of five counties: New York, Kings, Richmond, Queens and the Bronx.

\(^3\) See notes 90-97 and accompanying text, infra.
uncovering important evidence? Frequently, in cases of larceny by trick and device,⁴ the victim will have nothing whatsoever tying the suspect to the offense. In other cases, complainants often tear up important papers and memoranda in disgust, and only later come to the Bureau seeking assistance. Or, they never ask for signatures or documents relating to the transaction—the result of which is that their trusted associate has absconded with their property and they cannot prove he or she has no legal right to it.

7. Are there any witnesses to the act complained of? This is a classic proof problem and needs little amplification.

8. Will the defendant be able to maintain a valid defense which is inherent in the fact pattern?⁸⁵ This does not happen frequently, but may occur in investment swindles, where one party allows another to “play the market” without any restrictions on investment policy. When this factor is present, the complainant usually does not have spotlessly clean hands, and the A.D.A. may then decide not to investigate the matter. It also occurs in business partnerships, where one partner skims off money and assets improperly, but can wrap himself in the cloak of legality because of his position as a partner.

9. Has the statute of limitations run? Unfortunately, some complainants wait far too long after being the victim of a larceny or fraud to come to the Bureau.

10. Will the grand jury indict the defendant? This is the basic, core standard the Bureau uses in deciding to begin an investigation.⁸⁶ The Bureau does not have the personnel or resources to investigate all the cases brought to its attention. In order to make a positive decision on investigation, the case must inspire in the A.D.A. a belief that the investigation will uncover evidence that will warrant a grand jury indictment.⁷ This is the reason why the Bureau usually insists on more than a minimum probable cause standard to begin an investigation. The A.D.A.’s

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⁴ Larceny by trick and device is the typical con game, e.g. the handkerchief switch.  
⁵ See Klein, District Attorney’s Discretion Not to Prosecute, 32 L.A.B. BULL. 323, 331 (1957).  
⁶ F. Miller, supra note 13, at 343.  
⁷ As David Worgan, of the New York County District Attorney’s Office, stated: We have to review the complainant’s story and make a determination whether the evidence will stand a test in court . . . We do not want to harass citizens by bringing criminal charges that are not susceptible of proof. Worgan and Paulsen, The Position of a Prosecutor in a Criminal Case—A Conversation With a Prosecuting Attorney, 7 PRAC. LAW. 44, 51 (Nov. 1961).
are well aware of the implications of what Mr. Robert Jackson said of prosecutors:88

He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed.

The Bureau, in exercising its discretion by insisting on high standards of evidence and proof, has helped many innocent citizens avoid the fright and trouble of a visit to the District Attorney's office. Even though the Bureau's function is investigatory, many people believe that complaint letters are the equivalent of subpoenas, court orders, or arrest warrants. No A.D.A. wishes to abuse the power and authority that the people have vested in him—the standards employed by the Bureau help to guard against most instances of even well-intentioned overreaching.89

89. Other offices have developed their own criteria for deciding whether or not to charge (as opposed to investigate) a suspect. The Los Angeles District Attorney's Office has compiled this list:
   I. Departmental Policy
   II. No Corpus Delecti
      A. No specific intent
      B. No Criminal Act
   III. No Connecting Evidence
      A. Statement problem
      B. Witness problem
      C. Physical evidence problem
   IV. 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 poisoned tree
         3. Search warrant problems
         4. Search and seizure
         5. Warrant of arrest
         6. Miranda plus
   V. Lack of Jurisdiction
   VI. Statute of Limitation
   VII. Offense-Misdemeanor
      A. Filed
      B. Referred
   VIII. Interest of Justice
V. The Bureau’s Discretion in General Practice: Larceny and Bad Check Cases

Nearly 90% of the complaints investigated by the Bureau involve some form of larceny. Larceny may be committed by false pretence, false promise, embezzlement, withholding, or trick and device. The first two types pose the greatest difficulty for the A.D.A. because of the specific mens rea required of the defendant.

When a complainant comes to the office alleging a type of larceny, the A.D.A. must first determine if a larceny has actually occurred. Unlike the victim of a robbery, the victim of a larceny willingly hands over money or property because of something the defendant says, does, or represents. The A.D.A. must also determine if the defendant has stolen property—and in this context, property is tangible, something of value. If the A.D.A. believes that a larceny has occurred, he must determine if title and possession passed with the transfer of the property, or if mere possession passed. If both have passed, the complainant has been a victim of larceny by false pretence or false promise.

Next, the A.D.A. must determine which of the two larcenies has been committed. Larceny by false pretence is easier to prove in court than the false promise variety. The prosecutor, before beginning an investigation, must be satisfied that he will be able to persuade the grand jury to return an indictment. In order to accomplish this in the case of a larceny by false pretence, the prosecutor has to show a willful misrepresentation of a presently existing or past fact. This representation: (a) cannot be accidental—it must be willful; (b) must have been false and known to have been so; (c) must have been material to the whole scheme, and; (d) must have been relied upon by the injured party. If the A.D.A. believes he cannot prove any of these elements with positive evidence, he can exercise his discretion not to proceed with the investigation. The complainant will then be advised to proceed with his other remedies.

Comment, supra note 15, at 54. See also Baker, supra note 33, at 770-71; Klein, District Attorney’s Discretion Not to Prosecute, 32 L.A.B. Bull. 233, 325 (1957); Lezak, supra note 40, at 23; Mills, supra note 40, at 511-16; Snyder, supra note 33, at 173.

90. See generally Baker and DeLong, supra note 65, at 16.

91. In larceny by false pretence or false promise, title as well as possession passes. Only possession of the property passes in larceny by trick and device, embezzlement and withholding. See note 84, supra. Embezzlement differs from withholding in that the person converts the property to his own use, unknown to the party who has title, whereas in the latter larceny the “target” refuses to return the property after demand is made by the rightful owner.
In order to prove a larceny by false promise, the A.D.A. must show that the basis of the transfer in question was a promise, and that at the time of the promise, there was no intent on the part of the suspect to perform the promise. The complaint becomes a civil case if, at any time during the period of the contract, the suspect decides not to complete his scheme. Obviously, the prosecutor faces a very heavy burden. The prosecutor rarely can discover evidence to substantiate his belief that a larceny by false promise has occurred. The A.D.A. will seldom proceed with an investigation unless: (a) the defendant has made discoverable admissions at some subsequent time to third parties, i.e., friends, co-conspirators, etc.; (b) there have been repetitious promises coupled with repetitious failure, i.e., the common scheme or plan, or; (c) the suspect's subsequent acts or conduct is totally inconsistent with any desire to perform his part of the bargain. Once again, if the A.D.A. believes that the investigation will not uncover any evidence sufficient to prove larceny by false promise, he will advise the complainant that his remedies lie elsewhere. Quite simply, there would be little purpose in investigating a complaint that is not susceptible of proof.

The Bureau finds itself inundated, as do other bureaus across the country, with bad check complaints. In New York, there are basically two bad check statutes. One is larceny by bad check, and the other is the crime of uttering a bad check. In order to proceed with an investigation into a larceny by bad check case, the A.D.A. must be certain that: (a) the check was uttered at the time when there were insufficient funds in the account; (b) the defendant had the required mens rea—that he knew and believed the check would not be honored, and; (c) the check was in fact dishonored. Once the A.D.A. has assured himself of these facts, he must determine if there was a simultaneous transaction: did both parties exchange some item of consideration (i.e., a check for merchandise) at the same time? If there was no simultaneous transaction, no larceny by bad check occurred. While C.O.D. (either check or cash) payments qualify as simultaneous, any post-dated checks or agreements to hold checks immediately destroy the simultaneity requirement. If this be the case, the A.D.A. can exercise his discretion not to proceed with an investigation.

The Bureau believes that a grand jury would not indict a person

92. N.Y. PENAL LAW §155.05 2(C) (McKinney 1967).
93. Id. § 190.05.
suspected of larceny by bad check if any one of the elements cannot be proved. Contrary to popular opinion, respect for the grand jury's independent analysis of the facts and judgment influences the Bureau's decision on whether or not to begin an investigation. Even if larceny by bad check cannot be proven, the defendant can still be prosecuted for uttering a bad check.

In cases of larceny by bad check, the Bureau attempts to make certain that the complainant will not drop out of the investigation if he receives restitution. In addition, the A.D.A. informs the complainant that the goal of the Bureau is successful prosecution, and not restitution. In any event, restitution is not a defense to larceny. Many complainants understand this, and because of their reluctance to proceed with criminal remedies, usually decide to proceed civilly for the amounts owed them.

Nevertheless, some complainants insist that they will follow through with the prosecution. But even most of these parties decide not to continue the investigation once they receive restitution. The Bureau could legally continue its investigation, but it would be a hollow effort since the original complainant no longer desires to proceed. In these cases, the Bureau discontinues the investigation, and no formal charges are lodged against the potential defendant. As might be expected, the Bureau does its best to weed out those complainants whom it feels will drop out of the investigation.

In some bad check cases where a form of larceny could be charged (as where the account is closed on the same day the check is issued), and the A.D.A. determines that the potential defendant is not a "bad person," the A.D.A. may attempt to use his offices to settle the dispute amicably. Since the investigation can very often lead to either arrest or indictment, the A.D.A. has not violated office policy by deciding to terminate the investigation once restitution has been made. It must be emphasized that this procedure is used infrequently, and then only when a larceny has probably occurred. As mentioned earlier, except in rare instances, the office does not seek restitution in simple bad check.

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94. The author received extensive information on the subject of larceny from Mr. R. Bryant Lowe III of the New York District Attorney's Office.

95. Note that a party can be "bad" if he or she refuses to answer complaint letters, is abusive, or has a series of similar serious charges lodged against him or her by several different complainants. If such factors are present, a vendetta is not launched against the party. There will be a tighter scrutiny of the facts in the instant case.

96. F. Miller, supra note 13, at 271. "Amicably" can be interpreted as any manner that is acceptable to the Bureau, the complainant, and the defendant (at times).
cases. Thus viewed, the A.D.A. exercises his prosecutorial discretion in a restricted manner, and then usually with the complainant’s approval.\(^7\)

Many other cases come to the Complaint Bureau, all of which can be termed “civil.”\(^8\) These cases involve such disparate matters as contractual disputes over rentals of equipment or summer cottages, questions about wills, family squabbles over “loans” (often used to mask the parents’ desire to bring home their wandering child), divorce settlements, and most housing disputes and problems. With the last of these, only where an outright larceny can be proved on the part of the landlord will the Complaint Bureau intercede. Generally, the New York City Housing and Development Administration will handle problems arising in this area.

The Bureau maintains a policy of deferring investigation and prosecution if the complainant is already engaged in civil litigation. The rationale for this policy is that if the complainant cannot meet the burden of proof in a civil case, he will surely be unable to meet the higher burden required in a criminal action. Furthermore, the complainant may be awarded all that he desires in the civil suit, so that the complainant may decline to pursue the criminal investigation to its conclusion. This policy is an exercise of discretion aimed at conserving prosecutorial resources and avoiding needless duplication of legal actions.

In common with all prosecutors’ offices, the Complaint Bureau finds itself besieged with requests to become a “collection agency” for people who are the recipients of bad checks.\(^9\) After the A.D.A. determines that the potential defendant cannot be successfully prosecuted for a form of larceny, the only remaining charge is that of uttering a bad check.\(^10\) A special procedure for handling “bad check” cases has been developed in New York County. A complainant with a bad check is referred to Criminal

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\(^7\) The term “discretion” is being used as defined in the text immediately following note 12.

\(^8\) “Civil” complaints are those which are either entirely civil in nature (such as an ordinary contractual dispute) or those complaints that, for some reason, cannot be prosecuted criminally.

\(^9\) F. MILLER, supra note 13, at 271. See Baker, supra note 33, at 776; Baker and DeLong, supra note 65, at 18; Brezner, How the Prosecuting Attorney’s Office Processes Complaints, 27 Det. Law. 3 (1959); Comment, supra note 13; Note, 103 U. Pa. L. Rev. 1057, 1069 (1955).

\(^10\) The bad check charge is applicable when the check is returned for insufficient funds. If the check is returned marked account closed, or that no such account was ever opened, stronger charges will, of course, be proffered.
Prosecutorial Discretion

Court, Part 7, locally known as "346 Broadway." In this court, the complainant usually proceeds pro se. He obtains a summons which he must personally serve on the defendant. From that point on, the matter is handled solely by the Criminal Court. Thus, as a result of "346 Broadway", unlike other prosecutors' offices, the Complaint Bureau does not let itself become a collection agency. In fact, Office policy requires that the A.D.A.'s not use their power to coerce payment.

"346 Broadway" has eliminated another major problem that the average prosecutor's office must contend with—minor assaults (including some assaults between family members where resort has already been had to Family Court). The Complaint Bureau sends all cases of misdemeanor assault to the Criminal Court. The court has jurisdiction over misdemeanors only—it is a form of small claims criminal court. The Bureau sometimes retains jurisdiction over aggravated harassment cases where, in its judgment, an extensive investigation is warranted. All cases of non-support and some family quarrels are transferred to Family Court—another legal agency that saves the Complaint Bureau personnel and resources. With most bad check cases, simple assaults, and non-support claims handled by "346 Broadway" or Family Court, the Complaint Bureau finds itself free to examine the voluminous number of larceny complaints brought to its attention.

A. The Bureau's Discretion: Actual Cases

The Bureau retains jurisdiction over some aggravated harassment cases when it believes that an in-depth investigation is required or when the complainant has been unable to obtain satisfactory results from a "346 Broadway" pro se action. One such case that came to the Bureau's attention had transpired, off and on, for ten years. The complainant, a divorced mother of two children, had been harassed by a male approximately ten years

101. The court is known as "346 Broadway" because it is located at that address.
102. Infrequently, when the victim is aged or incapable of speaking English, the A.D.A. may write the potential defendant a #15 letter and attempt to secure repayment before having the complainant go to Criminal Court. This technically violates office policy, and is not approved of, but some A.D.A.'s find it extremely difficult to turn away some old people who would otherwise be unable to secure restitution.
103. F. MILLER, supra note 13, at 266. See also Brezner, How the Prosecuting Attorney's Office Processes Complaints, 27 Det. Law. 3 (1959).
104. N.Y. PENAL LAW §240.30 (McKinney 1967).
105. See notes 99 to 102 and accompanying text, supra.
older than she. Because he had never threatened to kill or to physically harm her, the police had expressed little interest in pursuing the matter. A trip to 346 Broadway seven years earlier had produced a temporary hiatus in the constant stream of mail, phone calls at all hours, and visits to the complainant’s home and office. Recently, he had resumed his old habits with new vigor. The complainant was at her wit’s end when she came to the office. The A.D.A. assigned to the case examined the evidence she brought—various items of correspondence from the defendant—and decided that the complaint was not manufactured. (Occasionally in such cases, the complainant has had a romantic involvement with the prospective defendant, and after a falling out, desires to hurt the defendant by means of an unfounded prosecution.) The Bureau Chief evaluated the evidence and agreed that the complaint was valid. Contrary to normal procedure, it was decided not to send a complaint letter to the defendant or his relatives for fear of what he might do to the complainant. Technically, the Bureau had sufficient evidence to warrant an arrest, but it wished to gather more positive evidence so that there would be little doubt that the charge could be proved in court. The Bureau decided not to have the defendant immediately arrested for one other reason: it did not want to harass the defendant with a prosecution that would ultimately end in dismissal. In order to implement its plans, electronics experts attached a tape recorder to the complainant, and she was sent out, accompanied by two plainclothes detectives, to meet with the defendant. An arrest was effected, but only after the defendant had attacked the detectives.

Upon listening to the tape recording, the A.D.A. discovered damaging admissions by the defendant concerning his decade long pattern of harassment. The defendant was arraigned on three counts—resisting arrest, assault on a police officer, and aggravated harassment. By using their discretion not to make an immediate arrest, the Bureau was able to conduct an investigation which led to three charges, instead of one, being filed against the defendant.

In other cases, the Bureau exercises its discretion to reconsider a decision not to begin an investigation. Often, the Bureau will reopen a case if new evidence is discovered which indicates that an indictment may be had, or that further evidence will be discovered which will warrant an indictment. One day a complainant, accompanied by his attorney, came to the Bureau alleging that his employee had embezzled hundreds of thousands of
dollars from his business. At first, the complaint sounded civil in nature—the employee sounded more like a partner or co-venturer who had a check signing privilege. The complainant was advised to pursue his civil remedies for an accounting, but, if he wished, he could return to the Bureau with his attorney and all the proof he had of his employee's criminal activity. At this point, the potential defendant was not even sent a complaint letter. A few weeks later, the complainant returned with his attorney and a veritable mountain of bills, cancelled checks, and invoices which made the Bureau reassess its first position. In a meeting with the Bureau Chief, it was decided to commence an investigation, although probable cause to arrest the defendant existed. The defendant was invited in to relate his version of the story. He came, accompanied by his attorney, and the A.D.A. conducting the interview read the defendant his *Miranda* rights. After listening to his story, the A.D.A. confronted him with some cancelled checks of dubious validity, and the defendant immediately began making all forms of incredible explanations. The interview ended, and the complainant was told to marshal all of his evidence so that the Bureau would have an airtight case to hand to the Indictment Bureau. Thus, the Bureau had managed to obtain more conclusive evidence of guilt than it would have if an arrest had been immediately ordered.

Discretion is often employed in a manner that saves innocent parties from legal harassment. On another occasion, a distraught woman in her mid-sixties came to the office with a plethora of complaints, all of which revolved around her apartment. She claimed that her landlord was attempting to make her abandon her apartment. To accomplish this scheme, he had rented the apartment next door to a band of teenaged drug addict pyromaniacs. She further claimed that the pyromaniacs had even enlisted the aid of the superintendent in their attempts to burn the apartment building down. The complainant said she had been to the local police precinct, but because, in her opinion, it was the most corrupt precinct in the city, nothing had been done. Similarly, the Fire Marshall had done nothing. She desired the immediate arrest of the landlord, the superintendent, and the drug addicts. The A.D.A. handling the case told her that the matter would be investigated, and that he would contact her as soon as possible.

106. See *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966). The rights are read to the recipients of complaint letters if the A.D.A. conducting the interview strongly believes that the party might become a defendant in a criminal action.
The A.D.A. contacted the police precinct and the Fire Marshall, and learned that two minor fires actually had been reported, but that neither the complainant nor any other resident of the building had ever volunteered any information about the fires. All parties contacted expressed a desire to help, but reported that they had received no cooperation from the residents. The complainant was notified of these facts, and an appointment with the Fire Marshall was arranged. After that meeting, nothing further was heard about the matter from the complainant. By the proper exercise of discretion, at least two people, and possibly seven, were neither immediately investigated nor arrested, and the complainant had the satisfaction of speaking directly to the Fire Marshall about her problem.

VI. THE FINALITY OF THE COMPLAINT BUREAU’S DISCRETION

Little has changed in the forty years that have passed since Baker and DeLong wrote: 107

Furthermore, the decision of the complaint department not to prosecute is practically final. It is very seldom that an appeal is taken to the first assistant state’s attorney, and even then the decision of the complaint department is almost never overruled. If the complaint department refuses to push a case which is brought before it, there is little if anything for the complainant to do except to drop the matter. The discretion of the complaint department is almost unlimited and uncontrolled.

If we define discretion broadly, so that it includes evidentiary reasons for the decision not to prosecute as well as those termed “in the interest of justice,” the A.D.A.’s in the Complaint Bureau do indeed have a vast amount of discretion. Their decisions not to investigate on evidentiary grounds are almost absolute. It must be mentioned, however, that a decision on a difficult case is only reached after the A.D.A. has discussed it with the other A.D.A.’s and the Bureau Chief. Such discussion is encouraged, and it can often lead to a change of decision. General guidelines for the exercise of discretion are often arrived at in discussions among all the members of the Bureau. 108

108. Professor Kaplan described the process at the United States Attorney’s Office: [T]he 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 advice of each other.

Unhappy complainants often mention that they know the District Attorney personally in order to get an Assistant to change his or her decision. Sensing this tack will not gain success, they complain about how criminals are let free and innocent people are made to suffer. The final argument of the disgruntled complainant is that the Assistants are government employees, and as a taxpayer, the complainant insists that his or her complaint be investigated. The Assistants tell irate complainants that if they so desire, they can write to the Bureau Chief asking him to review the Assistant's decision not to investigate. Needless to add, the complainants almost never appeal, and in any event, an appeal is essentially useless since the Bureau Chief was no doubt consulted about the decision before the complainant was told of it. Except in extremely rare instances, the District Attorney or his three top Assistants will never overrule a discretionary decision made by the Complaint Bureau, although they may ask for an explanation of the case. This policy allows the A.D.A.'s relative independence in the decision-making process—a necessary element in the proper exercise of discretion.

VII. PROPOSALS FOR REFORM OF ESTABLISHED OFFICES OR CREATION OF MODEL OFFICES

Many of the commentators who have written on the subject of prosecutorial discretion have offered various solutions to the problems of relatively uncontrolled discretion. While many examples of actual abuses of discretion across the country can be found, it is the potential for abuse that feeds the fires of reform. Professor Davis has exposed the core problem of discretion—that the power to be lenient and just must be accompanied by a power to be harsh and discriminatory. Most authorities have suggested the need for established procedures and standards in order to minimize potential abuses. Unintentional abuse in the form

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109. See also Baker and DeLong, supra note 65, at 17.
110. Professor Davis has written: A fundamental fact about the discretionary power to be lenient is extremely simple and entirely clear and yet is usually overlooked: The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate. K. Davis, supra note 11, at 170.
111. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 133-34 (1967). See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, supra note 12, at §3.9; Abrams, supra note 4; Breitel, supra note 9, at 433; Remington and Rosenblum, The Criminal Law and the Legislative
of discriminatory investigations and prosecutions can stem from a lack of uniform standards of discretion. A case which one A.D.A. may regard as not worthy of investigation may, in the eyes of another A.D.A., warrant a full investigation. In this situation, the activation of the law enforcement process depends on sheer chance. The public should not have to rely on such a system for the investigation and prosecution of its criminal complaints.

Because the New York County District Attorney's Office Complaint Bureau is the subject office of this comment, many of the following proposals are tailored to its function and present state of development. A model office should combine these proposals with the best features of the New York Office.

One such feature of the Office is its basically non-political nature. One does not have to be of a particular political persuasion to be taken on as an A.D.A.. This particular feature eliminates many of the abuses commonly associated with prosecutorial discretion. If the office is not highly politicized, the A.D.A.'s will not pursue investigations designed to embarrass political opponents. But this attribute is the result of the District Attorney's efforts alone. If the highest official wants to politicize the office, he can. Unfortunately, there are few safeguards (the main one being the popular elections) to prevent such abuses. Thus, the political or non-political character of a prosecutor's office depends almost solely on the prosecutor's intentions. A model office would be as non-political as possible (given the elective nature of the position of District Attorney), and would take measures to maintain that status.

A model office should also develop alternative dispositions for misdemeanors similar to those developed by the New York Office—such as "346 Broadway." The series of lectures given to incoming A.D.A.'s should be copied, as should the weekly conferences to discuss the status of pending cases (such conferences complement the informal, daily discussions). In addition to these features of the New York Complaint Bureau, a model office should consider adopting the following proposals:

1. Experienced Assistants should be added to the Complaint Bureau. At present, only one senior A.D.A. is assigned to the Bureau—the Chief. The advantage of adding senior staff

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*Process, 1960 U. Ill. L.F. 481, 497-99; Comment, supra note 11, at 495; Comment, supra note 15, at 542-44. See generally Ferguson, Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation, 11 Rutgers L. Rev. 507 (1957).*

*112. See Comment, supra note 15, at 543.*
would be to help standardize the ground rules for the exercise of discretion. There would be far fewer mistakes based upon ignorance or naiveté. The senior Assistants would bring their years of experience and their knowledge to the Bureau, thus assuring the junior members of a solid grounding in the actual practice of the law, and the complainants of a more stable exercise of discretion. One senior Assistant may not be enough because there may be occasions when he or she is called off the Bureau and there will be no one with whom the junior Assistants can consult. Two senior members in an eight or nine member Bureau should be sufficient.

There are disadvantages to the addition of senior staff. Primarily, their addition may stifle the initiative and individuality of the younger Assistants. The junior A.D.A.'s may feel obliged to defer to the senior A.D.A.'s ideas and courses of action. The addition may also mean the possible inculcation of bad or tired practices in the newer Assistants. Many senior members may feel that Complaint Bureau duty is a waste of their experience and could convey their displeasure to the junior A.D.A.'s. These disadvantages can be overcome by the judicious selection of senior members—the selection aimed at those people who are willing to teach and allow for the individuality and initiative of the junior A.D.A.'s.

2. There should be lengthier reports on the complaints that are not acted upon. At present, every A.D.A. in the Bureau fills out a card on each complainant interviewed. The Assistant usually writes only the most cursory explanation for a negative decision on investigation. A memorandum detailing the results of and the reasons for terminating an investigation is already required. While such a detailed report for every complainant interviewed may be time consuming, it should be considered. The reports could be of use in reviewing decisions at a later time if the complainant insists upon review, or if superiors want to inspect the work of the Assistants. At least, if detailed reports were required, the broadest area of discretion—the decision not to investigate—would be illuminated. Information in this area is, at present, sorely lacking. Errors or faults in the exercise of discretion could be much more readily corrected if more information were available.

3. There should be a computerization of all complaint cards, so that an A.D.A. will be able to learn quickly and accur-
ately if the complainant has ever registered the same complaint before. He can also learn if the potential defendant has ever been accused of the same type of criminal activity. Both of these factors could have a bearing on an Assistant’s decision whether or not to begin an investigation. Obviously, this would be expensive, but it too should be considered.

4. There should be an expanded staff, although this proposal, like the third one, would weigh heavily on the municipal treasury. If the proposal for lengthier reports is adopted, then additional staff may become a necessity, and not a luxury.114

5. The legislature of each state should carefully review the penal laws of the state, and repeal outdated laws, or laws which attempt to instill an obsolete or extreme sense of morality in the people. These are the laws most subject to abuse—the ones rarely acted upon, except in those instances when a prosecutor decides to “get someone.” Obsolete or irrelevant laws are a fertile ground for an erring prosecutor. The good intentions of those legislators that helped pass the laws in question amount to nothing. As Dean Pound wrote:115

Law must govern life, and the very essence of life is change.
No legislative omniscience can predict and appoint consequences for the infinite variety of detailed facts which human conduct continually presents.

A simplification and clarification of the penal law will eliminate many of the harshest and most blatant examples of abuses of discretion by drying up the springs that give birth to them.

6. There should be a greater range of alternatives to the criminal process. Provisions should be made, in particular, for increased use of social services. Communications with the various agencies and departments that supply care and assistance should be increased. Upon entertaining a complaint, the Assistant should have a set of guidelines to aid him in determining if a non-criminal disposition of the matter would be the best possible course of action. One commentator has collated a set of guidelines that might be of assistance in this area:116

1. the seriousness of the crime;

114. For an interesting array of suggested improvements, see Baker, supra note 33, at 795.
115. R. Pound, supra note 1, at 36. See also notes 26-32 and accompanying text, supra.
116. See Comment, supra note 11, at 492.
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;
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.

7. There should be a Complaint Bureau manual published and distributed to each Assistant in the Bureau. The manual should contain the parameters of prosecutorial discretion—detailed standards may pose the same problem as overly detailed laws. The manual would help the Assistants mitigate the differences they have in background, education, and values. This would be a major step in developing relatively consistent standards of discretion. Uniformity of standards is vitally needed to assist the public in obeying the laws which will be enforced. The manual would supplement the series of lectures now given to incoming A.D.A.'s in the Complaint Bureau, which cover the gamut of prosecutorial discretion from office policy to the various types of larceny.

Release of the standards to the public would have mixed effects. Many would applaud the flow of information about governmental policies to the people. This, undoubtedly, would result in increased public scrutiny of prosecutorial discretion. But it would also probably restrict the prosecutor's ability to try a case. Many defendants, once in possession of the published standards, would raise the defense of discriminatory prosecution as a matter of course. Many of these claims would be frivolous, and would tie up the courts. Thus, before this proposal to release published standards to the public is adopted, further study should be undertaken.

8. A review board composed of senior and junior personnel should be established to inspect the discretionary decisions of the...
Assistants in the Complaint Bureau. The board’s function should be more advisory and educational than punitive. The Assistants need not be called to the board unless there has been a pattern of misjudgments. So as not to undermine the confidence of the Assistants, the board should not be overbearing, and should exercise caution.120

Institution of these proposals should alleviate some of the necessity for suits alleging prosecutorial discrimination by nipping the causes of discrimination in the bud. This type of prevention would help the citizenry more than an after-the-fact legal cure.121

Yet, even with the adoption of all the proposals, there will still be wide areas of discretion. As long as one person, or groups of people, must judge others, there will always be different, but equally correct judgments. As Judge Breitel wrote:122

A note of skepticism must be introduced. Those who have spent many years in different branches of government know only too well the limitations of any system, machinery, or paper plan. Always men are involved, their quality, and their capacity for imaginative leadership. Good men will use discretion wisely. Good men will control discretion wisely. Bad men will make a mess of discretion; they will also make a mess of rules of law.

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120. See Abrams, supra note 4, at 56.
121. This cure has been of minor importance because until recently, defendants have not availed themselves of it, and the courts have been reluctant to entertain it. Comment, supra note 59, at 62.
122. Breitel, supra note 9, at 435.