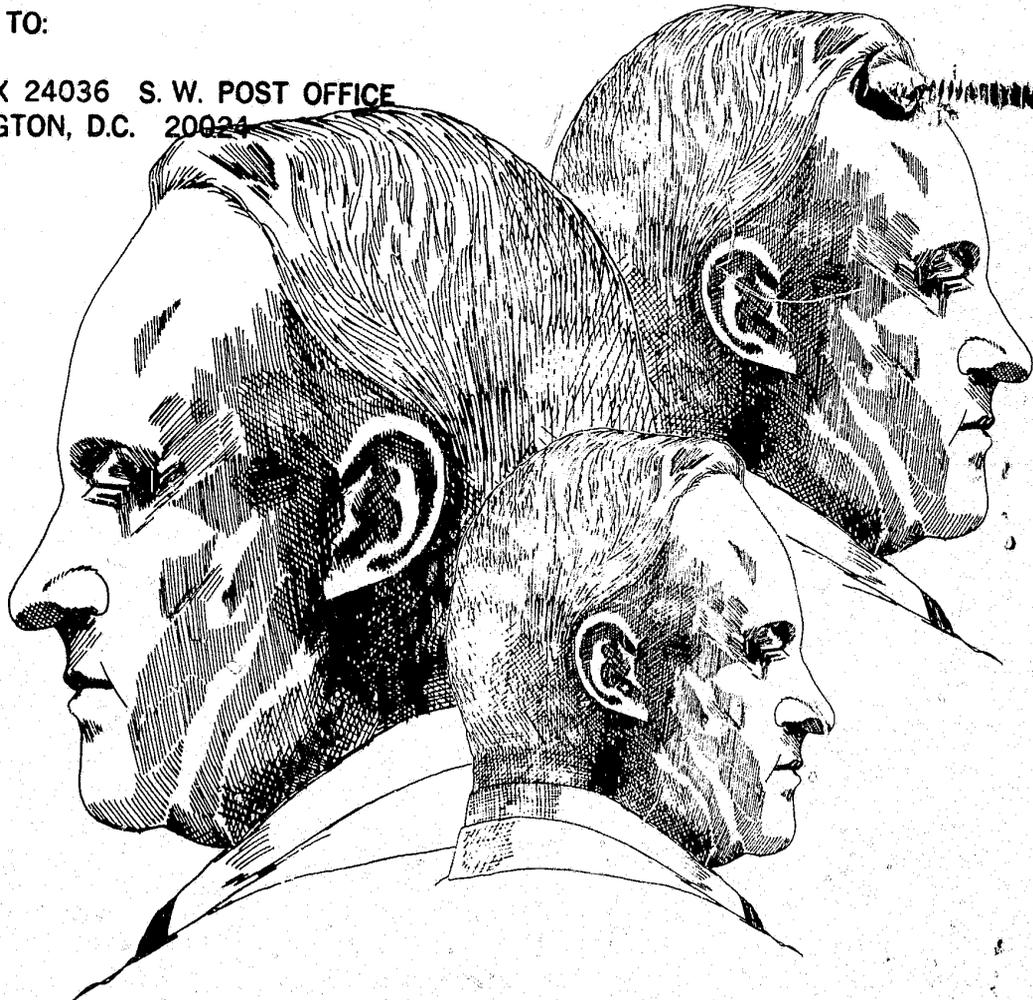


Prosecutorial Discretion: The Decision to Charge

An Annotated Bibliography

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**PROSECUTORIAL DISCRETION:
THE DECISION TO CHARGE**

AN ANNOTATED BIBLIOGRAPHY

**Prepared by:
W. Randolph Teslik**

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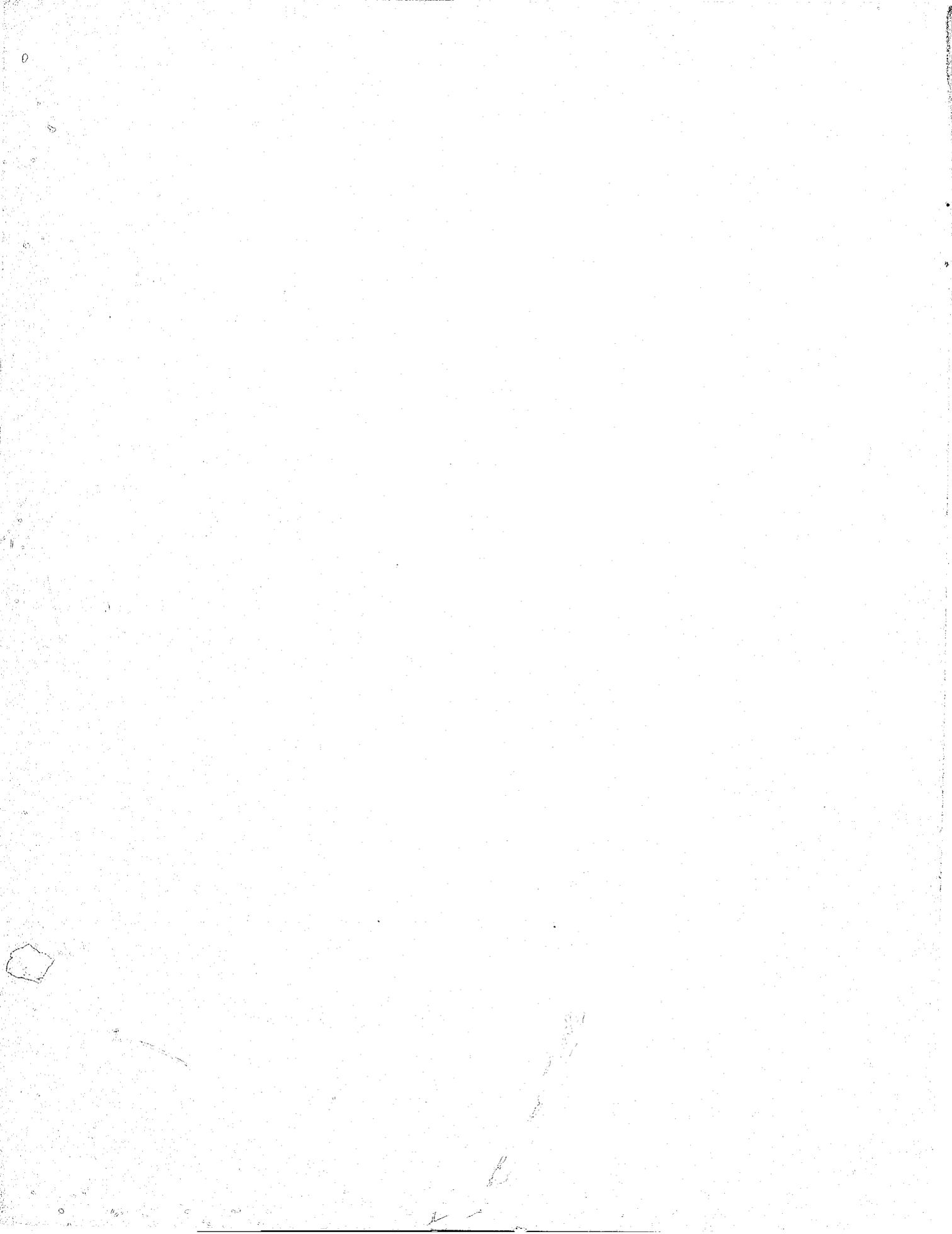
Richard W. Velde, Administrator

INTRODUCTION

The exercise of discretion by the American prosecutor has been the subject of debate and commentary from the time of the Wickersham Commission in the 1930's to the present, with new attention being focused on prosecutors by recent national commissions and studies of the criminal justice system. Not surprisingly, many of the issues are still unresolved. Should this vast power be vested in a single individual? Should the prosecutor's discretionary decisions be subject only to internal administrative review or should these decisions be subject to review by the courts? Must this discretion exist at all, or could our system of criminal prosecution adopt the West German model of limited and highly structured discretion? Must ideals of consistency in the application of the criminal law be sacrificed to flexibility in order to achieve "individualized justice?"

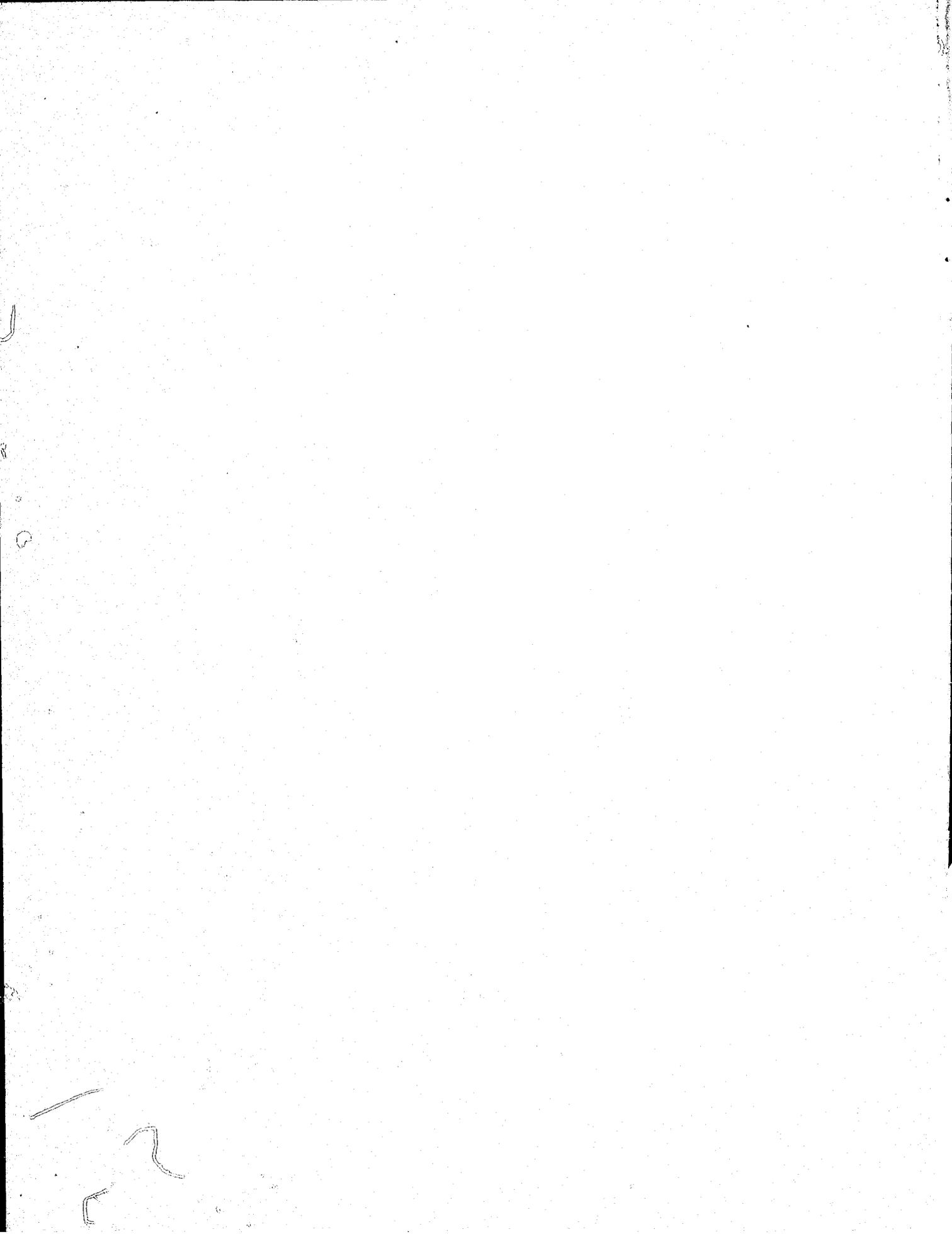
This literature review presents articles, books, and other documents which examine the prosecutor's discretionary decision to charge a suspect with a crime. For the accused, this decision may be as significant as the eventual finding of guilt or innocence by a judge or jury. In most jurisdictions, this decision is made by a junior assistant prosecutor and receives only cursory internal review. The alternate decision, to forgo prosecution, receives even less attention. Rarely are the reasons which support the decision even recorded. Despite the lack of review procedures or guidelines to aid the prosecutor's charging decision, there exist relatively few allegations of abuse of charging discretion in the case law or in academic studies. When courts have been faced with these allegations, they have struggled without consistent conclusion on such legal issues as standard of review, burden of proof, and appropriate remedies. These unresolved issues continue to receive attention in courts, classrooms, and legal circles.

Documents which examine prosecution case screening are also summarized. Case screening is the management process whereby the prosecutor reviews cases presented to him by the arresting police officer and decides what, if any, criminal charges are appropriate or if a non-criminal disposition would be in the interests of the accused and society. Numerous management issues are discussed in these studies, such as who should screen cases, where they should be screened, and when screening should occur.



DOCUMENT SOURCES

These documents are available at many local university law school libraries or only for reference use at the National Criminal Justice Reference Service.



ABRAMS, NORMAN. Internal Policy: Guiding the Exercise of Prosecutorial Discretion. UCLA Law Review, v. 19, no. 1: 1-58. October, 1971.

In prosecutorial decision-making there is a conflict between the need for certainty, consistency, and an absence of arbitrariness, and the need for flexibility, sensitivity, and adaptability. This article explores the use of internal policy guides to help strike an acceptable balance between these two sets of values. Professor Abrams discusses the importance of consistency and reviews the present state of the art of developing internal policy guides. The methods and scope of policy formulation are analyzed.

Of the two principal approaches to policy formulation, the quasi-legislative approach in promulgating general rules, guidelines, policy statements, etc. is considered more desirable and capable of maintaining the proper amount of consistency than the ad-hoc, quasi-judicial approach of developing policy in the context of particular factual situations. The article also considers classification of policies as nonprosecution, complete enforcement, and intermediate or selective prosecution. Arguments for and against publication of internal policies are examined in detail with Abrams concluding that publication of policy is desirable and that the burden of showing a need for nonpublication should fall on those opposed.

Finally, the article discusses litigation of policy and discretionary decisions. Abrams concludes that it is both feasible and desirable to develop comprehensive and detailed policy statements governing the exercise of prosecutorial decision-making and that significant prosecutorial resources should be allotted for the task of developing such policy.

AMERICAN BAR ASSOCIATION. Project on Standards for Criminal Justice. Standards Relating to the Prosecution Function and the Defense Function (Approved Draft). New York, Institute of Judicial Administration, 1971. 327 p.

Several of the standards promulgated by the American Bar Association (ABA) concerning the prosecution function concern the charging decision. Section 2.5 suggests that each prosecutor's office develop a statement of general policy as a guide to prosecutorial discretion. The ABA argues that articulation of policy contributes to the formulation of sound policies by compelling

consideration and evaluation of practices that may have become outmoded. Policies should aim at accomplishing ultimate prosecution goals of fairness, efficiency, and effectiveness. A significant caveat to this section does recommend, however, that directives that relate to strategic and tactical matters be handled as confidential internal executive memoranda and be accorded executive privilege.

Section 3.4 specifies standards for the initiation of prosecution by the prosecutor, screening procedures, and handling citizens' complaints. The commentary accompanying this section indicates that the ABA is in favor of early screening of complaints by experienced trial prosecutors, a procedure which should result in lower acquittal rates in criminal prosecutions. It is also suggested that joint screening of criminal cases by a prosecutor and a magistrate may be good procedure from a general policy viewpoint.

Section 3.8 recommends that the prosecutor explore the availability of noncriminal disposition before pressing criminal charges. He should be cognizant of the social services and diversionary programs available in his community. Finally, Section 3.9 outlines those factors that the prosecutor may properly consider in deciding to bring charges and in choosing the appropriate charges. The following are considered unprofessional conduct for a prosecutor: to initiate criminal charges that he knows are not supported by probable cause, to give weight to personal or political advantage or disadvantage when making a decision, and to charge crimes that he cannot support with evidence at a trial.

BAKER, NEWMAN F. The Prosecutor — Initiation of Prosecution. Journal of Criminal Law, Criminology, and Police Science, v. 23, no. 5: 770-796. January-February, 1933.

Although written in 1933, this study reveals many troublesome issues surrounding the prosecutor's discretion to charge that are still present today. Professor Baker recognizes that although legislative directives normally command prosecution for "all known criminal conduct," charging a criminal offender depends largely on the personal reactions and judgment of the prosecutor. In practice, contends Baker, prosecutors consider the expense of prosecution to the state, the fairness of the prosecution to the defendant, the likelihood of adverse publicity or political repercussions, and the defendant's importance or position in the community. The prosecutor constantly balances his political survival with the community's need for protection from the criminal element. Much of the discussion concerns prohibition and gambling, which were areas of prosecutorial concern at the time the article was written.

The study presents factual situations involving criminal conduct, with discussions of the alternative courses of action available to the prosecutor. The study examines several situations that present special problems, including rape allegations and pranks by college students. Also explored are the practices of accepting bargained guilty pleas, pleas to lesser offenses, and granting immunity in order to gain testimony. Professor Baker concludes that the state of the criminal justice system in 1933 was not advantageous to reform of the prosecutor's charging function. He suggests that higher salaries and enhanced administrative and clerical support for chief prosecutors, in addition to permanent staffs of assistants selected by civil service examinations in large jurisdictions, would add efficiency and avoid political influence in prosecutors' offices.

BREITEL, CHARLES D. Controls in Criminal Law Enforcement. The University of Chicago Law Review, v. 27, no. 3: 427 - 435. Spring, 1960.

"If every policeman, every prosecutor, every court, and every postsentence 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." This statement expresses the thesis of the discussion which is that the presence and expansion of discretion in crime control is both desirable and inevitable in a modern democratic society. The author argues that discretion may not be eliminated, except at intolerable cost, and that the question should be how to establish controls to avoid the unequal, the arbitrary, the discriminatory, and the oppressive.

Focusing on police discretion to arrest and the prosecutor's discretion to charge, the author notes that justified discretion is that which ameliorates the harshness of the literal criminal law. For instance, since criminal conduct is described in general terms, criminal laws sweep together similar acts by markedly different actors amid infinitely variable circumstances. By exercising discretion, law enforcement personnel exempt those for whom criminal prosecution is neither appropriate nor necessary. Controls in the area of discretion should only assure soundness and honesty in its exercise. To do more would be not to control discretion, but to dictate the manner in which it is to be exercised. Proper controls could include better internal administration, such as merit selection of personnel, training, and prompt, effective internal sanctions for abuse of discretion. In addition, statewide, centralized, supervision and enforcement of standards, and administrative mechanisms to correlate the thinking and operations of all the agencies of crime control could provide the greatest and most effective control over the ever-widening power of discretion. The author concludes on a note of skepticism: "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."

CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION. Uniform Crime Charging Project. Uniform Crime Charging Manual. Los Angeles, 1974. 1 v. (various pagings).

The purpose of the Uniform Crime Charging Manual is to assist in the implementation of the general policies set forth in the Uniform Crime Charging Standards, a companion volume to this manual. As in the standards, the manual makes recommendations subject to the following limitation: they are intended only as guides for prosecutors and are not binding nor are they intended as a substitute for or a limitation on the exercise of prosecutorial discretion by local prosecutors.

The Manual contains three basic parts. The first major section discusses the effective use of office procedures to expedite the crime charging process and subsequent prosecution. Model forms with instructions for their use are included for various procedures. Specific evidentiary, charge selection, and prosecutorial alternative problems that arise with individual crimes comprise the second major section. Where a great deal of discretion can be exercised because of statutory vagueness or the existence of alternative statutes or procedures, this section sets forth some general policy guidelines. Common evidentiary problems are categorized and analyzed to alert inexperienced prosecutors of their existence. An easy-to-use reference guide for prosecutors is provided by the discussion of basic relevant statutory and case law. Check lists are supplied to assure that investigations are complete before charges are made. The third major section contains model pleading forms for most significant felonies and misdemeanors. The recommended policies and procedures contained in this manual are the practical application of the standards to the everyday specific charging problems faced by individual prosecutors. Their implementation will assist in achieving the primary goal of the standards: a more effective and consistent exercise of prosecutorial discretion by individual prosecutors.

_____. Uniform Crime Charging Project. Uniform Crime Charging Standards. Los Angeles, 1974. 88 p.

The formulation and publication of uniform crime charging standards by a state-wide or regional group of prosecutors has never been attempted prior to this effort. In fact, few individual prosecutors' offices have crime charging standards as detailed and comprehensive as the ones set forth in this document. The Government Code of the State of California states that "The District Attorney 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...." A strict interpretation of the word "shall" has never been adopted by the courts. Indeed, a literal application of the statutory command would

cause chaos in the criminal justice system by seriously multiplying the number of criminal actions sent through the courts. In the interest of all citizens, the prosecutor exercises discretion in determining whether to prosecute a particular case.

What factors can he properly consider? These standards have been prepared to compile the numerous considerations inherent in the charging decision to guide prosecutors in their daily exercise of prosecutorial discretion. The standards reflect a consensus of what constitutes ideal policies or procedures among those California district attorneys in office at the time of their promulgation. They are not intended to be a substitute for developing prosecution policies at the local level or to limit the discretion of the individual prosecutor, but rather to guide and assist him in making the decision to charge.

The opening section defines the screening duties of the California prosecutor for felonies and misdemeanors. It describes the limited areas where these duties might be delegated to an investigating agency. Part I of the standards deals with the important issue of what constitutes sufficient evidence to charge. Part II, Charge Selection, aids the prosecutor in determining what particular charges are to be brought in a given case. Part III, Prosecutorial Alternatives, covers the discretion of the prosecutor not to file criminal charges for reasons other than the lack of sufficient evidence. In certain instances, no action at all by the prosecutor may be justified. In others he may select alternatives such as pretrial diversion, mediation, or civil lawsuits. Part IV sets forth recommended procedures for the effective and efficient exercise of prosecutorial discretion within a given prosecutor's office. These recommendations are subject to limitations imposed by office size, budget, and organization. Part V, Special Standards, deals with a variety of procedures or decisions that are frequently made at the charging stage. Provision is made for the periodic update of these standards.

CASTBERG, ANTHONY D. Prosecutorial Discretion - A Case Study. Evanston, IL., Northwestern University, 1968. 236 p.
Dissertation (Ph. D.) -- Northwestern University.

This document describes the prosecutorial process and the key decision-making points in the process. The most important decisions facing a prosecutor take place outside of formal hearings. These significant choices include whether to reduce charges against an accused in exchange for a plea of guilty, whether to nol-pros the case and thus terminate the process, and whether to continue seeking an indictment if there is no probable cause for arrest. This study found that party politics played a relatively minor role in the prosecutor's office under observation and that there was no indication of overt or covert party influence on the handling

of cases. The author argues that extensive pretrial disposition of cases is not destructive of justice. Nol-pros decisions were found not to be indiscriminate, and prosecutors generally justified their nol-pros motions orally to the judge. One of the most important findings of this case study is that there is little obviously unjust treatment of defendants, even those of minority groups.

CATES, AUBREY M., JR. Can We Ignore Laws? - Discretion Not to Prosecute. Alabama Law Review, v. 14, no. 1: 1-10. Fall, 1961.

The prosecutor, in exercising his discretion to accuse or not, wields more power than any other person in the criminal justice system. The author, an associate judge on the Court of Appeals of Alabama, enumerates certain considerations that might affect the prosecutor's decision to charge a suspected violator with a crime. Primarily, since "too many acquittals are bound to call into question respect for law and the validity of the processes of the courts," a practical judgement must be made as to the sufficiency of the legally admissible evidence. Other factors include the purpose of the criminal statute, statewide uniformity of enforcement, the legal responsibility of the accused, the accused's criminal record, possible resulting publicity, potential blackmail, and potential martyrdom for the law-breaking defendant.

The nolle prosequi also is considered as an area of broad prosecutorial discretion. It is noted that whereas at common law, the Attorney General could exercise absolute discretion in halting prosecutions by entry of a nolle prosequi, Alabama has modified prosecutorial discretion in this area by requiring permission of the court before discontinuance of an indictment. Numerous reasons are given for the entry of a nolle prosequi, including the running of the statute of limitations, over-charges, death or disappearance of crucial witnesses, accepting a plea to a lesser offense, and private mollification. To control the exercise of discretion to forego prosecution either before or after indictment, the author suggests that in each instance of a decision not to prosecute, a contemporary memorandum stating reasons be retained in the personal files of the prosecutor.

COLE, GEORGE F. The Decision to Prosecute. Law and Society Review, v. 4, no. 3: 331-343. February, 1970.

This paper is based on an exploratory study of the office of Prosecuting Attorney, King County (Seattle), Washington. An open ended interview was administered to one-third of the former deputy prosecutors who had worked in the office during

the 11-year period 1955-1965. In addition, interviews were conducted with court employees, members of the bench, law enforcement officers, and others who participated in legal decision-making. Over 50 respondents were contacted during this phase. A final portion of the research placed the author in the role of observer in the prosecutor's office and gave him direct observation of all phases of the decision to prosecute, including informal inner-office processes.

This examination views the prosecutor as an officer of the legal process within the context of the local political system. It is assumed that broadly conceived political considerations explain to a large extent the manner in which justice is dispensed within this system. The study suggests that market-like relationships exist between the persons in the system. Since prosecution operates in an environment of scarce resources and since the decisions have potential political ramifications, a variety of officials influence the allocation of justice. The decision to prosecute is not made at a specific time, but rather the prosecuting attorney has a number of options that he may employ during various stages of the proceedings. The prosecutor is able to exercise his discretionary powers, however, only within the network of exchange relationships. The police, court congestion, organizational strains, and community pressures are among the factors that influence prosecutorial behavior.

. Politics of Prosecution — The Decision to Prosecute. Seattle, University of Washington, 1968. 269 p.
Dissertation (Ph. D.) — University of Washington.

This dissertation studies two elected prosecutors' offices — one urban and one rural — and the nature of their transactions with the police, defendants, defense attorneys, courts, and the public. The author views the prosecutor's office as a political entity involved in exchanges with the other components of the court system and with other organizations and individuals in order to achieve its goals. The prosecutor must maintain good working relationships with other professionals as well as visibility with the electorate. The author found that the elective nature of the office had an effect on the timing of investigations and some trials as well as on the ethnic composition of the appointed staff assistants. Politics as such did not appear to influence the decision to prosecute. This function of the prosecutor's office was influenced by legal factors such as the sufficiency of the evidence; humanitarian considerations, such as mental illness or psychological harm to witnesses in sex offenses; and organizational interests, such as cooperation with another jurisdiction with a warrant for the same defendant. The primary difference between urban and rural prosecutors, the study determined, is the rural prosecutor often has personal knowledge of the defendant and his background.

Criminal Law - The Power of the Attorney General of Mississippi to Institute and Conduct Prosecutions. Mississippi Law Journal, v. 40, no. 2: 315-322. March, 1969.

What becomes of the administration of criminal justice when a case arouses such strong local sympathies that a district attorney, because of social and political pressures, fails to institute criminal proceedings? Must the law of the State go unenforced, or is there another state official, other than the district attorney, who may legally bring criminal charges on his own initiative in the State's behalf? The author focuses on the Attorney General in Mississippi, the only official elected by a statewide constituency with broad powers as an advocate for the State, and scrutinizes his legal powers to enforce criminal sanctions when a local district attorney fails to act. He concludes that the Attorney General of Mississippi, because his powers are coextensive with those of the common law office whose name it bears, may conduct any criminal prosecutions necessary to enforce the laws of the State and protect the public. The fact that the primary duty to perform this function has been shifted to the district attorney has no effect on the inherent power of the Attorney General. The Mississippi Supreme Court has said that the Attorney General possesses the right "to institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state...." The Attorney General's entry into local criminal matters is a viable remedy for unjustified local prosecutorial inaction.

DAVIS, KENNETH CULP. Discretionary Justice: A Preliminary Inquiry. Baton Rouge, Louisiana State University Press, 1969. 245 p.

Professor Davis contends that the system of statutes and judge-made law is overdeveloped and that our system of administrative, police, and prosecutor justice is underdeveloped. Concrete proposals for reforming the system of discretionary justice are advanced and the groundwork for further empirical and philosophical studies is laid. It is recommended that unnecessary discretionary power be eliminated and that better ways to confine, structure, and check necessary discretionary power be found. The author develops a theory of discretionary action and applies it to concrete subjects, such as Federal Trade Commission merger clearances, selective enforcement and policy making by police, evictions from public housing, sentencing by judges, practices of the U.S. Parole Board, and antitrust guidelines. Davis focuses on the discretionary power of the prosecuting attorney exercised in the decision to charge, and questions whether such broad, unstructured discretion must exist. He compares the American system of prosecutorial discretion with that of West Germany—a system where the prosecutor may exercise discretion only in rare instances. The charging function of the National Labor Relations Board, a system of fully structured discretion, is presented to illustrate that "the idea of structuring the prosecuting power is something more than an academician's dream."

Discretion Exercised by Montana County Attorneys in Criminal Prosecutions.
Montana Law Review, v. 28, no. 1: 41-93. Fall, 1966.

Montana county attorneys exercise considerable discretion in the initiation and control of criminal prosecutions. This article explores the state of the law concerning the discretion that may be legally exercised by county prosecutors, what discretion is actually exercised, and what factors influence the exercise of discretion. The author collected data by reviewing numerous criminal cases filed by county prosecutors in 1964 and by surveying prosecutors by questionnaire about the exercise of their discretionary powers. From this data, he concluded that prosecutorial discretion is inherent in the criminal process at nearly every stage. With each criminal complaint, the prosecutor must determine whether to bring charges or dismiss the allegation. Once an affirmative decision to prosecute is made, the appropriate charge must be selected. The prosecutor has the discretion to bargain for a plea of guilty and to request that the original charges filed with the court be dismissed. Subsequent to a conviction, the prosecutor may make sentencing recommendations to the judge.

In Montana as in most jurisdictions, the prosecutor's requests to withdraw charges and recommendations for sentencing are usually followed by the court. The prosecutor also has discretion to obtain the assistance of a special prosecutor. Montana county attorneys, however, do not consider their discretion unbridled. In varying degrees, they feel controlled by the courts, the Attorney General, and most significantly, by public pressure.

The author reviews four sanctions that have been imposed on prosecutors for abuse of their discretion: removal from office, criminal prosecution, disbarment, and private suit. He concludes that these sanctions have been ineffective in controlling discretion except in the most extreme instances, and that the effect of public pressure on the prosecutor's discretionary acts should be decreased. Accordingly, the author contends that a system of more constant, immediate, and effective controls should be devised to prevent abuses of discretion. These controls might include greater court participation in the guilty plea process and broader court powers to appoint special prosecutors where prosecutorial inaction is unjustified. Centralization of county prosecutors under a state department of justice could facilitate supervision and provide extra assistance. Administrative reforms, such as higher salaries and full-time prosecutors, would attract more qualified attorneys to the county attorney's offices and result in fewer discretionary abuses. Appointed rather than elected prosecutors would be less susceptible to public pressure. Imposition of these controls and reforms, while retaining the traditional discretionary powers of the prosecutor, would provide protection from abuses without sacrificing the flexibility essential to the criminal justice system.

EISENSTEIN, JAMES. The Federal Prosecutor and His Environment. 18 p.
Paper prepared for delivery at the 1968 Annual Meeting of the American
Political Science Association, Washington, D. C., September 2-7, 1968
(unpublished).

Professor Eisenstein focuses on the "strategic environment" of the federal prosecutor. He discusses the formal duties and organization of the office; the method of appointment; career development; and most importantly, interaction with "significant others" in the criminal justice process. His analysis of the "strategic environment", which greatly affects the prosecutor's charging decision, begins with a brief description of the federal prosecutor, the Assistant United States Attorney. The interaction of the prosecutor with the Department of Justice, judges, investigative agents, and others is considered in detail.

Although Eisenstein minimizes the influences of the Department of Justice on the prosecutor's decision to charge, he concludes that both judges and investigative agents have a significant impact. Since the prosecutor spends most of his day either preparing or prosecuting cases in court, his work-life can be pleasant or miserable depending in part on his relationship with the judges who conduct the trials. Accordingly, it is not surprising that the prosecutor is receptive to the types of cases the judge wants to hear.

Investigative agents, contends Eisenstein, have more influence on the prosecutor's charging decision than anyone else. Not only must the prosecutor rely on agents for any additional investigation, the evaluation of witnesses, and identification of problem areas in the case, but he can be influenced by the manner in which the agent initially presents the case. Numerous factors affect these relationships, however, such as the experience and number of Assistant United States Attorneys, judges, and investigative agents in the jurisdiction and also the methods of case selection. The paper offers an analysis of the effects of prosecutors' personal characteristics and "situation specific variables" on the decision to charge. Eisenstein concludes that in making this exceedingly complex charging decision, the prosecutor possesses much less freedom than the broad doctrine of prosecutorial discretion would seem to indicate.

FERGUSON, CLARENCE CLYDE, JR. Formulation of Enforcement Policy: An
Anatomy of the Prosecutor's Discretion Prior to Accusation. Rutgers Law
Review, v. 11, no. 3: 507-525. Spring, 1957.

The exercise of discretionary prosecutorial power to formulate enforcement policy, without corrupt motives, has been vigorously defended from encroachment by the judiciary. Prosecutors argue that since it is impossible to detect the commission of

all crime and to arrest all persons suspected of criminal activity, the formulation of selective enforcement policy is required. In State v. Winne, the Supreme Court of New Jersey permitted criminal charges of official misconduct to be brought against a prosecutor who failed to bring charges against certain individuals known to have committed crimes. The court held that the state need not prove official corruption to convict in this case. Professor Ferguson examines in detail the background and implications of the Winne decision. He suggests that no one would question the soundness of the principle of applying criminal law sanctions for corrupt non-use or misuse of prosecuting power. The possibility of applying the crime of misconduct in office without the element of corruption, however, raises questions of basic fairness to a prosecutor if this would place him in the position of having to insure that the full power of the state to combat crime is exercised. Ultimately, it raises the question of the utility of the criminal sanction vis-a-vis other procedures to procure prosecutorial performance.

Objections to criminal penalties appear to stem from the possibility of subjecting the incompetent, honest, prosecutor to criminal penalties. After reviewing the ineffectiveness of alternative sanctions, the author indicates that criminal penalties nonetheless may be justified to assure prosecution when enforcement is in the public interest. A major criticism of criminal punishment is that even after it is applied to the offending prosecutor, the criminal act in question may continue to go unprosecuted. Writs of mandamus to compel prosecution and civil actions to secure specific prosecutorial performance have been considered. However, the problem of who has the legal right to bring suit (standing to sue) and traditional prosecutorial independence, as well as the possibility that private vengeance might find its way into the criminal courts, indicate that both of these are inappropriate remedies. In conclusion, it is suggested that perhaps the most effective and least disruptive remedy for non-corrupt prosecutorial inaction may very well be entry and control of the prosecution by the Attorney General.

GROSMAN, BRIAN A. The Prosecutor: An Inquiry into the Exercise of Discretion. Toronto, University of Toronto Press, 1969. 121 p.

An examination of the decision-making role of the prosecutor in pretrial determinations in Toronto, Montreal, and Ottawa, Canada is presented in this study. Pretrial decisions made by prosecutors critically affect the rights of citizens, yet these decisions remain a grey area in the administration of criminal justice. There are considerable and important differences between what the prosecutor does and what the legal literature and judicial decisions say he should do. Very little is known about the powers wielded by prosecutors and the factors which influence their exercise of discretion. The prosecutor's informal relations with the police and defense lawyers are described and analyzed, as are the significance of these relationships for the accused and the fair administration of justice. The decision to begin prosecution, the negotiated guilty plea, the prosecutor's administrative bias, and recommendations for judicial and legislative reform are included.

HAMILTON, WILLIAM A. and CHARLES R. WORK. The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness. The Journal of Criminal Law and Criminology, v. 64, no. 2: 183-189. June, 1973.

Lack of management consciousness and of priority case assignment by large, urban prosecutors' offices has resulted in undue court delays and public dissatisfaction with the criminal justice system, according to the authors. In response, the U. S. Attorney's Office of the District of Columbia has instituted a comprehensive computerized information system, Prosecutor Management Information System (PROMIS), to aid prosecution personnel in effectively managing their case loads and in systematically developing and assigning priorities. The computerized PROMIS files include a complete summary of information relating to the defendant, a complete history of criminal charges growing out of the incident, a summary of court events related to the charges, and all information of significance concerning witnesses or police officers associated with the case.

Based on the gravity of the crime and the criminal history of the defendant, PROMIS assigns a case priority to each offense. On the basis of this priority, serious matters can be easily identified and singled out for special preparation by a small team of prosecutors. Data is indexed by police complaint number, defendant fingerprint number, and court docket number, enabling retrieval of all information in the system pertaining to a crime, criminal, or single case.

In addition to the functional evaluation of the office's operations necessitated by the institution of PROMIS, numerous other management benefits have resulted. These include formation of the special litigation unit to prosecute serious offenses or offenders, development of a procedure manual to guide the individual prosecutor, the requirement that prosecution records contain reasons for all discretionary decisions, and a new emphasis on review, planning, and policy development. Serious prosecutorial research using the growing PROMIS data base is planned. As a continuation of PROMIS, PROMIS II has recently been instituted. PROMIS II features terminals with television-type screens in the prosecutor's office that can be used throughout the case flow operation, so that all prosecutors may question the data base concerning defendants, cases, police officers, case ages, or witnesses.

HERRMANN, JOACHIM. Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany. University of Chicago Law Review, v. 41, no. 3: 468-505. Spring, 1974

The West German system of criminal procedure, unlike the American, attempts to control prosecutorial activities by the concepts of compulsory prosecution and restrained discretion. Within this framework, however, a considerable amount

of prosecutorial discretion in the charging decision is exercised. In this study, Professor Herrmann investigates the German prosecutor's discretion — its limits and its pattern. He introduces the doctrine of compulsory prosecution of felonies and serious misdemeanors. If the prosecutor fails to bring charges in cases where sufficient evidence exists, he may face criminal liability. In addition, the victim-complainant may prosecute privately or veto the prosecutor's decision to bring charges in the public forum, when any special public interest in prosecuting is absent. In certain other classes of cases, however, the prosecutor manifests considerable discretionary authority. If the prosecutor determines that the public interest does not demand prosecution, he may refuse to bring charges in most misdemeanor situations if he finds the guilt of the accused to be minor. Although judicial approval of this decision is required, the author notes that it is routinely granted. Plea bargaining, regarded with disfavor by West Germans, is beginning to appear more frequently in subtle forms. The author suggests that this trend from a highly structured, rule oriented system to one which permits discretionary decisions by the prosecutor, may improve the West German criminal justice system.

KADISH, MORTIMER R. and SANFORD H. KADISH. On Justified Rule Departures by Officials. California Law Review, v. 59, no. 4: 905-960. June, 1971.

"Rules of Competence," or those rules addressed to government officials and designed to define the limits of their authority, are the subject of this theoretical discussion. The central issue of the article, however, is narrower: when and in what circumstances does our legal system allow an official to justify departing from the rule of competence that constrains him in his official role?

The idea of departing from the rule appears to conflict with the concept of rule by law or supremacy of law. Rule of law constitutes an ideal model of legal authority in which government by rules is paramount over government by will of those in power. An official's personal evaluation and choice are not relevant, since all choices are reflected in rules and the official is required to perform in conformity with them. This tradition of rule of law protects against the injection of personal will into the exercise of governmental power.

The authors formulate the concept of legitimated interposition, for those instances when an official is justified under the law in departing from the rules of competence that bind him. They consider such actions legitimate when done in the context of his official role. The action is legitimate when the legal system allows the official to depart from a legal rule or when the interposition of the official's own judgment between the rule and the final action best serves proper ends. The authors believe that it is false to consider officials merely servants who hear and obey, and the authors introduced the idea of legitimated

interposition in order to discuss the possibility of discretionary adjustment. The authors argue that the system must set up and offer to the official a set of guidelines within which the official can justify the act of departure. The act of departure must have some positive value for the legal system. However, determining that departure from the rules is in the best interests of the legal system is an extremely subtle and complex matter.

Examples of legitimated interposition are discussed in detail as they relate to actions by the jury, the police, the judge, and the prosecutor. Concerning the exercise of prosecutorial discretion in the charging decision, it is suggested that the prosecutor's departure from the legal duty of full enforcement and exercise of judgment not to enforce is so pervasively and authoritatively recognized that full enforcement cannot be regarded as a rule at all. It is considered a vital part of the role of the prosecutor to determine what offenses and whom to prosecute, even among probably guilty offenders. To describe this legitimated departure from legal rules, discussions of plea negotiation, charge reduction, and sentence recommendations are presented.

KAPLAN, JOHN. The Prosecutorial Discretion — A Comment. Northwestern Law Review, v. 60, no. 2: 174-193. May-June, 1965.

Professor Kaplan's approach to prosecutorial discretion is a personal one — he served for four years as an Assistant United States Attorney in the Northern District of California and was able to subjectively analyze the charging decision and the motives of the prosecutors who made it. He reviews the procedural aspects of the decision, how the decision was made and by whom, and considers the influence of the Department of Justice and informal office policies.

The major emphasis of the article is on the factors which prosecutors evaluate in making the charging decision. Most prosecutors, he relates, felt it morally wrong to prosecute if they were not personally convinced of the guilt of the accused. The other major consideration was the likelihood of a conviction. The prosecutor was very conscious of his personal "batting average" and felt that a high rate of convictions was necessary to induce guilty pleas and to maintain credibility with the bench and bar, the press, and his boss, the United States Attorney.

Kaplan believes the pressure exerted by investigating agents is often over-emphasized. Agents infrequently attempted to influence the prosecutors' decisions. When they did, however, the prosecutor was usually able to reason them out of their request. In the final analysis, the prosecutor realized that he alone was responsible for the cases he elected to take to trial. Other factors which influenced the prosecutor's decision included the competence of the defense attorney representing the accused, the competence of the investigatory agent who made the arrest, the seriousness of the offense, the harshness of the probable sanction, the availability of non-criminal dispositions, and the appropriateness of state rather than federal prosecution. Numerous examples illustrate Kaplan's observations.

KATZ, LEWIS R., LAWRENCE B. LITWIN and RICHARD H. BAMBERGER. Justice is the Crime: Pretrial Delay in Felony Cases. Cleveland, The Press of Case Western Reserve University, 1972. 386 p.

The seeming maze of pretrial procedures in felony cases has made the defendant's journey between arrest and ultimate disposition a long and involved process. Paying particular attention to the due process goals of the various criminal procedures, the author analyzes specific pretrial procedures, such as arrest, preliminary hearing, indictment, and plea bargaining in light of the delay which each procedure contributes to the whole process. For example, in analyzing the charging process, the author notes that while the initial decision to charge a person with a crime is made by the police and the prosecutor, the charges against him also may be reviewed in a preliminary hearing or by the grand jury. The author recommends that all jurisdictions enact strict time limitations requiring ultimate disposition of felony cases within 60 days, if the defendant is in jail, and 120 days, if he is free on bail. The book contains numerous tables and appendices for reference, including a state-by-state review of basic pretrial criminal procedures.

LAFAVE, WAYNE R. The Prosecutor's Discretion in the United States. The American Journal of Comparative Law, v. 18, no. 3: 532-548. 1970.

The prosecutor's discretion is analyzed by Professor LaFave through the framework of the decision to charge and the practice of plea negotiation. Included in a symposium issue of the American Journal of Comparative Law, which compared the prosecutor's discretion in numerous countries, the article presents the current status of the charging process in the United States, factors that have caused the practice, and criticisms and potential remedies for discretionary abuses.

LaFave contends that the American prosecutor exercises considerable discretion in deciding whether or not to prosecute in a given case as a matter of enforcement policy. Primarily, legislative overcriminalization tends to make a crime out of anything that people are against, without regard to enforceability, changing social concepts, etc. An example is the average jurisdiction's gambling statute that bars all forms of gambling in order to present a statutory facade without loopholes for the professional gambler. Accordingly, neighborhood poker parties and church bingo events are routinely overlooked. Secondly, limitations in available resources force the prosecutor to select only the most flagrant or serious violations of the law for prosecution. Finally, it is contended that there exists a need to individualize justice. Individualized treatment of offenders, based on the circumstances of the particular case, has long been recognized at sentencing and is equally appropriate at the charging stage so as to relieve deserving defendants of even the stigma of prosecution.

In addition to being influenced by these three major factors, prosecutors regularly decline to prosecute in other situations. These include (1) where the victim has expressed a desire that the offender not be prosecuted; (2) where the cost of prosecution would be excessive, given the nature of the offense; (3) where the mere fact of prosecution would, in the prosecutor's judgement, cause undue harm to the offender; (4) where the offender, if not prosecuted, will likely aid in achieving other enforcement goals; and (5) where the harm done by the offender can be corrected without prosecution.

LaFave emphasizes, however, that although it appears the prosecutor possesses only the power to leniently drop cases and refrain from prosecution, he also possesses the power to use obscure statutes against unpopular defendants. The power to be lenient is the power to discriminate. The problem is one of eliminating unnecessary discretion and carefully structuring that which must remain. Several steps that LaFave contends would work toward solution of this problem are reform of the criminal codes, provision of adequate information to the prosecutor for his role as decision-maker, and development of adequate standards and procedures to guide the charging decision. He suggests that at least in serious cases, a decision not to prosecute should be supported by a written statement of reasons and that this statement should become a public record. La Fave indicates that although the reluctance of the judiciary to review the prosecutor's decisions may be an unfortunate state of affairs, no solution seems apparent.

LANGBEIN, JOHN H. Controlling Prosecutorial Discretion in Germany.
University of Chicago Law Review, v. 41, no. 3: 439-467. Spring, 1974.

Major differences distinguish West German and American criminal procedure. In both systems, however, the power to institute criminal proceedings is vested in the prosecutor. In the United States, the prosecutor is granted the unreviewable discretion to decline prosecution in cases of provable criminal guilt. In contrast, the Germans have devised statutory means to structure and regulate the prosecutor's charging function. The study reviews the historical development of the office of the prosecutor in Germany, and outlines German criminal procedure, noting divergences between the American and German systems. The focus of the author's analysis is "Legalitatsprinzip," the German rule of compulsory prosecution. Under this concept, the prosecutor is forbidden to refuse to prosecute in felonies and misdemeanors where there exists sufficient factual basis, or "probable cause" to proceed. A victim can appeal the prosecutor's findings on probable cause to his superiors and ultimately litigate the issue in the courts. This system protects the citizen from an all-powerful prosecutor but, equally important, protects the prosecutor from political intervention and pressures relating to any charging decision. In instances where prosecutors decline to prosecute misdemeanors, citizens can demand departmental review and appeal to the State Minister of Justice. The more rapid and efficient trial procedure of the German system, and lower crime rates, preclude any direct comparison of charging decision controls.

LEONARD, ROBERT F. and JAMES GARBER. Screening of Criminal Cases.
Chicago, National District Attorneys Association, 1972. 80 p.

Screening, in a broad sense, means any removal of a person from the criminal justice system. This material is designed to aid prosecutors who must make the determinations to charge an offender or to use an alternative method. Part one deals with the role and function of the prosecutor and details policy considerations for both Federal and state prosecutors. Michigan law regarding prosecutorial discretion in the charging function is used as an example of the type of statutory guidance often provided. The law allows, for example, both deferred prosecution and pre-prosecution probation for certain alleged offenders in lieu of the traditional route of formal criminal prosecution. A model citizen volunteer program currently in operation in Genesee County, Michigan is also reviewed. Part two presents an overview of present screening procedures and provides detailed recommendations for improvement. It is suggested that any new method of screening should have as its root the elimination of all unnecessary, wasteful, and ineffective steps in the criminal justice process. Additionally, the decision of whether to institute a criminal proceeding should be solely within the discretion of the district attorney. It is also recommended that screening should take place as close to the time of arrest as possible. Other guidelines concern preliminary hearings and the issuance of warrants.

LEZAK, SIDNEY I. The Decision to Charge. In George, B. James and Ira A. Cohen, Eds. The Prosecutor's Sourcebook. v. 2. Practising Law Institute, 1969. p. 421-428.

This is a revision of an outline written and presented by Mr. Lezak, United States Attorney for the District of Oregon, for the Pacific Northwest Prosecutors Seminar, sponsored by the National District Attorneys Association and the Law Enforcement Assistance Administration. Mr. Lezak recognizes the conflict between the "rule of law" and the discretion exercised by the police, prosecutor, and judge. He reconciles this conflict, however, by considering crime control not as a question of law but one of administration, or — quoting Thurmond Arnold — "an arsenal of weapons with which to incarcerate certain persons who are bothering society." The exercise of flexible discretion, it is argued, is central to the effective function of administrative agencies.

Numerous issues dealing with the prosecutor's charging function are outlined and illustrated with examples. These include laws not intended by the legislature to be fully enforced, prosecutors' failure to prosecute because of limited resources, ineffectiveness of traditional prosecution to control certain categories of crimes, discretionary charge reductions, alternatives to charging, and controlling the prosecutors' discretion.

MCINTYRE, DONALD M. A Study of Judicial Dominance of the Charging Process. Journal of Criminal Law, Criminology and Police Science, v. 59, no. 4: 463-490. December, 1968.

In addition to its traditional role of determining probable cause, the preliminary hearing in Chicago serves a second function. The judge conducting the hearing reviews most felony cases initiated by the police and decides which of them should be prosecuted further, which should be dismissed, and which should be dealt with in some manner other than the formal method of prosecution and adjudication. Normally, this initial charging or case screening process is conducted by the prosecutor. In making this charging decision, the judge considers the limitations of the criminal justice system in Chicago, the socioeconomic cultural grouping of the defendant, the strength of the state's case, the existence of a good defense, and various mitigating or aggravating factors. The judge may dismiss the case, 'strike off with leave to reinstate' (SOL), reduce the charge to a misdemeanor, or institute a program of court supervision. Court supervision is an individual program that can include probation, short periods of confinement, or other discretionary actions aimed at the first, young, or non-violent offender. Alternatively, the judge may bind the case over to the grand jury on the original charge. The author notes that in some very specialized cases, the prosecutor may bypass the preliminary hearing and seek a direct indictment by the grand jury.

_____ and DAVID LIPPMAN. Prosecutors and Early Disposition of Felony cases. American Bar Association Journal, v. 56, no. 12: 1154-1159. December, 1970.

Practices and procedures in six major prosecutors' offices are described in this article. The authors emphasize the many variations that exist throughout the country in the prosecutor's role for disposing of felony charges. Variations at the early stages, such as pre-trial screening, are particularly significant.

Major dispositional points in the criminal process, and the methods employed by the prosecutors' offices in Chicago, Los Angeles, Brooklyn, Detroit, Baltimore, and Houston to process criminal cases at these points are presented in tabular form. Procedures used by prosecutors at screening, at preliminary hearings, and before grand juries are also presented. In addition, statistics are provided for the number of felony arrests, subsequent indictments, guilty pleas, nolle prosequis, and jury and non-jury trials.

The authors argue that for the process of prosecution to be the subject of worthwhile reform, it is essential that the diversity in the prosecutor's role and practices as well as the complexity of his function be comprehensively examined in light of the goals of the criminal justice system.

MILLER, FRANK W. Prosecution: The Decision to Charge a Suspect with a Crime.
Boston, Little, Brown and Co., 1969. 366 p.

Because of limited time, money, and personnel, a prosecutor is unable to charge all suspects with appropriate criminal violations. Accordingly, he makes the decision to charge on a selective and sometimes arbitrary basis. This study explores the prosecutor's responsibility and authority to charge, the criteria by which the determination to charge is made, and the degree to which the prosecutor controls what charges will be brought.

Professor Miller's observations are based upon his study of data obtained from the municipal, state, and federal jurisdictions of Michigan, Wisconsin, and Kansas and are supplemented by numerous footnotes, examples, and case references. The steps taken in the decision to charge, the quantum of evidence necessary to support the initial charge, and the role of the trial judge in the charging decision are all analyzed in detail. More than half of the book examines the alternatives facing the prosecutor who makes the decision to charge. The prime questions raised include: where the boundaries of the prosecutor's discretion should end; where those of legislative authority should begin; and how a criminal justice system can maintain flexibility within the prosecution process yet preserve the constitutional guarantee of equal treatment under the law. Although originally published in 1969, this study remains the major work in this area and will be useful to those examining the prosecutor's discretionary decision to charge.

MILLS, RICHARD. The Prosecutor: Charging and Bargaining. University of Illinois Law Forum, v. 1966, no. 3: 511-522. Fall, 1966.

Judge Mills considers the prosecutor's charging function as an element of a continuous "bargaining" process. After the primary determination that the defendant is guilty of a crime, the prosecution bargains with the defendant and his attorney concerning the crime charged, the number of charges, and the possibility of non-criminal disposition. In this exercise, the prosecutor considers the availability and credibility of witnesses, the amount of evidence, the offender's criminal record, the amount of injury, relationships between the victim and the defendant, and any mitigating or aggravating factors. The decision requires a great deal of discretion on the part of the prosecutor, who must act in the interest of fairness to both the people and the defendant.

In the case of juvenile offenders, the prosecutor often considers alternatives to prosecution. It is common, for example, for a prosecutor to require that the youth enlist in the armed forces in return for a decision not to prosecute. In this way, the youth avoids a criminal record, lives in a disciplinary atmosphere, and serves his country.

Mills examines the interaction of the prosecutor with the grand jury. He rejects the common notion that the grand jury is a "rubber stamp" for the prosecutor, and argues that grand jurors are for the most part intelligent, reasonable, forth-right individuals who are capable of perceiving attempts on the part of the prosecutor to deceive them. The threat of grand jury indictment is also useful in encouraging guilty pleas from suspects.

Conferences with the court are useful in many situations. The court is informed not only of the agreements in successfully negotiated dispositions, but also of the background of the offense and offender. In instances when plea negotiations have broken down, court conferences may be helpful. Although some judges feel that meeting pretrial with the parties in a criminal matter is improper, Judge Mills contends that a pretrial conference can be extremely helpful to both prosecution and defense. A criminal matter may be completely settled as a result of the conference. If, however, an agreement is not reached, only a small amount of time is lost.

The prosecutor's role in sentencing is discussed. Judge Mills argues that the prosecutor must consider the same traditional factors when recommending a sentence that judges consider, namely, punishment, rehabilitation, and deterrence. In conclusion, it is argued that regardless of how the public views the prosecutor's bargaining function, it is a valid exercise of discretion and few allow partisan politics or their conviction records to effect the actions.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION. Prosecutor's Screening Function - Case Evaluation and Control. Chicago, 1973. 92 p.

This manual provides an introduction to the screening function and develops practical guidelines that can effectively reduce the number of cases that continue along the expensive and time consuming route to trial. Screening at the earliest point in the criminal process reduces police investigative work on cases that surely would be dropped later and helps strengthen cases that proceed to trial. The manual stresses that the screening process should be given high priority in the prosecution structure. The importance of the function demands that it be staffed by senior trial personnel and not entrusted to inexperienced prosecutors without the expertise to confidently make the proper decisions at this early stage of the judicial process. The volume includes an office design for a screening operation, suggested records and information that would be helpful to the prosecutor who screens accused persons, and techniques for evaluating the overall program. The manual

also presents formal case evaluation techniques based on a theory of broad prosecutorial discretion to guide the prosecutor in the actual decision-making process. It is supplemented with numerous forms now in use and evaluative data from projects in 15 police departments from all over the country.

NEUBAUER, DAVID W. Criminal Justice in Middle America. Morristown, N. J., General Learning Press, 1974. 320 p.

After a citizen's arrest for violating the law, numerous crucial decisions are made by those involved in the criminal justice system. This is a study of decision making in Prairie City, a fictitious name given to a medium-sized industrial town in Illinois. Prairie City is not approached as a unique place. Instead, the experiences of Prairie City are described in a manner that lends insight into the general administration of justice in the United States.

Chapter Six investigates the charging decision in Prairie City. The discussion focuses on four questions: (1) Who controls the charging decision? (2) What standards does the prosecutor use in deciding to file charges? (3) What are the consequences of the charging decision? and (4) Has the prosecutor's handling of the charging decision eclipsed the traditional functions of the preliminary hearing and the grand jury?

The prosecutor dominates the charging process in Prairie City. He exercises his discretion with virtually no pressure from the courts or police to act in a certain manner. In making the charging decision, the study finds, the prosecutor's basic consideration is the strength of his case. Although in other jurisdictions this factor is one of several considered by the prosecutor, in Prairie City it is clearly the dominant one.

The author examines the charging discretion exercised by the local prosecutors and identifies two major discretionary considerations: the dangerousness of the defendant and the seriousness of the event. Both can affect the prosecutor's decision to charge a more or less serious offense. The study concludes, however, that relatively little discretion is used in felony cases.

All adult nontraffic arrests for January 1970 were analyzed to show the effect of prosecution screening on the original police booking charge. Finally, the effect of pre-charge screening on later criminal justice processes is analyzed, and the author concludes that elimination of weak or inappropriate cases immediately after arrest does, to a certain extent, minimize the importance of the preliminary hearing and grand jury in the Prairie City criminal justice system.

Nonfeasance: A Threat to the Prosecutor's Discretion. Indiana Law Journal
v. 30, no. 1: 74-86. Fall, 1954.

Prosecutorial nonfeasance, or failure to act where a duty to act exists, can subvert the entire criminal justice process. Within the context of broad prosecutorial discretion to bring criminal charges against a suspected individual, the existence of a duty to act is not clear. The author discusses the advantages and disadvantages of discretion in the criminal law, and concludes that in balance, the flexibility afforded by discretion is more desirable than the rigidity of mandatory action.

The discretionary decision to charge could theoretically rest with one of four actors in the criminal justice system: the policeman, the grand jury, the prosecutor, or the judge. Should this power be lodged in the policeman, perhaps the disadvantages that arise from political influence could be avoided. Others, however, would ensue. Since the police decision would have to be made almost immediately after apprehension, the benefit of another's opinion would be lost. The author also suggests that the policeman's daily dealings with the criminal element of society and his lack of legal education make him an unsuitable choice for this decision. The grand jury is equally unsuited to make this decision. Laymen are not as cognizant of the many factors inherent in the charging decision as are criminal justice professionals. Realistically, the only possible contenders for the grant of discretion are the judge and the prosecutor. Although the judge's professional qualifications usually equal or surpass the prosecutor's, and where the judge is appointed rather than elected, political influences are not as significant as with the elected prosecutor; other considerations indicate that the discretion should remain vested in the prosecutor. If the judge were to decide in favor of prosecution, a prejudice in favor of this decision might surface during the trial, where total objectivity is essential. Also, if both the charging and sentencing decisions were vested in the same actor, certain checks and balances in the present system would be lost. The prosecutor is educated both generally and in the law. He is responsive to his community and his trial experience makes him uniquely suited to judge the sufficiency of the evidence.

The author concludes that as a result of these factors, permitting the prosecutor to exercise general discretion while limiting that exercised by others is the most satisfactory system. The extent of this discretion is analyzed, and notwithstanding statutes that appear to command prosecutorial action, the study finds it to be exceedingly broad. Sanctions for abuse of discretion - prosecutorial malfeasance, misfeasance, and nonfeasance - include mandamus, disbarment, impeachment, and criminal indictment. These sanctions have proven ineffective in controlling discretion. Mandamus is not available where the duty is discretionary rather than ministerial. With only limited exceptions, corruption is the necessary basis for criminal prosecution for official misconduct. Impeachment and disbarment apply only to the grossest abuses of discretion. For the incompetent and ineffective, but honest prosecutor, the author concludes, the remedy lies with the voters.

PEAT, MARWICK, MITCHELL AND CO. Study of the Prosecutors' Offices in the State of Texas. Dallas, 1971. 1 v. (various pagings).

Peat, Marwick, Mitchell and Company was engaged to assist the Texas Criminal Justice Council in formulating plans to assist the state's prosecutors. The firm reviewed and analyzed 17 prosecutors' offices in order to develop recommendations that could assist in optimizing the efficient handling of the criminal case loads. Included in their report is an analysis of the current charging process as applied to typical felonies and misdemeanors. The consultants found that in many jurisdictions, prosecutors screen offense reports before charges are formally filed with the court. In other jurisdictions because of logistical problems or custom, screening by prosecutors occurs after cases have been filed with the court by law enforcement officers. Peat, Marwick, and Mitchell recommended that prosecutors screen all cases prior to filing with the court. This procedural change would allow prosecutors to obtain additional information for trial preparation as early as possible, reduce the number of dismissals after filing and eliminate unnecessary clerical work, encourage closer coordination between law enforcement personnel and prosecutors, and reduce the workload of the justice courts, county and district clerks' offices, and the prosecutors' offices.

Prosecutorial Discretion in the Duplicative Statutes Setting. University of Colorado Law Review, v. 42, no. 4: 455-466. March, 1971.

"When there are two statutes which prohibit the same behavior, when one of the two statutes imposes a greater sanction for such behavior, and when there are no more elements of proof necessary to sustain a conviction under the harsher statute, a prosecutor who is free to invoke either statute against a defendant is in a position to create an arbitrary or discriminatory classification of defendants." The author asserts that this proposition clearly raises equal protection questions that must be faced by the courts. He recognizes, however, that courts have been reluctant to overturn the prosecutor's discretion or invalidate penal statutes on the basis of equal protection. A method of analysis is presented in this article that would enable courts faced with a duplicative statute situation to examine the facts and rule consistently with constitutional equal protection doctrine. The first step in the proposed test is to determine if the statutes are in fact duplicative. If the court finds the statutes duplicative, then it should ask whether any method of statutory construction will resolve the conflict, i. e., by implicit repeal of the earlier statute. The author suggests that should the court find that no rule of statutory construction will solve the duplication, the court will be forced to conclude that empowering a prosecuting attorney to unilaterally choose one of two or more duplicative statutes is constitutionally impermissible.

Prosecutorial Discretion in the Initiation of Criminal Complaints. Southern California Law Review, v. 42, no. 3: 519-545. Spring, 1969.

The commentator combines the results of a survey of prosecutors, an analytical discussion of prosecutorial discretion, and an examination of case law and existing procedural safeguards in this critique of current discretionary prosecutorial practices. To determine the attitudes of prosecutors about the charging process, questionnaires were distributed to deputy district attorneys in the Los Angeles County District Attorney's Office. The responses showed that prosecutors often differ on fundamental charging policies. Informal office policies developed which controlled the charging decision, such as a reluctance to prosecute inter-family assaults, neighborhood squabbles, and non-commercial gambling. The common justification for non-prosecution was the improbability of a conviction or the belief that the relevant social goals could be achieved without the aid of the criminal process. The commentator notes that a possible negative result from this type of prosecutorial policy is a lack of law enforcement in socioeconomically disadvantaged neighborhoods.

Prosecutors in the survey were reluctant to admit that the suspects' personal characteristics affected their charging decisions. This result notwithstanding, the author hypothesized that such personal characteristics as occupation, prior record, and intelligence are the most important variables in the charging equation. Also considered in the decision is the credibility and community status of the victim and the public reaction to the criminal act. These considerations are criticized as being not always concurrent with the interest of justice. It is argued that charges are often brought to aid police investigations, to aid plea bargaining, and to mollify law enforcement pressures.

Judicial reluctance to interfere with the administrative policies and discretion of law enforcement officials and prosecutors is isolated as a significant obstacle to providing safeguards for accused individuals from decisions often made arbitrarily by prosecutors who possess only incomplete and imprecise information. The commentator suggests that the causes of this broad, prosecutorial charging discretion include the ambiguity of the substantive criminal law, the failure of legislative overgeneralization, and penal statutes that prescribe unrealistic moral idealism. He concludes that since equal protection and other constitutional protections are virtually unavailable in this area, unnecessary prosecutorial discretion should be eliminated, and where elimination is impossible, enforcement policy should be formalized, published, and subject to public and judicial review.

Prosecutorial Discretion — A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse. DePaul Law Review, v. 21, no. 2: 485-518. Winter, 1971.

The limits of the prosecutor's discretion are somewhat nebulous and generally undefined. He has the authority to enforce the law by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, and 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. Since this type of broad discretion implies that differences of opinion could result in widely divergent decisions, a great potential for abuse exists.

The article examines the sources of the prosecutor's discretion and finds that this power is derived from the implication of statutes, the common law, ambiguous and inconsistent criminal statutes, and intentional legislative overcriminalization. The multitude of factors involved in the decision to prosecute are reviewed, and it is emphasized that although some, such as the sufficiency of the admissible evidence, are quite legitimate, others, such as the competence of defense counsel, are clearly improper.

Challenging the prosecutor's discretion is rarely successful. Defenses and remedies for the wrongful or abusive exercise of discretion are analyzed in detail. Defenses are categorized as direct or collateral. Direct defenses, based on equal protection and due process theories, rarely succeed because of problems of evidence and proof. The relevance of the prosecutor's motive and the concomitant virtual impossibility of its proof are considered. The author concludes that direct defense is an ineffective tool against discriminatory prosecution unless perhaps the selective prosecution pattern reveals clear-cut racial discrimination. Collateral defenses such as injunction, writ of prohibition, writ of mandamus, and writ of habeas corpus are examined and shown to be of little efficacy in controlling abused discretion. The author suggests that a re-evaluation of prosecutorial discretion and innovative methods of control is clearly in order.

Prosecutor's Discretion. University of Pennsylvania Law Review, v. 103, no. 8: 1057-1087. June, 1955.

This article summarizes an operational study of the Philadelphia District Attorney's Office conducted in the early 1950's. The focus, rather than on the prosecutor's decision to charge a suspect with a crime, is on the flow of the criminal complaint through the grand jury, preliminary hearing, and other pretrial stages. In addition, the effect on that flow of the prosecutor's discretionary powers, including the power to enter a nolle prosequi, is examined.

The author found that within the statutory framework considered, the application of the criminal law to individual defendants is subject to a vast amount of discretion in the prosecutor to effect a flexible system of prosecution. To protect the accused, some immediate restrictions are imposed. The magistrate and the grand jury function as some protection against unfounded accusations and overzealous prosecutors. There are statutory remedies to protect against delays in accusation or trial and safeguards against the malicious and inefficient prosecutor. On the other hand, to protect the community's interest in law enforcement, it has been deemed expedient to subject the power of nolle prosequi to court control and to provide for the removal of prosecutors who are guilty of flagrant violations of duty, rather than force prosecution by a mandamus proceeding. However, where immediate relief is needed from the prosecutor's neglect of duty, the attorney general may have the authority to force immediate action.

The efficacy of many of these restrictions, the author concludes, is at best open to question. The magisterial system and the grand jury in many cases may well be controlled by the prosecutor, and court approval of the nolle prosequi may be merely perfunctory. Even in the case of a gross abuse of discretion, removal of the prosecutor may be extremely difficult because of local political pressures and the inertia of state governing bodies. Although the attorney general could provide immediate relief in many states, the failure to impose duties in the exercise of this power, the fact that criminal matters are a negligible part of his work, and political pressures flowing from his need for re-election make the exercise of this power a rare occasion.

Public interest in the administration of the criminal law, rather than further legislation, is needed to insure that the grand jury and magisterial systems operate efficiently. Similarly, it is argued, since the nolle prosequi is such an essential tool of prosecution, it would be unwise to legislate additional restrictions on its use. On the other hand, it might be beneficial to consider curing the defects and inefficiencies of the sanctions of removal and the powers of the attorney general. Removal on petition to the highest court of the state and an appointed attorney general would reduce the impediment of political pressure. Imposing duties on the attorney general in the exercise of his powers over the local prosecutor and extending his activities as a supervisor of the administration of the criminal law would reduce the barrier of administrative inertia. Although the prosecutor's discretion is essential, the reform measures the author suggests might make existing sanctions against its abuse more effective.

RABIN, ROBERT L. Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion. Stanford Law Review, v. 24, no. 8: 1036-1091. June, 1972

The point of intersection between investigative agency enforcement policy and prosecutory agency enforcement — a critical juncture in the administrative process — is explored in detail in this study. Specifically, the author examines the exercise of discretion by the Department of Justice in handling referrals for criminal prosecution from federal agencies and departments. Virtually all federal agencies authorized to mete out criminal penalties are dependent upon the Justice Department for prosecution. Thus, criminal enforcement of federal regulatory programs is divided functionally: investigative responsibility is vested in the agency charged with implementation of the regulatory program, and prosecutorial responsibility is vested in the Justice Department. A matter is transmitted to the Justice Department by referral from the agency. It is the handling of these referrals that constitutes the subject of this study. The author specifies the variables that shape the selective enforcement policy of the Justice Department in agency criminal referral cases. This policy turns upon two critical discretionary decisions: the initial decision to prosecute and the decision whether to settle the case through plea bargaining. While the factors that determine plea-bargaining strategy are considered, principal emphasis is placed upon the exercise of discretion to prosecute. In addition to analysis of the empirical data, the author offers proposals to safeguard the abuse of discretion. These proposals include a complete monitoring system to facilitate internal review of the discretionary decisions of U. S. Attorneys by the Department of Justice.

Reviewability of Prosecutorial Discretion: Failure to Prosecute. Columbia Law Review, v. 75, no. 1: 130-161. January, 1975.

The reluctance of courts to review prosecutors' decisions not to prosecute is analyzed in the context of current legal authority regarding judicial review of administrative decisions. The author contends that although it is not an accepted legal principle that the prosecutor's discretion is reviewable, both legal and public policy arguments to that effect can and should be made.

In examining bases for jurisdiction to review, the author considers the specific statutory provisions for review in the enabling legislation of administrative agencies, general statutory review via the Administrative Procedure Act, and non-statutory review as authorized by "federal question" jurisdiction and the Mandamus and Venue Act of 1962. Of the three, jurisdiction authorized by the Administrative Procedure Act appears to be the strongest basis for judicial review of the prosecutor's discretion.

Barriers to judicial review are presented. They include the separation of powers doctrine, inability of lower court records to show the reasons for a prosecutor's decision, and the legal requirement that to be reviewable the decisions must be formal, and final agency rulings. Policy arguments against review of discretion, such as the need for prosecutorial secrecy, the need to deter potential offenders and protect the accused, the lack of prosecutorial resources, and administrative effectiveness are also offered. In each instance, the author meets the argument with a rebuttal. He asserts that the legal and theoretical obstacles to judicial review of decisions not to prosecute are not compelling, and the technical and policy obstacles could be overcome by imaginative courts and litigants. Policies against the review of prosecutorial discretion should be given effect whenever they are justified. They should, however, cause only a restricted scope of review rather than an absolute bar to judicial questioning.

The applicability of the Administrative Procedure Act to prosecutorial decisions in criminal matters is analyzed in detail. The author concludes that judicial review of decisions not to prosecute is justified by resorting to general principles of administrative law, even though the courts have not readily seized the opportunity to scrutinize the exercise of prosecutorial discretion. He concedes that as a practical matter, it is more difficult to secure review of failure to institute criminal prosecutions than to obtain enforcement of civil laws, and that in all likelihood, courts will continue to be hostile toward requests for review in relation to criminal matters.

SCHWARTZ, L. B. Federal Criminal Jurisdiction and the Prosecutor's Discretion. Law and Contemporary Problems, v: 13, no. 1: 64-87. Winter, 1948.

Although Professor Schwartz's study was written in 1948, it remains a classic today. He argues that the jurisdiction of the federal courts is often employed by federal prosecutors when a more proper action would be referral of the matter to state or local officials for their consideration.

Federal criminal jurisdiction is employed in three ways: (1) to punish anti-social conduct of distinctively, if not exclusively, federal concern; (2) to punish conduct of local concern, with which local enforcement authorities are unable or unwilling to cope; and (3) to secure compliance with federal administrative regulations. Schwartz contends that federal criminal jurisdiction is an institution well adapted to the first use, but that it has been employed indiscriminately in the second category, and that a new federal court of inferior jurisdiction is needed to handle the considerable volume of petty offenses in category three.

The strongest case for the exercise of criminal jurisdiction by the federal courts can be made for the class of offenses which undermine the court itself or the governmental authority that the court represents. In this category are the crimes of treason, espionage, contempt of court, or bribery of federal officials. Here, important values concerning the prestige of the central authority are involved. Moreover, there are valid administrative considerations which favor a separate federal tribunal when dealing with these prosecutions. Despite these factors, it does not follow that all conduct which adversely affects the federal organization must be dealt with in the federal courts.

There is even more reason for restraint in creating and exercising federal criminal jurisdiction auxiliary to state law enforcement. To enlist federal power in the battle against obscenity, lotteries, theft, and prostitution does not protect federal prestige but hazards it. In addition to encroaching on matters which are of predominantly local interest, different treatment often afforded defendants in the federal system suggests constitutional infirmities.

Professor Schwartz recommends criteria for limiting the number of federal criminal prosecutions when that action is merely auxiliary to state law enforcement. He suggests that federal action is justified in the presence of one or more of the following circumstances: (1) when the states are unable or unwilling to act; (2) when the jurisdictional feature, e. g., use of the mails, is not merely incidental or accidental to the offense, but an important ingredient of its success; (3) when, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) when the criminal operation extends into a number of states, transcending the local interests of any one; or (5) when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.

Congress has extended the basis of federal jurisdiction to the extent that little can escape the charging power of the overzealous federal prosecutor. Attention and controversy tend to focus on the jurisdictional problem rather than the substantive issues of criminality. Schwartz contends that penal code revision should define federal crimes in terms of significant criminal conduct, and the jurisdictional features necessary to give federal authorities the power to act should be brought together in a comprehensive definition of some phrase like "within the federal jurisdiction."

The study suggests four methods by which federal criminal jurisdiction can become the instrument of an intelligent national law enforcement policy: (1) the evolution of a broader, more uniform jurisdictional formula for federal criminal statutes, (2) the expansion of the power of the United States Commissioners to try petty offenses, (3) an express authorization by Congress of a general policy of remitting local offenders to local authorities, and (4) articulation by the Department of Justice of a complete set of standards for the exercise of this discretion to withhold federal prosecution.

U. S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION. National Advisory Commission on Criminal Justice Standards and Goals. Courts. Washington, Government Printing Office, 1973. 379 p.

A major restructuring and streamlining of procedures and practices in processing criminal cases at state and local levels is proposed by the National Advisory Commission on Criminal Justice Standards and Goals. The proposals of the commission appear in the form of specific standards and recommendations — almost 100 in all — that spell out in detail where, why, how, and what improvements can and should be made in the judicial segment of the criminal justice system. Courts is a reference work for the practitioner — judge, court administrator, prosecutor, and defender — as well as the interested layman. The commission argues that the problems that keep the criminal court system from performing its functions are inconsistency in the processing of criminal defendants, uncertainty concerning results obtained, unacceptable delays, and alienation of the community.

The commission's first priority is to devise standards for attaining speed and efficiency in the pretrial and trial processes and prompt finality in appellate proceedings. The second priority is the upgrading of defense and prosecution functions, and the third priority is the assurance of a high quality in the judiciary. To expedite pretrial procedures, the commission suggests that the prosecutor should screen all criminal cases coming before him and divert from the system all cases which do not require further processing by the prosecutor. Among commission recommendations are elimination of all but the investigative function of the grand jury, elimination of formal arraignment, unification of all courts within each state, and the upgrading of criminal court personnel.

U. S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION. National Institute of Law Enforcement and Criminal Justice. Prescriptive Package: Case Screening and Selected Case Processing in Prosecutors' Offices. By W. Jay Merrill and others. Washington, Government Printing Office, 1973. 46 p.

Chapter I of this study introduces the rationale for early case screening by prosecutors, suggests that broad prosecutorial discretion in the decision to charge is its legal basis, and outlines the considerations and procedures for implementation of the practice. Chapter II discusses special processing units (such as the Washington, D. C. U. S. Attorney's Office's Major Violators Unit) that are designed to select cases that require extra investigation or attention and assign these priority cases to individual prosecutors who are responsible for preparing them for trial. Included in the discussion are suggested policies and details of implementation of the system.

Two types of early case screening by prosecutors are discussed: intake screening in the prosecutor's office and case screening in the police stationhouse at the time of booking. Many of the same fundamental principles and procedural variations apply to each of these concepts. For example, the study argues that screening performed at the earliest possible opportunity conserves maximum resources for both the government and the defense. Equally important, screening responsibilities should be given to a separate unit adequately staffed with prosecutors, preferably those with trial and appellate experience. Finally, the process should follow established departmental guidelines, and each charging decision should be reviewed by a senior assistant prosecutor to check for errors and to ensure that the guidelines are being followed.

Intake screening in the prosecutor's office can adopt at least three formats. The most basic screening procedure consists simply of a review of the crime report and evaluation of the charges prepared by the police, without any follow-up interview with investigators or witnesses. This method of screening does not provide the prosecutor with an opportunity to evaluate the case background, witness quality, or missing details in the police report.

A conference between the arresting officer or detective and an assistant prosecutor is the second type of intake screening procedure. The charging decision is based on the facts as presented by the police. The prosecutor also can ascertain the police officer's impression of the victim and witnesses.

The third type of intake screening procedure is the most thorough and independent evaluation of police-initiated cases. The prosecutor personally interviews the victim, witnesses, the arresting officer, as well as the defendant before making his decision to prosecute. Of the three types of intake screening, this procedure provides the reviewing assistant with the most information to make a reasoned decision, but also requires the greatest expenditure of time and resources.

A second approach discussed is the implementation of screening programs in police stationhouses. Assistant prosecutors are assigned to police stations to screen cases at the earliest feasible stage of the criminal process and to provide police with readily available legal advice. The prosecutor can evaluate evidence, suggest further investigations, or assist in drafting arrest or search warrants in addition to his normal charging functions.

In implementing stationhouse screening procedures, the cooperation of the police is essential. Since assistant prosecutors would be the guests of the police, officials must be convinced not only that screening is essential but that it is to their advantage to base the process in their stationhouse.

In choosing between the two methods of screening, pre-existing court and police procedures must be examined. Since both prosecutor's office and stationhouse screening yield similar results, the method that is the least disruptive would probably be the best. For example, in jurisdictions where the initial court proceeding is in the same building that houses the prosecutor's offices and the arresting officer and other witnesses are required to attend that proceeding, intake screening in the prosecutor's office would be the most desirable approach. Conversely, if the initial court appearance is held at a location distant from the prosecutor's office and the arresting officer and witnesses are not required to attend, stationhouse screening may be the more acceptable option. The number of police stationhouses that would require a prosecutor's services is also a factor to be considered.

U. S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION. National Institute of Law Enforcement and Criminal Justice. Prosecution of Adult Felony Defendants in Los Angeles County - A Policy Perspective. By Peter W. Greenwood and others. Washington, Government Printing Office, 1973. 174 p.

This research project was undertaken as a demonstration of the value of empirical analysis and as a description of the functioning of the criminal justice process in Los Angeles County. Findings and recommendations resulting from this research concentrate on the district attorney, since the work was done mainly for his agency. Most of the conclusions drawn from analysis of the data are not readily explicable and resulted in the principal recommendation to seek answers through additional research. The most important conclusion is that there are serious doubts concerning the consistency or fairness with which defendants are treated in Los Angeles County. Findings which lead to that conclusion include (1) the existence of wide disparities among police departments, district attorney's offices, and courts in the way in which similar offenses are handled; (2) forceful incentives are offered by the system to plead guilty, since defendants who plead not guilty receive harsher sentences on conviction; and (3) defendants who await trial in jail have less chance of being dismissed or acquitted. The report also finds that no objective performance standards exist by which law enforcement agencies can rate the work of their employees, nor are there sufficient data systems available that provide for a systematic diagnosis of problems and formulation of policies by the district attorney's office.

VANCE, CAROL S. The Prosecutor's Discretion: A Statement of Policy of the District Attorney of Harris County. Houston, District Attorney, Harris County, Texas, 1974. 39 p.

Historically, the prosecuting attorney has been vested with broad discretionary powers that are essential to the orderly and effective administration of justice. These powers include decisions on the initiation and termination of prosecution, and recommendations to the court concerning sentencing or reduction of charges. They are some of the most basic and fundamental decisions made within the criminal justice system. Under Texas law, these broad discretionary powers are vested in the elected prosecuting attorney. Thus, the prosecuting attorney has the responsibility to set up general guidelines, policies, and supervisory control to ensure that the laws of the state are constitutionally upheld, that all persons accused of a particular crime under the same facts and circumstances are treated equally, that prosecutorial resources are effectively utilized, and that practical and understandable guidelines allow the individual prosecutor to handle his assignments in a professional and lawyerlike manner.

The guidelines published in this statement are the official policy of the Harris County Office of the District Attorney. A primary section considers the initial decision to charge, who shall be responsible for this decision, and what factors may properly be considered. Guidelines for bail recommendations are presented, as is the District Attorney's position on release on personal recognizance. Plea negotiation policy is presented together with listed criteria which may properly be considered by the negotiating prosecutor. Prosecutor conduct during negotiations and supervisory control of negotiations also are discussed. The final sections develop office policy for terminating prosecutions and reinstating criminal charges. Special prosecutorial problems, such as extradition, use of special prosecutors, commencement of formal investigations, certification of juveniles to be tried as adults, issuance of subpoenas and warrants are considered in relationship to stated policies.

WATTS, FREDERICK and CHARLES R. WORK. Developing an Automated Information System for the Prosecutor. American Criminal Law Quarterly, v. 9, no. 1; 164-169. Fall, 1970.

This document discusses the key features of the Prosecutor Management Information System (PROMIS), a comprehensive automated information system designed for use by the U. S. Attorney in the District of Columbia to facilitate case processing. The system, implemented in 1971, integrates the operational demands placed upon the prosecutor with modern statistical analysis and computer information,

storage, and retrieval. It provides a priority case listing which classifies cases on a weighted system, points out specific prosecutory problems in each case, and aids in case scheduling. The system automatically notifies government witnesses of appearance times, which helps resolve witness scheduling conflicts. The system also provides information on the whole prosecutory process. The prosecutor making the charging decision records vital information by checking a list of items and thereby captures data which is used to evaluate the seriousness of the offense and the offender's criminal history. This helps him make a subjective estimate of the probability of successful prosecution. When PROMIS is used in conjunction with police and corrections information systems, it will have a management evaluation and research capability for the total criminal justice process in the District of Columbia.

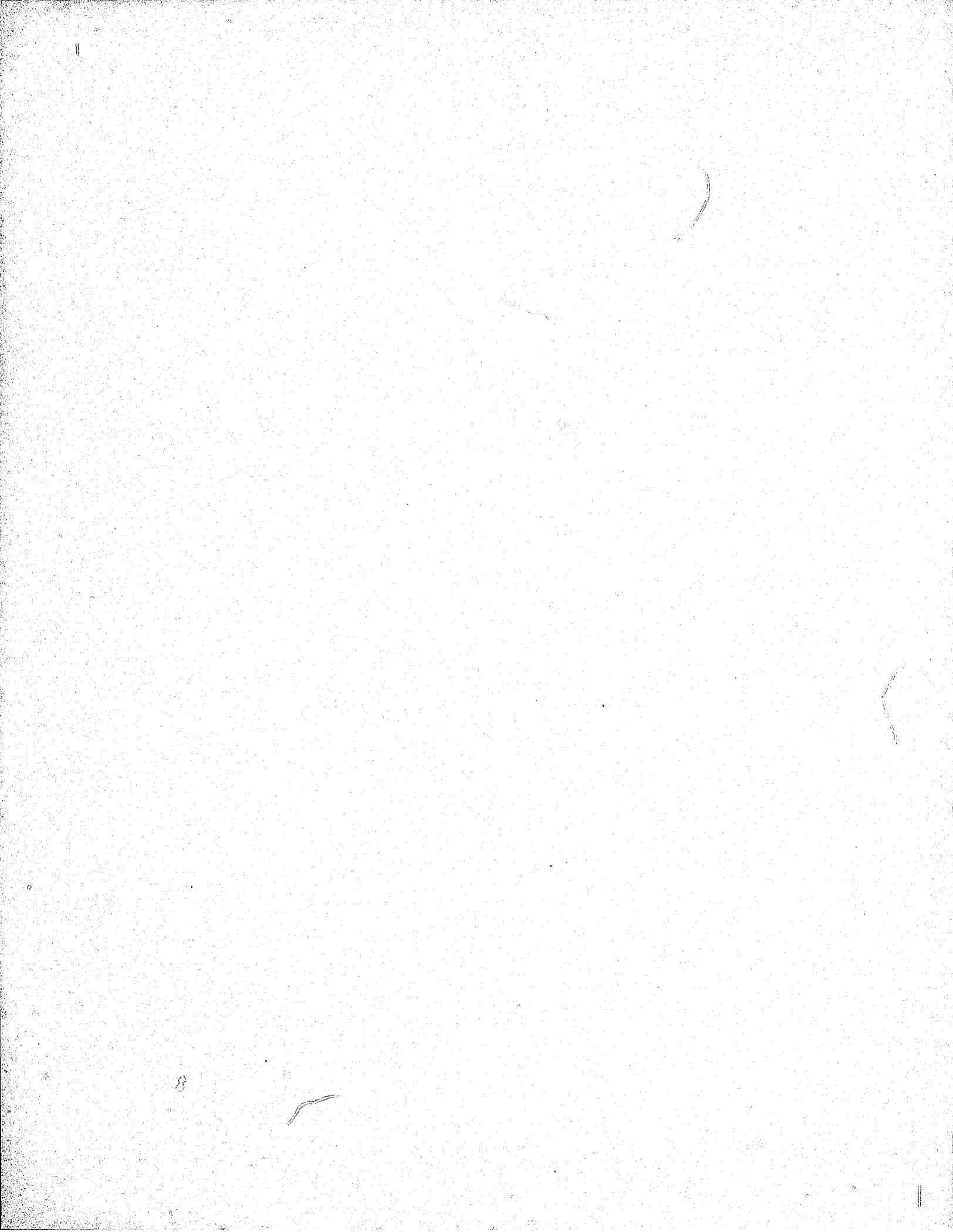
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