

# An Analysis of American Prosecutors' Power of Selective Prosecution

## Discussion Based on Cases and Rules

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**Abstract**—The selective prosecution system of the United States means that when American prosecutors perform their prosecution functions, as long as not for bribery, discrimination and other reasons prohibited by law, for cases meeting the prosecution condition, they can make decisions to prosecute, not to prosecute, withdraw prosecution and prosecute with different crimes based on discretion. Compared with the extensive prosecution options enjoyed by American prosecutors, Chinese prosecutors have only limited non-prosecution discretion, but no power to choose prosecution. Therefore, in view of the functions of the selective prosecution system such as protecting interests, balancing interests and restricting power, the author seeks their referential part to relief the real dilemma in the field of prosecution in China through analysis of the historical evolution and the main content of the power of selective prosecution of American prosecutors.

**Keywords**—American prosecutors; the power of selective prosecution; historical evolution; consideration factor

### I. INTRODUCTION

The American prosecutor's power of selective prosecution means that "not all crimes must be prosecuted to the court for trial; the prosecutors can choose to prosecute part of the crimes while tolerating the other crimes based on the specific circumstances of the case and the relevant social policy."<sup>1</sup> The discussions on American prosecutors' discretionary power of prosecuting at home mostly focus on the plea bargaining, while the power of selective prosecution is rarely mentioned, however, in the judicial practice, American prosecutors make full use of their power of selective prosecution, which greatly improves the efficiency of litigation, and achieves good results in interests protection, balance of interests and power constraints. According to this, this paper analyzes the American prosecutors' power of selective prosecution according to the general idea of "research of the historical data - clarification of contents - enlightenment and reference", which will help us to further understand and draw lessons from this system.

### II. EMERGENCE AND DEVELOPMENT OF THE POWER OF SELECTIVE PROSECUTION

#### A. Source: The Nolle Prosequi

There is no definite conclusion about where the prosecutor's power of selective prosecution came from in American Academic Circle. One view takes the power of selective prosecution as a product of power separation. The grand justice Scalia once said in the case of *Morrison v. Olson*, "The investigation and prosecution of the crime are the essence of the executive power and the key for executive authorities to guarantee the proper enforcement of national laws."<sup>2</sup> Another view thinks that the prosecutor's power of selective prosecution followed The Nolle Prosequi of UK and gradually developed.

On this issue, we believe that the second view is more convincing. On the one hand, it has been a long time since the establishment of the Chief Prosecutor by "Judicial Act" of 1789, which has been appointed by the President and is responsible for him/her. The District Attorney does not report to the Chief Prosecutor, and the general citizens and other government departments are actively involved in the prosecution of criminal offenses. During this period, the prosecutors did not have any power to select prosecution. It can be seen that the separation of the three powers did not give birth to American prosecutors' power of selective prosecution. On the other hand, the history of the power of selective prosecution following The Nolle Prosequi of UK can be found. In the case of *United States v. Robbins* in 1799, Marshall made it clear that the prosecutor's decision to withdraw the litigation was not an intervention of administrative power in the judiciary power, but that the prosecutors exercising their unquestionable discretion.<sup>3</sup> Marshall's speech linked The Nolle Prosequi and the power of selective prosecution for the first time, which has been considered the beginning of American prosecutors' power of selective prosecution, although there was a great gap between the modern senses of prosecutors' power of selective prosecution.

<sup>1</sup> He Jiahong: "Selective prosecution and plea bargaining "," Procuratorial Daily ", August 21, 2001, fifth edition.

<sup>2</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>3</sup> *United States v. Robbins*, 27 F. Cas. 825, 827—31 (D.C.S.C. 1799).

### B. Establishment: the Expansion of Power Subject and Power Scope

At the beginning of The Nolle Prosequi in the United States, the power was only enjoyed by the chief prosecutor, that is, the Minister of Justice alone. With the development of judicial practice, in the case of *Virginiav. Dulany* in 1802, the court suggested that without the consent of American prosecutors, the court had no right to make any decision to withdraw the litigation.<sup>4</sup> In the subsequent case of *Commonwealthv.Wheeler*, the court clarified that the district attorney had the power to withdraw litigation and the decision to withdraw the litigation made by district attorney was not subject to judicial review.<sup>5</sup> Since then, the power subject of withdrawing litigation extended to all prosecutors from the chief prosecutor, which was also an important symbol for development of withdrawal of litigation to selective prosecution.

Through The Nolle Prosequi, American prosecutors master the power to unilaterally withdraw the case, but do not have the power to choose whether to bring a lawsuit. However, through judicial practice, it is often found that there is no realistic possibility for the prosecutors to make any decision for prosecution against their will, since the prosecutors may withdraw the litigation after the prosecution and their decision to withdraw the litigation is not subject to judicial review. Thus, in the case of *UnitedStatesv. Hill* in 1809, the grand justice Marshall made it clear that "the court should" let go "those litigation that prosecutors think not proper to save the time that may be wasted for the court to investigate whether it has jurisdiction to such litigation."<sup>6</sup> Since then, American prosecutors have the right to choose whether to prosecute in fact.

### C. Development: Power Limitation and Power Improvement

In the development over centuries, American prosecutors' power of selective prosecution continues to expand, and the independence continued to increase. Former US Attorney General Robert Jackson pointed out that there was a great risk of abuse of public discretion in the field of selective prosecution. In this regard, the United States Congress amended the rules of criminal litigation in 1944 to regulate the application of the power of selective prosecution, and passed Paragraph I of Article 48 of the "Federal Code", making it clear the court has the power for judicial review of prosecutors' power of selective prosecution. This provision changed the case law at that time, and included the power of selective prosecution as a procuratorate discretionary power subject to judicial review.

## III. THE CONTENT OF THE POWER OF SELECTIVE PROSECUTION

With development over the past three centuries, American prosecutors' power of selective prosecution gradually improved and formed a set of complete system with choosing not to prosecute, choosing to prosecute, choosing behavior to

prosecute and choosing crime to prosecute as the main content, by the Constitution, consisting of the constitution, statute law and case law. In this system, in order to prevent the abuse of public power, the regulations of prosecutors' consideration factors when choosing prosecution and their discretion constitute the boundaries of power operation.

### A. Choose Not to Prosecute

Choosing not to prosecute means that when prosecutors have a probable cause to suspect that a particular person has committed a crime or crimes, for certain factors, they have the right to decide not to prosecute the suspect. American prosecutors' discretionary power of choosing not to prosecute has the following to characteristics: firstly, in the pursuit of value, to choose not to prosecute reflects the principle of litigation economy and litigation efficiency; secondly, in the discretion factor, American prosecutors have a great discretion, even it's a felony case, if the prosecutor thinks that prosecution does not help criminals to transform and is not conducive to restrain crime or will spend too much judicial resources after comprehensive consideration of the social public interests and the criminal's personal circumstances, he or she can make a decision not to prosecute in accordance with discretion.

### B. Choose Person to Prosecute

Choosing person to prosecute means that in a similar case, prosecutors may choose one or several persons to prosecute and waive the right to prosecute others. This mainly includes two cases: firstly, in a joint crime case, prosecutors may choose to prosecute only a part of the persons and not to prosecute the others who have committed the same or other crime; secondly, in the same type of crime case, and different persons have committed the same or similar crime, the prosecutors may choose to prosecute some of them.

Choosing person to prosecute seems to violate the basic principle of rule of law that everybody is equal before the law, but there is a reasonable factor for this system to exist for a long time in the United States. Firstly, the power of selective prosecution has its legitimacy basis. This mainly reflects a kind of individualized judicial idea, which treats different cases differently in the process of applying the law, so as to maximize the realization of purpose of rule by law of fairness and justice. Secondly, the process of power operation is not untraceable; on the contrary, the prosecutors often need to consider the information of defendant as comprehensive as possible when the power of selective prosecution is applicable, including the defendant's culpability, criminal record, cooperation degree and personal circumstances. Therefore, it is not the consequence of arbitrary power.

### C. Choose Behavior to Prosecute

Choosing behavior to prosecute means the prosecutors choose to prosecute part of the criminal behaviors when a person has committed a number of criminal behaviors and constitutes a number of crimes, while not prosecuting the other crimes of this person. Here, choosing behavior to prosecute includes choosing to prosecute felony while waiving the

<sup>4</sup> *Virginia v. Dulany*, 28 F. Cas. 1223,1223(D.D.C.1802).

<sup>5</sup> *Commonwealth v. Wheeler*, 2 Mass.172(1806).

<sup>6</sup> *Commonwealth v. Wheeler*, 2 Mass.172(1806).

prosecution of minor crime, as well as choosing to prosecute minor crime while waiving the prosecution of felony.<sup>7</sup>

#### *D. Choose Accusation to Prosecute*

Choosing accusation to prosecute means that the prosecutors have the full discretion to decide to access to court with which accusation when they have a reasonable basis to suspect that a person has committed a crime. It mainly includes two cases: Firstly, in case of overlap or repetition of articles of law, when a behavior of the person violates several overlapped law articles at the same time and constitutes several different accusation, the prosecutors have the power to choose to prosecute in accordance with which article of law and accusation; secondly, When the behavior of the person constitutes a crime, the prosecutors may choose to prosecute with this accusation or other accusations of the same nature as this crime.

### IV. THE CONSIDERATION FACTORS OF PROSECUTOR IN SELECTIVE PROSECUTION

The prosecutors must operate the power of selective prosecution lawfully and reasonably, otherwise it can easily lead to the abuse of power, and impact people's bottom line of judicial justice. The fair-and-square restriction of consideration factors, not only includes the factors that prosecutors may consider in the decision to prosecute or not, but also includes those unreasonable situations that should not be considered. Therefore, which factors should be considered in the process of making a decision of prosecution and which should not become the key issues for prosecutors to properly use the discretion.

#### *A. Factors that Can Be Considered*

According to the provisions of American laws, the prosecutors not only have the responsibility to prosecute the crime, but should also pursue justice. One of the important functions of prosecutors is to "reform and improve the criminal justice", to take the necessary remedial measures when they find that there is deficiency or detrimental to justice in the operating course of criminal substantive law or procedural law.<sup>8</sup> In summary, the factors that are allowed to be considered by American prosecutors in the review of prosecution should be based on the realization of justice or protection of the basis of judicial justice.

- Firstly, the quality and quantity of evidence. The prosecutors must have "sufficient" and "admissible" evidence to prove that they have probable cause to suspect that the defendant has committed a criminal behavior, whether in the prosecution of a grand jury or in the indictment. "Probable cause" raises the lowest requirements in terms of evidence act to the prosecutors to file a lawsuit. "Admissibility" is the quality issue of the evidence, that the prosecutors must ensure that the evidence which can serve as basis for prosecution is

obtained in a lawful way, which is the precondition for relevant evidence to enter the court; "sufficient" relates to the quantity of evidence. According to the provisions of Paragraph 1 of Rule 29 (a), Federal Rules of Criminal Procedure, the evidence must be sufficient to support the Court's guilty verdict. On the basis of the relevant evidence obtained, the possibility of the defendant to be convicted is greater than the possibility of being acquitted, that is, it can be considered that it meets the quantity requirement of evidence.

- Secondly, the nature, severity and social harm of the crime. The nature and severity of the crime involves a number of factors, the most important of which is what kind of impact the crime has on the community in which the defendant is located and the what kind of actual impact or possible impact the crime has on the victim. These factors can be used as a reference by the prosecutors in making decision to prosecute, but this is not the main factor for prosecutors to decide to prosecute or not. In fact, sometimes the professional responsibility of the prosecutors requires them to make a decision opposed to the public.
- Thirdly, the defendant's specific circumstances. The defendant's specific circumstances include: 1. Culpability, including the defendant's criminal motive and its role; 2. the defendant's criminal record; 3. the defendant's degree of cooperation, namely the degree of participation of the criminal suspect when the police investigates criminal behavior; 4. the defendant's personal circumstances, including age, psychological status.
- Fourthly, whether there are other alternative penalties. Criminal law is the most severe punishment basis for the violation of the law, in other words, the ultimate for the perpetrator to bear the illegal responsibility is to bear criminal responsibility, and the criminal law is the last line of defense to protect the social order. It is precisely because of the powerful deterrent effect of the criminal law that the American legal norms show a "Pan-criminalizing" legislative phenomenon, but the criminal penalty is often not the most effective way to punish the perpetrators. In many cases, some alternative measures are often used to achieve better legal effects and social effects. The federal legislature and the state legislature provide a variety of civil and criminal remedies for various unlawful acts, such as civil tax proceeding; civil action that may be instituted in accordance with the provisions of the Securities Act, the Customs Act and the Anti-unfair Competition Law; or appealing to other authorities and professional organizations, such as the American Bar Association. In addition, in some cases, pre-trial diversion is also an important alternative measure. When the prosecutors consider that alternative measures are more effective, they often do not take prosecution as the first choice.

<sup>7</sup> Duan Mingxue: "On selective prosecution", *Criminal Science*, 6, 2007, Page 75.

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[http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.htm](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.htm).

## B. Factors that Should Not Be Considered

There are broad factors that American prosecutors can consider when making a decision to prosecute, but some factors are clearly excluded from the considerations of the prosecutors' decision to prosecute, such as individual race, religion, sex, ethnicity, political faction, personal activity and political belief; the personal feelings of the prosecutor on the defendant; the social relationship of the defendant and the victim; the possible impact of the prosecution decision on the personal occupation of the prosecutor and the personal circumstances. These factors will, to a certain extent, affect the realization of judicial justice, so that the prosecutors are obliged to avoid referring to the factors that may affect the fairness of the case even they may consider a number of factors in making a decision to prosecute.

## V. REGULATION ON AMERICAN PROSECUTORS' POWER OF SELECTIVE PROSECUTION

Unrestricted power surely contains the possibility of abuse of power. The prosecutors' power of selective prosecution was not subject to any restrictions at the beginning of its emergence, and the problem of abuse of the power of selective prosecution was prominent in the judicial practice. American legal theory and practice circle were also gradually aware of this problem and actively explored the reasonable regulation on prosecutors' power of selective prosecution. The regulation on the power of selective prosecution is divided into two aspects, one of which is external regulation; and the second is the internal regulation.

### A. External Regulation

Under the guidance of the principles of equal protection and procedure, the prohibitions of discriminatory prosecution and retaliatory prosecution become two important aspects on regulating the prosecutors' power of prosecution. Firstly, it should prohibit the discriminatory prosecution. The so-called discriminatory prosecution means that the prosecutors exercising the power of public prosecution, on the basis of discriminatory factors such as race, religion, sex and nationality, selectively prosecute particular object or objects. (2) The choice made by the prosecutor is based on "prejudice" or "malice" (that is, based on the factors not allowed by law, such as the defendant's race or religion), and then the prosecution should be deemed to be discriminatory. Secondly, it should prohibit the retaliatory prosecution. The so-called retaliatory prosecution means that the prosecutors decide to prosecute on the basis of a retaliation, for example, because the defendant exercises his/her constitutional power (such as the defendant refuses plea bargaining and requires to exercise his/her constitutional power judged by the jury), the prosecutor violates the principle of due process and brings more serious charges against the defendant for the purpose of retaliation.

### B. Internal Regulation

Here it mainly refers to the restrictions within the procuratorial organs. Specifically, the restrictions within the procuratorial organs include the behavioral regulation on the prosecutors from the autonomous organizations and the internal self-discipline of the procuratorial organs. The first is the behavioral regulation from self-governing organizations.

For more than a century, ABA and other industry self-government organizations have been strengthening the behavioral regulation on the public prosecutors. In 1908, ABA promulgated the first "Canons of Professional Ethics", which made it clear that the prosecutors were responsible for the pursuit of judicial justice and had the obligation to show evidence of innocence. In 1964, ABA established the Ethics Research Council, which passed the "Code of Professional Responsibility Model" as described above. Later, in 1973 and 1983, ABA passed "The Prosecution Function Standards" and "The Model Rule of Professional Conduct" to specify the duties of the prosecutors and in which way they should perform their duties more fairly; the second is the internal self-discipline of the procuratorial organs. The US Department of Justice has also set up a Prosecutor's Office of Professional Responsibility (OPR), which deals specifically with misconduct. The office is responsible for investigating complained prosecution behavior and reporting the results to the Attorney General, who then carries out punishment such as rebuke, position suspension or dismissal. In addition, the Ministry of Justice has also made a Handbook for Prosecutors, which sets out the guiding principles for the exercise of the right of public prosecution and the factors that should and should not be considered in the exercise of the right of public prosecution.

## VI. REVELATION: BETWEEN STRICT RULES AND DISCRETION

Based on the important roles of the power of selective prosecution in improving the efficiency of litigation and saving judicial resources, some scholars put forward the idea to set up the selective prosecution system in China.<sup>9</sup> The author holds the following basic position for the referential significance of American prosecutors' power of selective prosecution to China.

### A. The Overall Copy of American Prosecutors' Power of Selective Prosecution Is Not Feasible

The existence of American prosecutors' power of selective prosecution has its own unique institutional, conceptual and realistic basis, and there is a big gap between China and the United States in the above aspects, and in some respects they are even entirely different.

In terms of institutions, the separation of the three powers is the organic principle of basic political systems in the capitalist countries, which also provides the "institutional soil" for the existence of American prosecutors' power of selective prosecution. Within the framework of the separation of the three powers, the prosecutors' decision to prosecute exercises the executive power on behalf of the administrative organ. As an administrative subject, the prosecutors are given great freedom of formulating and enforcing their own strategy in the course of law enforcement, who have the power to prosecute selectively without violating the provisions of the law based on following the principle of reasonable administration to pursue the rational legal effect. In comparison, our procuratorial

<sup>9</sup> Liu Chi, Wang Jianrong: Study on selective prosecution under the vision of a harmonious society, "People's Procuratorial Monthly", 2008, No. 18, Page 19-21.



organs exist as a judicial organ and are given the responsibility of legal supervisory authority. In the context of Chinese law, the property of prosecutors' power of public prosecution is very different from that of American prosecutors. Therefore, the power of selective prosecution based on the political system of the separation of the three powers lacks political basis in our country.

In terms of concept, in the United States which implements confrontation lawsuit model, the people are willing to hand over the power of selective prosecution, which directly affects the civil and property rights, to the prosecutors, and the main reason is that a concept of fully respecting the prosecutors' skills generally exists in the community of the United States. The public is fully convinced that the prosecutors can choose the best strategy to handle the cases on the basis of their authority, their full knowledge of the case and their own judgment. In our country, the public have diligently striven after the truth, fairness and justice since ancient times. In such context, if we overall copy the selective prosecution system of the United States, it is likely to cause suspicion of litigants and the general public to the justice of prosecution, which is not conducive to maintaining the credibility of the judiciary, is not conducive to safeguarding the people's sense of fairness and justice.

#### *B. We May Selectively Refer to American Prosecutors' Power of Selective Prosecution to Improve the Efficiency of Litigation*

The greatest benefit of American prosecutors' power of selective prosecution to the juridical practice of the United States is to alleviate the contradiction between the excessive burden of criminal cases and the shortage of judicial resources. In the 1960s, social criminal case increased in the US, and the US National Commission once said: "The US criminal justice system is an overcrowding, overworked and under-staffed system."<sup>10</sup> The National Commission established by the US Department of Justice conducted a survey on the excessive burden of public defense counsels, and the results showed that the defender should not undertake more than 150 felony cases or 400 misdemeanor cases within a year.<sup>11</sup> According to survey of the ten largest prosecutor offices nationwide carried out by Harris County, Texas, these ten prosecutor offices had a total jurisdiction of nearly 40 million people, handling more than 10 million cases per year. In these ten prosecutor offices where there were only 1043 investigators, each investigator handled an average of one thousand criminal cases per year, and the situation was even more serious in other offices with large number of cases and small number of prosecutors, for example: in 2009, there were only 20 prosecutors in the prosecutor office in Clark County, Nevada, while there were a total of 29308 felony cases and 41295 misdemeanor cases all the year. These data went far beyond the reasonable scope of the prosecutor's annual filing of the case. Through the power of selective prosecution, prosecutors focus the limited judicial resources on

important cases, and flexibly deal with different cases with different methods according to the priorities of the cases.

In our country, the reality of "large number of cases and small number of staff" in the judicial practice makes us urgently hope to seek an effective way to improve the efficiency of litigation and realize the litigation economy. In the prosecution stage, prosecuting all cases in line with the conditions of prosecution is contrary to the pursuit of litigation economy. On the one hand, unfiltered criminal cases are bound to increase the burden on the court, leading to delays in litigation; on the other hand, handling too many cases in unit time may affect the real discovery of the case, which is not conducive to the realization of litigation justice. Therefore, giving prosecutors the power of selective prosecution is conducive to the filtering of cases in the stage of censorship, diverting cases in accordance with legal procedures, to and concentrating judicial resources and sophisticated trial litigation on major, difficult and complex cases to improve the efficiency of litigation and achieve judicial justice.

#### *C. The Establishment of Prosecutors' Power of Selective Prosecution in China Requires Seeking Balance between the Strict Rules and Discretion*

"The history of the law shows that people always move back and forth between strict rules and discretion, and the whole history of western law is a process of moving in circles between broad and loose discretion and strict and detailed rules, between justice with law and justice without law."<sup>12</sup> To use the American prosecutors' power of selective prosecution for us, we must achieve balance between strict rules and discretion through rational setting of the power.

1) *Discretion: introduce the power of selective prosecution, expand discretionary non-prosecution:* As mentioned above, the main referential significance of the American prosecutors' power of selective prosecution to China lies in the consideration of litigation economy and social effects, while the institutional and conceptual bases on which the prosecutors' power of selective prosecution relies do not exist. Therefore, when drawing on this power, we should not rigidly adhere to the restrictions of conventions, but should introduce the prosecutors' power of selective prosecution based on the existing system, the implementation of the public prosecution principle dominated by the principle of legality and supplemented by the evaluation prosecution, so as not to undermine the theoretical structure of China's public prosecution system, but also to meet the needs of judicial practice.

Specifically, I believe that: it's not suitable to independently set prosecutors' power of selective prosecution in our country, but we can introduce the reasonable factors in American prosecutors' power of selective prosecution by expanding the scope of discretionary non-prosecution. That means, the following two cases are included in the category of

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[http://www.absoluteastronomy.com/topics/U.S.\\_National\\_Commission\\_on\\_the\\_Causes\\_and\\_Prevention\\_of\\_Violence](http://www.absoluteastronomy.com/topics/U.S._National_Commission_on_the_Causes_and_Prevention_of_Violence).

<sup>11</sup> Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Task Force Report on the Courts, Standard 13.12 (1973).

<sup>12</sup> Cui Linlin: "Between strict rules and discretion - comparative analysis of British and American judicial style differences and their causes", Peking University Press, 2005 edition, Introduction Page 1.

discretionary non-prosecution on the basis of the original discretionary:

- In the case of a joint offense or a crime of the same type, the prosecutors have the right to choose not to prosecute the person who meets the legal conditions. The criminal motives of different criminal suspects, the behaviors in the crime and the roles are all different, and "excusable" criminal suspects can be tolerated, while the vicious criminals are seriously treated, which meets the criminal policy of "combining punishment with leniency" of our country.
- The prosecutors have the power not to prosecute the misdemeanor in line with the legal conditions if a person commits a number of crimes and is punishable combined punishment for several offenses under the "Criminal Law of the People's Republic of China". Prosecutors are allowed to only prosecute the felony, which can limit large-scale trial litigation, save litigation resources, and improve litigation efficiency.

It is noteworthy that both of these conditions mentioned above may lead to expansion of the prosecutors' prosecution discretion, with a risk of abuse of power. Therefore, we must include the prosecutor's discretion in the scoped set by strict rules. We discuss from the angle of strict rules below.

2) *Strict rules: clarify consideration factors, improve the control rules*

a) *Clarify consideration factors:* The prosecutors should apply the law mechanically when exercising the power of public prosecution, but should take into account both the legal effect and social effects of public prosecution.

At the level of legal effects, in addition to the quantity and quality of evidence, the prosecutors should consider the following two factors when deciding whether to adopt discretionary non-prosecution: first, judicial costs and efficiency. The prosecutors may make a decision of discretionary non-prosecution for circumstances that may seriously delay the litigation and waste the judicial resources, while having little significance to preventing and combating crimes; second, whether there is viable alternative measure. If there is a better alternative measure with lighter criminal penalty, the prosecutors shall be allowed to divert the cases reasonably under the premise of ensuring judicial justice.

At the level of social effect, the prosecutors should consider three factors: First of all, they should consider the specific circumstances of the defendant to determine whether the criminal penalty has meaning of punishment and prevention to the criminal suspect; secondly, refer to the legitimate expectations and the interest demand of the victim; finally, carefully consider the public attitudes, and the prosecution decision should not be subject to public opinions' interference, nor should it harm the public sense of justice and fairness of law.

b) *Improve the control rules:* "All the discretion is likely to be abused, which is a wisdom. Therefore, any right shall be

restricted by some laws."<sup>13</sup> In order to prevent the abuse of the power of prosecution after the expansion of discretion, we should establish a complete set of control rules from internal aspects of legislative, judicial and procuratorial organs.

At the legislative level, we can regulate from the following aspects: firstly, carry out the judicial idea of equal protection, make it clear that the expanded discretionary non-prosecution cannot violate the principle of equality before the law; secondly, clarify the power subjects, object, procedures, considerations and remedial measures of discretionary non-prosecution through legal provisions; thirdly, prohibit discriminatory prosecution and retaliatory prosecution that violate judicial justice.

At the judicial level, on the one hand, the judicial review of the prosecutors' discretionary non-prosecution can be strengthened through the court; on the other hand, the relief of the non-prosecutor and the victim, etc., should be strengthened, and the interest relevant parties should be allowed to bring a civil lawsuit directly to the people's court, to request to investigate and affix the civil liability of the prosecutor who abuses power.

At the level of internal control of the procuratorial organs, first of all, rules and standards of internal prosecution of procuratorial organs should be established based on the expanded discretionary non-prosecution, and the considered factors and the resolution process should be clearly defined; secondly, the undertaking prosecutor should make "case statement" when making the decision to prosecute and submit it to the procuratorial committee for discussion, which then submit to the superior procuratorial organ for the record to form internal restriction mechanism to the exercising of power; finally, prosecutors who abuse the power of selective prosecution should be given punishment such as warning, demotion, removal or dismissal, to urge every prosecutor to enforce the law more strictly, and use their discretion more carefully.

## VII. CONCLUSION

American prosecutors' power of selective prosecution has a long history, which lasted more than three centuries, improving. Through this paper, I hope to learn from the beneficial factors of this power to ease the contradiction between the sharply increasing number of cases in China and the limited judicial resources. In fact, to achieve the cross-system, cross-cultural, cross-law grafting of prosecutors' power of selective prosecution in China, deeper exploration on legal theory and practice of the two countries is needed. This process will certainly be difficult. In this paper, my discussion is only a simple individual view in this regard, which needs further criticism, improvement and validation of judicial practice in theory.

<sup>13</sup> [UK] William Wade: "Administrative Law", translated by Xu Bing, China Encyclopedia Publishing House, 1997 edition, page 70.

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