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# THE PROSECUTING ATTORNEY

## POWERS AND DUTIES IN CRIMINAL PROSECUTION

NEWMAN F. BAKER\* and EARL H. DE LONG†

### I. *Introduction.*

In the eyes of the average voter, for whom the daily press affords the only acquaintance with the prosecuting attorney, the office exists primarily to prosecute such offenses as murder, rape, robbery, burglary, and a few other common felonies. It does not occur to him that the prosecuting attorney is charged with the enforcement of scores of laws which touch every phase of the life of his community, nor does he realize that the office usually involves important civil duties as well. This misconception of the importance of the civil duties of an average prosecutor's office does not seem to be confined altogether to the layman. The prosecuting attorney of a populous county in the Middle West recently stated in a public address that his office "differed from most other such offices in the fact that it had a large number of civil duties to perform." The provisions of law which will be described in this and the following article show conclusively that his office does not differ in that respect from hundreds of others throughout the country.

The constitutional provisions and statutes which define the powers and duties of the prosecuting attorneys of the various states certainly do not depict this office as it actually functions, for the habits and routine of administration often—perhaps usually—make the practical picture far different from the legal outline upon which it is built. For that reason this study does not attempt to describe the office of prosecuting attorney as it actually operates. The purpose here is to describe the duties and powers of the office as the legislatures have contemplated them, to point out the wide range which his powers cover in respect both to criminal and civil proceedings, and to learn what restrictions the legislatures have thrown about the great discretion with which the office is endowed.

The prosecuting attorney derives his powers and duties from the constitution or from the statutes of his particular state. In the few states where the constitution sets forth his official duties, the legisla-

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ture cannot expand or diminish them beyond the limits of the constitutional provisions.<sup>1</sup> However, since almost all of the constitutions are silent on this matter of powers and duties, most legislatures are entirely free to deal with the subject. The law-makers of the entire country have been so generous in their grants of power to the prosecuting attorney that there has been little necessity for expansion of his powers by the courts. The statutes which it is the purpose of this study to examine seem to be almost the sole source of the prosecutor's powers and duties. If changes are needed in the definition of those powers and duties, it is the province of the legislatures to make the changes.

The statutes of every state have dozens of provisions concerning specific powers or duties of the prosecuting attorney but in almost every case one of these sections deals generally with the functions of the prosecutor. To a large extent the specific provisions which are found throughout the statutes are superfluous and their subject matter is covered in the general section. The Michigan statutes contain the following general statement of the powers and duties of the prosecuting attorney:<sup>2</sup>

"The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party, or interested."

There are few duties which might be given to the prosecuting attorney which this section does not confer and, in general, it may be taken as typical of the powers and duties which are almost universally given. However, few states have been satisfied with such a general statement for the following discussion is based upon an analysis and classification of approximately thirteen hundred statutory provisions dealing in some manner with the duties of the prosecuting attorney. This number includes only those statutes which specifically mention the prosecuting attorney and does not include the hundreds of criminal laws which, by the implication of sections such as that quoted, it is his duty to enforce.

The analysis and interpretation of these thirteen hundred items has been rather a difficult task in as much as few of these provisions are found in more than ten states. The statutes which will be discussed, and particularly those relating to criminal prosecution, to a large extent supplement rather than include the popular picture of

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<sup>1</sup>See cases cited at 18 *Corpus Juris* 1308-9, note 58.

<sup>2</sup>Compiled Laws of Michigan (1929), sec. 1286.

the prosecuting attorney as the man who enforces the laws against murder, rape, robbery, embezzlement, and similar offenses. They are discussed here to illustrate the broad range of activity which the duties of the prosecutor include.

## II. *Jurisdiction.*

The first question for consideration is the jurisdiction of the prosecuting attorney, to be taken up, first, as it relates to territory and, second, as it relates to particular courts. A preceding article of this series contains an extended tabulation of the governmental units for which the prosecuting attorney is chosen.<sup>3</sup> It is stated there that in thirty states the county is the territorial unit for which he is selected and there is only one prosecuting officer for any locality. In seven other states it was found that the judicial circuit or district rather than the county is the basis for selection. In these thirty-seven states it is the duty of the prosecuting attorney to participate in all public cases arising within the territory for which he is chosen. The following sections from Illinois and Oklahoma illustrate:<sup>4</sup>

"It shall be the duty of the state's attorney [in Illinois] to . . . commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned."

"It shall be the duty of the county attorney [in Oklahoma] to appear in the district, superior, and county courts of his county and prosecute and defend, on behalf of the state or county, all actions or proceedings, civil or criminal, in which the state or county is interested or is a party."

In most of these states the jurisdiction of the prosecuting attorney stops at the boundaries of his county or district except when a change of venue is taken or when cases originating in his territory are taken to the appellate courts. It seems rather generally to be provided by statute that when a change of venue is taken to a neighboring county or district the prosecuting attorney of the territory where such proceedings were commenced conducts the case the same as if it remained in his jurisdiction.<sup>5</sup> The New York statutes require in addition that the district attorney of the county to which the case is re-

<sup>3</sup>23 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 931 (March-April, 1933).

<sup>4</sup>Illinois Revised Statutes (Cahill, 1931), ch. 14, sec. 5; Compiled Statutes of Oklahoma (1921), sec. 5741.

<sup>5</sup>Examples: Idaho Compiled Statutes (1919), sec. 3655; Code of Iowa (1927), ch. 258, sec. 5180; Wisconsin Statutes (1929), sec. 59.47. On the other hand, sec. 5975 of the Colorado Compiled Laws (1921) required a district attorney to conduct all cases in which a change of venue is taken into his district.

moved must assist if requested to help by the district attorney in whose county the case started.<sup>6</sup>

In seven states it was found that the statutes provide for one prosecutor chosen for the county and another for the judicial circuit or district.<sup>7</sup> Such officers are restricted territorially by the boundaries of their respective districts or counties, but this situation also presents the problem of dividing the jurisdiction of one from that of the other where they overlap. In criminal cases the district attorney seems usually to be required to prosecute in the district or circuit court which is the court of general criminal jurisdiction, and the county attorney prosecutes criminal cases in the inferior courts which have only misdemeanor or restricted felony jurisdiction. In civil matters the county attorney, just as his title implies, is the attorney for the county and its officers and the district attorney is given those civil matters which seem to concern the state at large.<sup>8</sup> Where only one prosecutor is chosen for any territory, all of these duties are combined in the one office.

The statutes of Massachusetts provide for the election of a district attorney in each of eight districts defined by statute. Each of these districts covers several counties and seems to bear no relation to the jurisdiction of the various courts of the state. These statutes enjoin the district attorney to prosecute criminal cases in the superior courts of the state and to conduct appeals on such cases but they do not seem to provide a prosecutor for the district or city courts, which have limited criminal jurisdiction.<sup>9</sup> Such prosecutions in the lower courts are conducted through the police departments or the city prosecutors of the various municipalities of the state.<sup>10</sup>

There is no doubt that in practically all the states it is the duty of the prosecuting attorney to appear in cases before the court of general jurisdiction in his district or county. As illustrated in the Illinois provision quoted, some states require the prosecutor to act in any court of record, while others follow the example of Oklahoma and enumerate the courts in which the prosecuting attorney must appear. In still other states, for example Iowa, the statute requires

<sup>6</sup>Consolidated Laws of New York (Cahill, 1930), ch. 11, sec. 200.

<sup>7</sup>23 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 931 (March-April, 1933).

<sup>8</sup>The opinion of the court in *Commonwealth v. Euster*, 237 Ky. 162, 35 S. W. (2d) 1 (1931), contains a discussion of the respective jurisdictions of the commonwealth's attorney and the county attorney in Kentucky.

<sup>9</sup>General Laws of Massachusetts (1921), ch. 12, secs. 12, 13, 27; Acts and Resolves of 1922, ch. 459.

<sup>10</sup>National Commission on Law Observance and Enforcement, Report on Prosecution (1931), footnote on page 10.

him to appear in proceedings "in the courts of his county."<sup>11</sup> It is specifically provided in several states that he shall appear and prosecute in city or municipal courts, and Utah has a similar provision requiring his presence in the juvenile court.<sup>12</sup>

It is difficult to generalize with respect to the relation between the prosecuting attorney and the justice of the peace courts. A provision such as that quoted from the Oklahoma statutes seems definitely to exclude police courts from the list in which it is the duty of the county attorney to prosecute, and the Illinois provision making it the duty of the state's attorney to prosecute in courts of record similarly excludes the police courts. It is probable, however, that such provisions do not prevent the prosecutor from appearing in such police courts whenever he wishes, but certainly they do not require him to do so. The Illinois statutes do require the state's attorney "when in his power to do so" to appear before justices of the peace in preliminary hearings "when the offender is required to be recognized to appear before a court of record."<sup>13</sup> The qualification appears to mitigate the duty quite effectively. In many states the county attorney must appear before a police court if the magistrate requires his presence.<sup>14</sup> The statutes of Utah and New Mexico state that the prosecutor may appear before a justice of the peace whenever he wishes.<sup>15</sup> In Idaho the prosecuting attorney is required to appear before the probate or magistrates' courts only if his presence is requested by the court.<sup>16</sup>

In only a few states do the provisions of law indicate clearly what is the duty of the prosecuting attorney upon appeal. It has appeared rather incidentally in the course of this study that in many states it is the duty of the attorney-general to conduct proceedings before the supreme court of his state. The Illinois statutes, for ex-

<sup>11</sup>Code of Iowa (1927), ch. 258, sec. 5180.

<sup>12</sup>Compiled Laws of Michigan (1929), sec. 16305; Illinois Revised Statutes (Cahill, 1931), ch. 37, sec. 492; Burns' Annotated Indiana Statutes (1926), sec. 11021; Marr's Annotated Revised Statutes of Louisiana (1915), sec. 2447; Compiled Laws of Utah (1917), sec. 1610.

<sup>13</sup>Illinois Revised Statutes (Cahill, 1931), ch. 14, sec. 5. The Iowa Statutes require the county attorney to appear and prosecute all preliminary hearings before justices of the peace on charges triable on indictment. (Code of Iowa (1927), sec. 5180.)

<sup>14</sup>Compiled Statutes of Oklahoma (1921), sec. 5742; Compiled Laws of South Dakota (1929), sec. 5999; Compiled Laws of Michigan (1929), sec. 1287. In Kansas the county attorney must appear before justices of the peace and prosecute complaints on request either of the justice or the complainant. (Revised Statutes of Kansas (1923), ch. 63, sec. 505.)

<sup>15</sup>Compiled Laws of Utah (1917), sec. 5762; New Mexico Statutes Annotated (1915), sec. 1861.

<sup>16</sup>Idaho Compiled Statutes (1919), sec. 3655.

ample, require the attorney-general to conduct appeals in all cases "in which the State or the people of the State are interested."<sup>17</sup> In Iowa it is the duty of the attorney-general to "prosecute and defend all cases in the supreme court in which the State is a party or interested."<sup>18</sup> The statutes of Iowa, however, contain the additional provision that the county attorney shall appear in the supreme court in all cases in which the county is a party.<sup>19</sup> The laws of Massachusetts require the district attorney to appear before the supreme judicial court in all cases, civil or criminal, which he has conducted in the lower courts, and in Georgia the solicitor general must attend before the supreme court of the state to argue any criminal case coming from his own circuit.<sup>20</sup> It is provided in Illinois, Iowa, and Utah that the local prosecuting attorney must assist the attorney-general in appeals in cases originating in his county or district.<sup>21</sup> In New York there is no statute requiring the district attorney to represent the county or state upon appeal but it has been held to be an implied duty of the office.<sup>22</sup> To determine definitely for all the states what is the duty of the prosecuting attorney in the appellate courts it would be necessary first to learn what duties the statutes and constitutions have given to the attorney-generals in this respect. In those states where it is not required that the attorney-general conduct proceedings in public causes before the supreme court, the prosecuting attorney probably can do so. If it is the duty of the attorney-general to appear, then any participation of the prosecuting attorney in the case would be subject to his supervision.

There is another situation in which it is the duty, or at least the power, of the prosecuting attorney to step outside the bounds of his particular district. As will appear from subsequent discussion, it is often the duty of the prosecuting attorney to conduct proceedings before administrative tribunals of various kinds and, while the interest which he represents must be related in some way to his jurisdiction, often it may be necessary for him to journey to the state capital to conduct the actual proceedings. In Vermont, for example, the statutes provide that the state's attorney may petition the public service commission and participate in hearings involving matters in

<sup>17</sup>Illinois Revised Statutes (Cahill, 1931), ch. 14, sec. 4.

<sup>18</sup>Code of Iowa (1927), sec. 149.

<sup>19</sup>*Ibid.*, sec. 5180.

<sup>20</sup>General Laws of Massachusetts (1921), ch. 12, sec. 27; Park's Annotated Code of Georgia (1914), sec. 4926.

<sup>21</sup>Illinois Revised Statutes, ch. 14, sec. 5; Code of Iowa, sec. 13999; Compiled Laws of Utah, sec. 5761.

<sup>22</sup>*Tompkins v. City of New York*, 14 App. Div. 536, 43 N. Y. S. 878 (1897).

which he may have an official interest.<sup>23</sup> In many other states he is required to assist various state agencies and commissions in matters involving his territory and to prosecute proceedings before such commissions in the exercise of their duties.<sup>24</sup> Another example which might be mentioned would be a hearing before a medical licensing board on a petition presented by a prosecuting attorney asking for the revocation of a physician's license.

The statutory provisions and decisions upon the duties of the local prosecuting attorney in the federal courts are too scarce to allow much generalization. In any one year the entire country supplies only a few cases, civil or criminal, which might conceivably take a county attorney into the federal courts. Such a situation, however, can occur and deserves some comment.

The widely publicized case of *ex parte Dierks*, involving a federal prohibition agent who killed a man in attempting to arrest him, illustrates a situation in which a federal court may hear a criminal prosecution for violation of a state law.<sup>25</sup> An information charging murder was filed in the state courts of Colorado and Dierks, under the provisions of a federal statute, petitioned for removal of the case to the federal district court. Dierks was represented by the United States district attorney and Colorado by its district attorney for the judicial district in which Denver lies. When the case was carried to the United States Supreme Court, the solicitor-general of the United States represented Dierks and the attorney-general of the state appeared for Colorado.<sup>26</sup> The case has not so far been tried on the facts but if the actual murder trial is heard by the federal district court, it is evident that the United States district attorney will defend and the Colorado district attorney will prosecute.<sup>27</sup>

<sup>23</sup>General Laws of Vermont (1917), sec. 5051.

<sup>24</sup>This subject will be discussed in the succeeding installment of this study.

<sup>25</sup>*Ex parte Dierks*, 55 Fed. (2) 371 (1932).

<sup>26</sup>*Colorado v. Symes*, 286 U. S. 510, 76 L. Ed. 838 (1932).

<sup>27</sup>This example does not exhaust the situations in which a state prosecution might be removed to a federal court. Section 76 of the federal judicial code (United States Code Annotated, title 28) provides for the removal from the state courts of any cause involving prosecution against a revenue officer of the federal government, any officer of either house of Congress, or any officer of a federal court if that prosecution is directed at some action taken under the authority of or an appointment under the federal revenue laws. This section seems to provide the basis for removal of prosecutions against prohibition agents such as the Dierks case (*Colorado v. Symes, supra*).

Section 74 of the federal judicial code presents another situation in which a local prosecuting attorney might be called upon to prosecute in the federal courts. This section provides for removal from the state to the federal courts of any civil suit or criminal prosecution against any person who cannot enforce in the state courts the rights guaranteed to him by the fourteenth amendment to the federal constitution. It also provides for removal of a suit or



Because of the diversity of citizenship of the parties, many civil actions involving municipal bond issues are brought in the federal courts. If the bonds in any such proceeding are county bonds and the county which issued them is a party, the case might be one in which the local prosecuting attorney would represent the county in a civil proceeding in the federal courts. In any particular state the duties of the prosecuting attorney in any such action depend largely upon statutory interpretation. No statute has been found which indicates plainly upon its face that the legislature contemplated such a situation when it defined the duties of the prosecuting attorney. In some states the prosecutor would represent the county. In others the county board might engage special counsel to conduct the proceeding or at least to assist the prosecuting attorney. It is quite certain that the local prosecuting attorney would conduct such a case only if it involved a local interest. In any case of importance to the entire state there is no doubt that the attorney-general would supersede him.<sup>28</sup>

prosecution against any public officer for an act committed in an attempt to enforce laws guaranteeing those rights or for refusing to do an act which violates such a law.

In only four states have statutes been found which specifically make it the duty of the prosecuting attorney to appear in criminal cases in the federal courts. Tennessee has the following provision:

"All criminal cases removed from a state court to any inferior federal court shall be prosecuted in the federal court by the district attorney of the state court from which the particular cause was removed." (Code of Tennessee (1932), sec. 9966.)

The Virginia statutes contain a similar provision but provide that such is the case "where any person indicted in the courts of this state for a violation of its laws has his case removed to the district court of the United States under section six hundred and forty-three of the Revised Statutes of the United States." (Code of Virginia (1919), sec. 4971.) Section 643 is referred to herein as section 76. The attorney-general of the state may participate in such a case at his discretion. In North Carolina the solicitor of the district within which the federal court sits must prosecute in all criminal cases removed from the state to the federal courts "under the provisions of the various acts of Congress on such subjects." (Consolidated Statutes of North Carolina (1919), sec. 7696. Alabama has a similar provision: Criminal Code (1923), sec. 5498.)

While the statutes of only these four states appear to define the duties of the prosecuting attorney in the proceedings described, it is probable, nevertheless, that the prosecuting attorney in most states would prosecute such criminal proceedings in the federal courts inasmuch as the trial involves a violation of a state law. Colorado appears to have no statute covering the situation but the *Dierks* case indicates that it was his duty to prosecute the matter after removal to the federal courts.

<sup>28</sup>The Minnesota statutes require the county attorney "to appear for the county in all cases to which it is a party," and such language seems broad enough to include federal as well as state courts. (General Statutes of Minnesota (1923), sec. 962.) An Arkansas statute providing that the prosecuting attorney shall defend all suits brought against any county lying within his jurisdiction has been held to include suits brought in the federal courts. (*Graham v. Parham*, 32 Ark. 676 (1878).) The Kentucky statutes require the county attorney to prosecute or defend suits for or against his county "before

The jurisdiction of the prosecuting attorney may be summarized by the statement that the bulk of his work, civil and criminal, involves cases arising within the district or county for which he is chosen and where such work involves court proceedings, it is prosecuted or defended largely in the courts of record of that area. Prosecution and defense of appeals, in states where that is a duty of the prosecuting attorney, present the important exception to this generalization.

### III. *Criminal Prosecutions.*

#### (a) Particular Duties.

From this point on this discussion will be a description of particular powers and duties of the prosecuting attorney. It will consider in this article those powers or duties which relate to the administration of the criminal law and in the following article the phases of the prosecutor's work which are essentially civil in character will be studied.

In view of the fact that many civil proceedings really are attempts to enforce criminal laws, the allocation of particular statutory provisions to one or the other of these large classes is not a mechanical problem alone. For present purposes these hybrids have been classified as civil in character but their purposes and effects will be distinguished from ordinary civil suits which it is often the duty of the prosecuting attorney to prosecute or defend. The first classification—that relating to the administration of criminal law—will be restricted to those powers and duties involved in criminal prosecution, criminal investigation, and criminal procedure.

Although incidental duties of every description have been imposed upon it, the chief function of the office of prosecuting attorney, nevertheless, is the prosecution of violations of the criminal laws. Ex-

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any of the courts of this commonwealth?" (Carroll's Kentucky Statutes (1922), sec. 127.) It has been held that under this language it is not the duty of the county attorney to appear in suits in the federal courts. (*Stayton v. Rogers*, 128 Ky. 106, 107 S. W. 696 (1908).) Similarly, the Kansas supreme court has held that suits brought in the federal courts do not come within the duties of county attorneys under a statute making it their duty "to prosecute or defend on behalf of the people all suits, applications, or motions, civil or criminal, arising under the laws of this state in which the state or their county is a party or interested." (*County of Leavenworth v. Brewer*, 9 Kan. 307 (1872); *Nichols v. Shawnee County*, 76 Kan. 266, 91 Pac. 79 (1907).)

These Kentucky and Kansas cases indicate that if the courts or statutes have provided that it is not the duty of the prosecuting attorney to appear in the federal courts, he may collect a fee in addition to the regular salary provided by law. The Arkansas case indicates that if it is his duty to appear in the federal courts, he can collect no compensation in addition to that provided by law.

cept where the statute divides this function between two overlapping prosecuting officials, the duties and powers of the prosecuting attorney under these laws are amply prescribed by the general provisions requiring him to appear in all civil or criminal actions in which the people of the state or county are interested. Notwithstanding the broad character and inclusiveness of these general provisions, the statutes of the forty-eight states contain several hundred provisions each of which requires the prosecuting attorney to prosecute some specified offense.

Few of these specific references, however, involve offenses which are *mala in se*. Legislatures apparently have considered that the agreement of the community that such offenses should be prosecuted would be sufficient to impress the prosecuting attorney with his responsibility toward them. In respect to lynchings and offenses involving burning of property this general statement fails to hold. Kansas and North Carolina place lynchings within the duties specifically imposed upon the prosecuting attorney by statute.<sup>29</sup> The provisions referring similarly to burning offenses variously require the prosecuting attorney to institute criminal prosecutions against persons wilfully setting fire to woods or grass on the land of another<sup>30</sup> or who maliciously or negligently set fire to grain or woods,<sup>31</sup> to proceed against persons responsible for fires and report to the state fire marshal,<sup>32</sup> to bring arson prosecutions after investigations by the state fire marshal,<sup>33</sup> or to prosecute incendiaries.<sup>34</sup>

Almost every one of the scores of provisions particularizing the duties of the prosecuting attorney is stated positively as a duty and practically none implies that the prosecutor has any discretion toward the specified offense. In very few cases, if any, does the enactment of such a provision add to the powers of the prosecuting attorney. It merely makes it more clear that the prosecutor has violated his oath of office if he fails to prosecute the particular offense in question. The statutes involving liquor and gambling illustrate this point.

The enforcement of laws such as those regulating liquor and gambling seems to have been a continual source of worry to legis-

<sup>29</sup>Revised Statutes of Kansas (1923), ch. 21, sec. 1005; Consolidated Statutes of North Carolina (1919), sec. 4600. See Chadbourn, "Lynching and the Law" (1933), University of North Carolina Press.

<sup>30</sup>Delaware Revised Statutes (1915), sec. 726.

<sup>31</sup>Annotated Code of Maryland (Bagby, 1924), art. 39a, sec. 14.

<sup>32</sup>Wisconsin Statutes (1929), sec. 200.20.

<sup>33</sup>Compiled Laws of Michigan (1929), sec. 605.

<sup>34</sup>Compiled Statutes of Nebraska (1929), sec. 5507. In addition to these provisions, an Oregon statute requires him to prosecute violations of the libel laws and a West Virginia law involves provisions against dangerous weapons.

lators. As indication of this, note the disproportionately large fees which prosecuting attorneys have been given in the past for convictions under these laws. Such statutes probably cause any law enforcement official more political embarrassment than any other laws which he is called upon to administer. The fact that very large sections of the community often oppose the enactment or enforcement of such statutes has undoubtedly caused many prosecuting attorneys to relax their enforcement of such provisions.

This factor accounts for the statutes to be found in several states which declare specifically that it is the duty of the prosecuting attorney to bring proceedings against persons accused of violating the liquor laws.<sup>35</sup> The Virginia provision makes it a misfeasance on the part of the commonwealth's attorney to fail to enforce the prohibition law, and in Colorado the district attorney may be removed for any neglect of duty under the liquor laws. Many states in similar provisions charge the prosecuting attorney with the duty to enforce the laws against gambling, and the Oregon statute adds that failure to do so forfeits the office.<sup>36</sup> Another provision of like character is the Nevada statute requiring the district attorney to prosecute violations of the act relating to the location of houses of ill fame.<sup>37</sup> In Washington the statutes impose upon the district attorney the duty to enforce the law prohibiting the sale of cigarettes to minors,<sup>38</sup> and in Oregon he forfeits his office on conviction of failure to prosecute under a similar law.<sup>39</sup> North Dakota requires the state's attorney to enforce the law against the manufacture and sale of snuff,<sup>40</sup> and in New Mexico the prosecutor must proceed against violators of the Sabbath Laws.<sup>41</sup>

There are other provisions of somewhat similar character which deal, however, with such subject matter that they command wider respect and sympathy in the community than the provisions mentioned in the preceding paragraph. In California the district at-

<sup>35</sup>Code of Virginia (1919), sec. 4655; Compiled Laws of Colorado (1921), sec. 3724. Other states in which similar provisions are found include Delaware, Georgia, Iowa, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Dakota, and Utah. Most of the new liquor regulation codes which have been enacted since the repeal of the Eighteenth Amendment require the aid of the prosecutor in one way or another.

<sup>36</sup>Oregon Laws (Olson, 1920), sec. 2107. Among the other states with similar sections are Colorado, Florida, Idaho, Montana, New Mexico, North Dakota, Oklahoma. A similar statute in Indiana is directed at horse racing. (Annotated Indiana Statutes (Burns', 1926), sec. 8718.)

<sup>37</sup>Revised Laws of Nevada (1912), sec. 3459.

<sup>38</sup>Compiled Statutes of Washington (Remington, 1922), sec. 2701.

<sup>39</sup>Oregon Laws (Olson, 1920), sec. 2149.

<sup>40</sup>Compiled Laws of North Dakota (1913), sec. 10182.

<sup>41</sup>New Mexico Statutes Annotated (1915), sec. 1793.

torney must continue prosecution under an ordinance against maintaining a nuisance until it is abated.<sup>42</sup> The statutes of Nevada require prosecution under the laws respecting opium,<sup>43</sup> and in Minnesota the county attorney is enjoined by statute to prosecute under the laws concerning the sale or use of cocaine.<sup>44</sup>

These provisions which have been cited are among the duties which the general public commonly associates with the office of the prosecuting attorney. The common criminal prosecutions are so generally understood to be within the duties of the prosecutor that legislators have not felt it necessary to comment further than has appeared from the foregoing discussion. It seems hardly profitable to discuss these common criminal duties further. However, it is important to realize that the prosecuting attorney who really fulfills his oath of office cannot concentrate his prosecutions exclusively upon the problem of the rapist, the murderer, and the automobile thief.

The following discussion is intended to be descriptive rather than exhaustive. It is based upon those statutes which particularize the duties of the prosecuting attorney in the belief that they present a sufficient cross-section of the lesser known duties of the office in criminal prosecution. The great variety of things which legislatures have made it his duty to prosecute should be of interest.

#### (b) Public Health Laws

The field of public health and allied phases of public administration present the largest number and the greatest variety of these provisions which detail the prosecutor's duties in respect to criminal prosecutions. In several states the statutes specifically require the prosecuting attorney to proceed against violations of the public health laws, to assist the state board of health, and to enforce its rules and orders.<sup>45</sup>

In addition to these general references to public health laws and regulations, it is found that in a majority of the states the statutes contain provisions requiring the prosecuting attorney to enforce

<sup>42</sup>California Penal Code (Deering, 1931), sec. 373a.

<sup>43</sup>Revised Laws of Nevada (1912), sec. 6493.

<sup>44</sup>General Statutes of Minnesota (1923), sec. 5811.

<sup>45</sup>Colorado, Minnesota, Nebraska, Nevada, Oregon and Vermont. The Pennsylvania statute requires the housing bureau of the department of health to certify to the district attorney the names of persons failing to comply with its orders and it is his duty immediately to institute prosecution. (Pennsylvania Statutes (1920), sec. 896.) Some of the statutes require that the assistance to the state board of health shall include nuisance abatement proceedings as well as criminal prosecutions, e. g., Carroll's Kentucky Statutes (1922), sec. 2059 a 14; Compiled Statutes of Oklahoma, Annotated (1921), sec. 8695.

the laws relating to the sale and quality of food and dairy products. In several of these states the statutes merely require the prosecutor to proceed in case of violations of the food, dairy, or drug laws.<sup>46</sup> The Michigan laws, however, are more detailed in that they require him to prosecute for adulteration of candies, for violations of the brands and labels act, for violations of the dairy act, and of the fruit and vegetable container laws.<sup>47</sup> Other things which the prosecuting attorney must attend to are the classification of eggs, the adulteration of cider vinegar, unclean bakeries, the apple marketing act, the laws regulating the sale of oleomargarine, laws concerning the standard weight and sale of bread, and the pollution of water.<sup>48</sup> In several of these states the prosecutions are to be instituted by the prosecuting attorney when complaint is made to him by some state agency.<sup>49</sup>

Another duty imposed upon the prosecuting attorney and closely related to the food, dairy, and drug laws is the prosecution of violations of the pharmacy acts or poison and narcotic acts.<sup>50</sup> A district attorney in Pennsylvania must prosecute when the state pharmaceutical examining board notifies him of violations of the pharmacy act.<sup>51</sup> The laws of North Dakota require the state's attorney to enforce the law against the adulteration of paris green and to prosecute infractions of provisions relating to the sale of formaldehyde.<sup>52</sup>

There are numerous provisions making it the duty of the prosecutor to institute criminal proceedings against violators of the various laws regulating sanitary conditions in hotels and restaurants.<sup>53</sup> The Oregon statute requires the district attorney to prosecute for violations of rules relative to sailors' lodging houses,<sup>54</sup> and elsewhere various provisions require the prosecuting attorney respectively to

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<sup>46</sup>Some of these statutes refer to foods, dairy products, or drugs alone; others may combine food and dairy products or foods and drugs in the same section. A Nebraska law requires the prosecution of food manufacturers for insanitary conditions.

<sup>47</sup>Compiled Laws of Michigan (1929), secs. 5495, 8973, 5575, 5409.

<sup>48</sup>Florida, Nebraska, Missouri, California, North Dakota, Oregon and Rhode Island respectively.

<sup>49</sup>For example, in Kentucky violations of the dairy act are to be reported by the Kentucky Agricultural Experiment Station. (Carroll's statutes (1922), sec. 1905 a 54). In Iowa the department of agriculture must report food and drug violations and the prosecuting attorney must prosecute. (Code of Iowa (1927), sec. 3050.) The Colorado board of health reports food adulterations. (Compiled Laws of Colorado (1921), sec. 999.)

<sup>50</sup>Examples of such statutes have been found in Delaware, Idaho, Maine, Minnesota, Utah, Virginia, Washington and Wisconsin.

<sup>51</sup>Pennsylvania Statutes (1920), sec. 9344.

<sup>52</sup>Compiled Laws of North Dakota (1913); secs. 2931, 2937.

<sup>53</sup>The following states have such provisions: Florida, Idaho, Iowa, Kansas, Maryland, Michigan, Ohio, Oklahoma, Washington and West Virginia.

<sup>54</sup>Oregon Laws (Olson, 1920), sec. 7763.

prosecute nursery inspection violations, to prosecute under the maternity hospitals act, and to investigate and act in regard to boarding houses for infants.<sup>55</sup> It is a part of the duty of the prosecutor in Oregon to prosecute violations of the act regulating sanitary conditions in tourist camp grounds.<sup>56</sup>

The manufacture of mattresses is another subject which the statutes of three states specifically list as a subject for the attention of the prosecuting attorney,<sup>57</sup> and in Oregon a similar provision is broadened to include the manufacture and sale of any bed clothing.<sup>58</sup> The Washington statute defines his duty in this respect as that of prosecuting violations of the "shoddy" law.<sup>59</sup>

These public health duties which have been listed largely concern the enforcement of the purity of food products or of laws regulating sanitary conditions. Another important aspect of public health administration which is specifically mentioned among the duties of the prosecuting attorney in several states is the regulation of physicians, dentists, and members of related professions. It is made the duty of the prosecutor in a few states to prosecute the unlawful practice of medicine or to proceed against persons practicing medicine without a license.<sup>60</sup> Similar provisions appear with respect to dentists,<sup>61</sup> optometrists,<sup>62</sup> pharmacists,<sup>63</sup> chiropractors,<sup>64</sup> and embalmers.<sup>65</sup>

The prosecuting attorney in Maine must prosecute physicians who fail to notify the state board of health of cases of occupational diseases or lead poisoning,<sup>66</sup> and the same is true in Michigan if the physician fails to report either occupational or communicable disease.<sup>67</sup> Other violations which must be prosecuted involve contagious disease laws, vaccination laws, and medical and surgery laws.<sup>68</sup>

In at least seventeen states statutes have been enacted to require the prosecuting attorney to prosecute delinquencies in respect to the registration of vital statistics, sometimes upon the initiative of the

<sup>55</sup>Oklahoma, Kansas and New Hampshire, respectively.

<sup>56</sup>Oregon Laws of 1925, ch. 137.

<sup>57</sup>Indiana, Michigan and Minnesota.

<sup>58</sup>Oregon Laws (1920), sec. 8282.

<sup>59</sup>Compiled Statutes of Washington (Remington, 1922), sec. 6135.

<sup>60</sup>California, Maryland, Michigan, Texas and Virginia.

<sup>61</sup>Arkansas, Missouri, Nevada, New Mexico and Washington.

<sup>62</sup>Idaho, Nevada, New Mexico, Pennsylvania, Rhode Island and Virginia.

<sup>63</sup>Alabama, Arkansas and Florida.

<sup>64</sup>Missouri, Washington and West Virginia.

<sup>65</sup>Michigan Compiled Laws (1929), sec. 6729.

<sup>66</sup>Revised Statutes of Maine (1930), p. 453.

<sup>67</sup>Compiled Laws of Michigan (1929), secs. 6544, 8615.

<sup>68</sup>Idaho, Maine and Wisconsin.

prosecutor himself, sometimes at the instance of the state registrar or department of welfare.<sup>69</sup>

It is interesting to notice that legislatures have been concerned not only with the health of persons but also with that of live stock. In at least four states the prosecuting attorney is charged with the duty to prosecute any person who practices as a veterinarian without a license,<sup>70</sup> and in Indiana it is his duty to aid the state and county veterinarians in the enforcement of their rules and regulations. In North Carolina he must prosecute violations of the stock and poultry tonic act, and in Michigan he must prosecute violations of the live stock remedies act. In various other states the statutes contain provisions requiring the prosecuting attorney to prosecute such things as violations of the Texas or splenic fever act,<sup>71</sup> the cattle quarantine act,<sup>72</sup> the laws relating to contagious diseases among sheep,<sup>73</sup> and numerous other live stock health acts.<sup>74</sup> Several states also have laws requiring the prosecuting attorney to prosecute infractions of the laws regulating the manufacture and sale of commercial feeding stuffs.<sup>75</sup>

There are a number of other statutory provisions which it is hardly accurate to classify as public health provisions but they are obviously related to the police power and in some respects resemble some of the provisions which have been discussed under public health. For that reason they may as well be treated here as elsewhere. The laws of a number of states require the prosecuting attorney to prosecute violations of the agricultural seed acts.<sup>76</sup> In some places it is his duty to commence criminal prosecution for failure to remove noxious weeds,<sup>77</sup> to prosecute the sale of noxious weed seeds,<sup>78</sup> or to prosecute violations of the thistle law.<sup>79</sup> Iowa and North Dakota vary this somewhat by requiring the prosecuting attorney to institute criminal prosecution against the highway superintendent or other official charged with the duty who fails to enforce the law against noxious

<sup>69</sup>As an example of these provisions see the Michigan statute, *Compiled Laws (1929)*, sec. 6593.

<sup>70</sup>Florida, Iowa, Michigan and Oklahoma.

<sup>71</sup>Illinois Revised Statutes (Cahill, 1931), ch. 8, sec. 85; Revised Statutes of Kansas (1923), ch. 47, sec. 641.

<sup>72</sup>Revised Statutes of Maine (1930), ch. 40, sec. 18.

<sup>73</sup>Oregon Laws (1920), sec. 9260; *Compiled Statutes of Washington (1922)*, sec. 3149.

<sup>74</sup>Florida, Illinois, Maryland, Nebraska and Ohio.

<sup>75</sup>Arkansas, Maryland, Nebraska, Washington, West Virginia and Virginia.

<sup>76</sup>Idaho, Minnesota, Missouri, New Mexico, North Dakota, Oklahoma and South Dakota.

<sup>77</sup>Michigan, Washington and Wisconsin.

<sup>78</sup>Michigan *Compiled Laws (1929)*, sec. 5079.

<sup>79</sup>Revised Statutes of Missouri (1929), sec. 12600.



weeds. County attorneys in Nebraska must proceed against the sale of diseased plants, and in Arkansas the prosecutor, on the evidence of the chief inspector of the plant board, must prosecute for violations of the nursery fraud act. Other provisions which might be similarly mentioned relate to potato, grain, and tobacco inspection, to the manufacture and sale of fertilizer, or to prosecutions for cruelty to animals.<sup>80</sup>

Several legislatures have enacted statutes requiring the prosecuting attorney to prosecute under the various acts providing for the inspection of gasoline and motor oil, mining illuminating oil, and various other petroleum products.<sup>81</sup>

The legislatures have specifically defined the duties of the prosecuting attorney in regard to only a few public safety laws and regulations. In Maine he must prosecute owners of inland steamers for violations of the safety regulations, and in Indiana it is his duty to prosecute persons or firms for violation of the boiler act. In Minnesota the statute imposes the duty to arrest and prosecute the operators of motion picture shows when the fire marshal reports that they do not have the required license. In Michigan the prosecutor's duty regarding violations of the theatre fire act is defined by statute, and in other states similar provisions appear on the subject of violations involving fire escapes, or fire laws and orders in general.

### (c) Miscellaneous

The office of prosecuting attorney has been charged with many new duties relating to the regulation of economic activities by the states. Under many of these statutes the prosecutor must conduct criminal prosecutions required to enforce public utility laws and the regulations of public utility commissions.<sup>82</sup> In addition to the stat-

<sup>80</sup>North Dakota, Missouri, Tennessee, Maryland and Virginia, and Michigan, respectively.

<sup>81</sup>Such provisions have been found in Colorado, Delaware, Florida, Idaho, Iowa, North Dakota, Oklahoma, Tennessee, Texas.

<sup>82</sup>The Oregon laws provide: ". . . Upon the request of the commission it shall be the duty of the attorney-general or the prosecuting attorney of the proper county to aid in any investigation, hearing, or trial had under the provisions of this act and to initiate and to prosecute all necessary suits, actions or proceedings for the enforcement of any law of this state or any law or ordinance of any municipality thereof relating to public utilities, and for the punishment of all violations thereof. . . ." (Oregon Laws (1920), sec. 6102).

Similar statutes relating to utility regulation have been found in Colorado, Idaho, Maine, Michigan, Nevada, Rhode Island and Utah. Some of the laws refer specifically to particular acts or types of acts such as the common carriers act in Colorado, the railroad act in Wyoming, or street railway acts in Indiana, Nebraska and Washington.

utes involved in the general regulation of public utilities, there are a number of provisions concerned with details of railroad administration which the prosecutor must enforce. Examples are the Montana statute requiring street railways to provide a proper enclosure for motormen, the North Dakota statute concerning coal freight rates, the Missouri provision forbidding railroads to give passes to public officers or members of the general assembly,<sup>83</sup> or the numerous safety provisions regulating brakes, couplers, headlights, and grade crossings. In Pennsylvania it is the prosecutor's duty to investigate railroad injuries and prosecute responsible persons. A few other provisions are directed at specific actions by public utilities such as the unlawful stringing of wires, or merchandising by a public utility corporation.

There are many provisions requiring the prosecutor to initiate criminal prosecutions under acts regulating various business practices such as creation of trusts and monopolies,<sup>84</sup> unfair competition or discrimination,<sup>85</sup> restraint of trade,<sup>86</sup> or false or fraudulent advertising.<sup>87</sup> A Vermont provision requires the prosecutor to bring contempt proceedings against corporations failing to produce their books,<sup>88</sup> and in North Carolina to prosecute for violation of the rules of the corporation commission.<sup>89</sup> It is the duty of the state attorney in Florida to prosecute combinations created to obstruct the sale of Florida meat. In Nebraska the statute requires the county attorney to prosecute combinations of grain dealers, and the object of a similar statute in Wisconsin is prosecution of dairy monopolies.<sup>90</sup>

Numerous other provisions require the prosecuting attorney to proceed against violations of law by insurance companies or express companies,<sup>91</sup> to enforce the orders of industrial commissions,<sup>92</sup> or

<sup>83</sup>A. Minnesota statute requires the prosecuting attorney to prosecute a railroad for failure to carry members of the national guard on official business at one cent per mile and first class.

<sup>84</sup>Arizona, Colorado, Kansas and Wisconsin.

<sup>85</sup>Arkansas, Colorado, Florida, Iowa, Michigan, Nebraska, North Dakota and Oklahoma. The Missouri law specifies that the prosecutor must bring criminal action against a railroad which discriminates against express companies.

<sup>86</sup>Massachusetts, Nebraska, and South Dakota.

<sup>87</sup>Revised Statutes of Kansas (1923), ch. 21, sec. 1113; Compiled Laws of North Dakota (1913), sec. 9990.

<sup>88</sup>See General Laws of Vermont (1917), sec. 4955.

<sup>89</sup>A Nebraska statute requires the county attorney to prosecute foreign corporations which fail to appoint a resident agent or file the certificate required by law.

<sup>90</sup>A Minnesota law requires prosecution for discrimination in the sale of petroleum.

<sup>91</sup>Insurance companies: Massachusetts, Michigan, Maine, Nebraska and Washington. Express companies: Idaho and Indiana.

<sup>92</sup>Ohio, Utah and Wisconsin.

the provisions of the mining laws.<sup>93</sup> There are a number of statutes enumerating among the duties of the office the prosecution of factory and labor law violations,<sup>94</sup> and of other laws regulating the relationship between employer and employee.<sup>95</sup> In several states the laws specifically require the prosecuting attorney to institute proceedings to punish violations of banking or security laws.<sup>96</sup> The Nevada statutes require the district attorney to examine the stockholders of a surety company if the laws relating to surety companies are being violated, and failure to make this examination is misdemeanor in office.<sup>97</sup>

The prosecution of violations of weights and measures acts is another duty which is specially mentioned in some states. The Colorado provision on this subject is rather interesting in that it requires such prosecution to be made at the direction of justices of the peace.<sup>98</sup>

The laws involving public health administration and the regulation of economic activities do not by any means exhaust the subjects for which legislatures have enumerated specially the duties of the prosecuting attorneys. None of the other subjects covers as many statutory provisions as either of the first two but to list them in as much detail would extend this discussion indefinitely. It seems

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<sup>93</sup>Arkansas, Colorado, Idaho and Nevada.

<sup>94</sup>The Wyoming provision, for example, requires the prosecutor to assist the state labor commissioner. (Compiled Statutes of Wyoming (1920), sec. 271.) The Iowa statute requires him to investigate and prosecute violations of the child labor act. (Code of Iowa (1927), sec. 1541). One Michigan provision requires the prosecuting attorney to prosecute violations of the "legal working day" act (Compiled Laws (1929), sec. 8488), while another requires him to prosecute violations of the factory laws on complaint of the commissioner of labor or the factory inspector. (Sec. 8336.) Various other provisions of like character appear in the statutes of Indiana, Missouri and Virginia.

<sup>95</sup>A Minnesota law requires the county attorney to proceed against any corporation which requires from any employee a right or privilege of citizenship. (General Statutes (1923), sec. 10502.) Under an Ohio statute the prosecutor must prosecute any employer who forces his employees to purchase at certain places or who pays them in scrip redeemable only at company stores. (Code of Ohio (Throckmorton, 1930), sec. 12947.) A Vermont provision requires prosecution for violation of the weekly payment of wages act. (General Laws of Vermont (1917), sec. 5855.)

<sup>96</sup>Several of these provisions specify that such prosecutions shall be undertaken upon the complaint of the state banking examiner or securities commissioner. See for example the New Mexico Laws of 1925, ch. 67, in respect to prosecutions under the state bank examiner, and Burns' Indiana Statutes (1926), sec. 5002, for a provision requiring "blue sky" prosecutions under the state securities commission.

<sup>97</sup>Revised Laws of Nevada (1912), sec. 1248.

<sup>98</sup>Compiled Laws of Colorado (1921), sec. 4123. Other states which have sections on this type of prosecution are North Dakota, Nevada and Oregon.

sufficient, therefore, to attempt to summarize briefly the more important classes of these provisions.

There are a large number of provisions requiring the prosecuting attorney to initiate prosecutions against public officials and the reasons for which such action is to be taken include nearly every conceivable ground. The following are some of those that appear: Delinquency in the handling of public funds,<sup>99</sup> illegal issuance of marriage license,<sup>100</sup> failure in duty in respect to dog licenses,<sup>101</sup> failure of officials to purchase public necessities from the state penal institutions,<sup>102</sup> failure of public official to report as required by law,<sup>103</sup> negligence or malfeasance in administration of the election laws,<sup>104</sup> and many other items of malfeasance or negligence on part of public officials.<sup>105</sup>

The statutes specifically designate as the duty of the prosecutor the prosecution of many election offenses such as fraudulent signature of petitions, refusal to serve as election judge or clerk, illegal expenditures and corrupt practices, election frauds, and bribery.<sup>106</sup>

The laws of many states make it the duty of the prosecuting attorney to enforce various conservation measures chief among which are the fish and game laws.<sup>107</sup> In a few places the duties of the

<sup>99</sup>Kentucky, New Mexico, Pennsylvania, Tennessee, Texas and Virginia.

<sup>100</sup>Indiana Statutes (Burns' Annotated, 1926), sec. 9872.

<sup>101</sup>General Laws of Massachusetts (1921), ch. 150, sec. 184; Public Laws of New Hampshire (1926), ch. 150, sec. 22.

<sup>102</sup>Indiana Statutes (Burns' Annotated, 1926), sec. 12449.

<sup>103</sup>Idaho Compiled Statutes (1919), sec. 413; Revised Laws of Nevada (1912), sec. 3371.

<sup>104</sup>California, Colorado, Maine, New Hampshire, Rhode Island and Tennessee.

<sup>105</sup>The California statutes require the district attorney to see that the public administrator shall do his duty. Some of the other prosecutions required of the prosecuting attorney are based upon the following grounds: Against the county superintendent of the poor for failure to keep proper records or to report (Michigan); against sheriff or constable for failure to execute process or take prisoner into custody (Pennsylvania); against selectmen for not making a true report of persons eligible for military duty (Connecticut); against the sheep inspector for neglect or misfeasance (Nevada); against county treasurer for discounting warrants (Colorado); against an assessor who assesses property fraudulently (California); against sheriff for releasing a prisoner on insufficient bond (North Carolina); against public officials who fail to comply with the law concerning the sale of public pamphlets (Idaho).

<sup>106</sup>Such provisions involving illegal expenditures or corrupt practices appear in the statutes of at least twelve states. In Louisiana and Minnesota any prosecuting attorney forfeits his office upon conviction for failure or neglect to prosecute under the corrupt practices act.

<sup>107</sup>In at least fifteen states the laws to which this statement refers are the usual provisions regulating hunting and fishing as sports. In some of the coast states, however, these provisions take the form of regulation of industries. For example, in Rhode Island the attorney-general must conduct prosecutions under the direction of the commissioners of shell fisheries, and is required to prosecute under the various laws regulating the cultivation and marketing of

prosecutor also include prosecution under forestry, timber, and logging acts,<sup>108</sup> and in Louisiana a similar provision appears with respect to the conservation of natural gas.

In many states the statutes impose various criminal prosecutions involving taxation such as prosecution for non-payment of the dog tax,<sup>109</sup> for taxation frauds,<sup>110</sup> or prosecutions brought under the direction of state tax commissions<sup>111</sup> or under license laws.<sup>112</sup> Under the school laws the prosecutor in some places has the duty to prosecute truants,<sup>113</sup> violations of the text-book act,<sup>114</sup> failures to put deaf children in a school for the deaf,<sup>115</sup> or other school law violations. There are various provisions directing the attention of the prosecuting attorney to offenses involving or affecting children,<sup>116</sup> and to cases of non-support or desertion.<sup>117</sup> Other items which may be mentioned are the unlicensed practice of the law,<sup>118</sup> trespass upon state lands,<sup>119</sup> violations of the road and highway laws,<sup>120</sup> infractions of

shell fish. (General Laws of Rhode Island (1923), secs. 3281, 3285.) In Florida it is the duty of the prosecutor to enforce the sponge fisheries law. (Compiled General Laws of Florida (1923), sec. 1886.) The Virginia statutes require him to prosecute under the oyster fishing laws. (Code (1919), sec. 3289.) In Delaware it is the duty of the attorney-general to enforce the uniform fishing law relating to the Delaware River and adopted by both Delaware and New Jersey. If any Delaware resident is illegally taken and detained in New Jersey under this law, it is the attorney-general's duty to appear in the courts of that state and procure the return of the defendant to Delaware. (Revised Statutes of Delaware (1915), sec. 564.)

<sup>108</sup>Arkansas, California, Idaho, Ohio, Oregon and Virginia.

<sup>109</sup>Indiana Statutes (Burns' Annotated, 1926), sec. 14090.

<sup>110</sup>Code of Tennessee (1932), sec. 1439; Wisconsin Statutes (1929), sec. 70.36.

<sup>111</sup>Kansas, Kentucky, Michigan, Ohio and Washington.

<sup>112</sup>Revised Statutes of Kansas (1923), ch. 19, sec. 714; General Statutes of Minnesota (1923), sec. 5945.

<sup>113</sup>Compiled Laws of Utah (1917), sec. 4743; Compiled Statutes of Washington (1922), sec. 5079.

<sup>114</sup>Compiled Statutes of Oklahoma (1921), sec. 10281.

<sup>115</sup>General Statutes of Minnesota (1923), sec. 4615.

<sup>116</sup>The provisions include statutes requiring him to prosecute juvenile offenders or delinquents (Colorado, Idaho, New Jersey and Ohio), to prosecute the unlawful use of firearms by children (Montana), and to prosecute violations of statutes respecting care and protection of children (Maine). The West Virginia statutes particularly require prosecution of persons contributing to the delinquency of children.

<sup>117</sup>The statutes of Colorado require the prosecutor to proceed to extradite a husband for non-support (Compiled Laws (1921), sec. 5568), and the laws of Massachusetts require prosecution of desertion, non-support and bastardy cases (General Laws (1921), ch. 273).

<sup>118</sup>Missouri, North Carolina, Oregon and Rhode Island.

<sup>119</sup>Massachusetts, Michigan, North Dakota, Ohio and Wisconsin. A similar Texas statute requires prosecution of depredations against public lands, and a Rhode Island law requires the attorney-general to prosecute encroachments upon public tide waters.

<sup>120</sup>These involve a great number of offenses ranging from ploughing up public roads to failure to trim hedges and violations of the motor vehicle laws. Other items which are hardly highway offenses but which should be mentioned

the military laws,<sup>121</sup> violations of the civil service acts,<sup>122</sup> of lobbying laws,<sup>123</sup> or laws prohibiting the exhibition of deformed persons.<sup>124</sup>

One more type of duty which should be mentioned involves those statutes which require the prosecuting attorney to prosecute contempts of court. In Washington, Oregon, and North Carolina the laws provide that it is his duty to prosecute all contempts of court.<sup>125</sup> In Wisconsin it is required that he bring contempt proceedings for jury commissioners, and the statutes of Vermont make it the duty of the prosecutor to bring contempt proceedings against corporations which fail to produce their books.

This description is not a complete tabulation of the statutes which define the duties of the prosecuting attorney in criminal prosecution but others which might be added are similar to those presented. The discussion has covered the subjects to which these statutes relate sufficiently to picture the variety and complexity of the duties which legislatures have expected the prosecuting attorney to perform. Quantitatively, the provisions described give rise to a comparatively small part of the criminal prosecutions in any office. Notwithstanding this quantitative unimportance, it seems worth while to present this cross section because it shows better than any other method the great number of points at which the life of the community can be affected by the administration of the prosecutor's office.

It is obvious that the mere existence of these hordes of statutes does not insure their enforcement. Scores of these laws probably lie unused and forgotten but the fact that they have been enacted from time to time demonstrates that legislatures have contemplated that the duties of the prosecuting attorney should include far more than the prosecution of a few common criminal offenses.

#### IV. *Investigation.*

It is quite apparent that there are few criminal prosecutions which do not involve a large amount of preliminary criminal in-

are prosecutions for obstructing navigation (Delaware), for violations of buoy and beacon act (Michigan), and for violations of the drain and levee laws (Missouri).

<sup>121</sup>Utah and Texas. The Idaho provision requiring prosecution of an embezzler of military funds is hardly a military law in the same sense but it does show special consideration for military organizations.

<sup>122</sup>Louisiana, 1926 Supplement, Marr's Annotated Revised Statutes, p. 1659.

<sup>123</sup>General Laws of Rhode Island (1923), sec. 1772.

<sup>124</sup>Oregon Laws (1920), sec. 2198.

<sup>125</sup>Washington has another provision which requires the district attorney to prosecute recalcitrant witnesses before military courts, and in New Jersey it is provided that the prosecutor shall bring contempt proceedings for failure to deliver militia uniforms.

vestigation or police work. This may have been undertaken by any one of a large number of agencies—the coroner, the sheriff, the prosecuting attorney, the police department, private detectives retained by the injured party, railroad police, game wardens, state health inspectors, or many others. In view of the fact, however, that the prosecuting attorney must have proper evidence to obtain a conviction, it is often necessary for him to keep a close watch upon the investigation of the criminal act to insure that all the pertinent facts are uncovered. No study of the statutes alone can possibly indicate the extent to which any prosecuting attorney actually enforces as well as prosecutes the criminal law. The crime surveys have shown that he is often a more important conservator of the peace than the sheriff with whom the task has rested for centuries, but often the assumption of this role by the prosecutor is purely a practical development without any basis in the laws of the state. To some extent, however, the legislatures themselves have imposed upon the prosecuting attorney the duty or granted him the power to investigate crimes and apprehend criminals. It seems desirable now to examine the provisions by which this has been accomplished.

Throughout most of the United States the coroner, sheriff, and prosecuting attorney are county officers of coordinate rank. If a murder should occur within their county, the respective duties of these three officers in punishing the murderer might be nicely delineated, in theory, by reference to the historical functions of the offices. Such a division of labor among the three would assign to the coroner the examination of the body and the discovery of the murderer, to the sheriff the task of apprehending him, and to the prosecuting attorney the task of prosecuting him.<sup>126</sup> Actually, the administration of criminal justice does not work this way. The

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<sup>126</sup>For several hundred years it has been the duty of the coroner to investigate homicides but the original reason is quite different from the present one. At the inception of the office the interest of the sovereign seems to have been not the solution of the crime but the collection of the property of the deceased and of a fine which the laws of the time imposed upon the hundred in which the body was found. It was the duty of the coroner to collect and turn over to the king this property and such things as treasure troves, "royal fish," and shipwrecks which might be found within his jurisdiction. This original purpose of the office has disappeared, of course, and wherever the office of coroner exists in the United States, he is the official charged with the duty to examine the body in order to determine whether or not a crime has been committed and to attempt to some extent to find the guilty person. See Thompson, "The Anglo-American Judicial System," 17 *Cornell Law Quarterly* 31 (Dec., 1931). Perhaps a remnant of this original function of the coroner is found in the Ohio statute which requires the prosecuting attorney to bring an action to recover for the state the property from the body of a person found dead. (Code of Ohio (Throckmorton, 1930), sec. 2885.)

coroner usually turns out to be a poor detective, the sheriff prefers to spend his time serving civil process for which he receives higher fees than he would get for arresting murderers, and the prosecuting attorney often must perform the functions of all three offices. It is evident from the crime surveys that the offices of sheriff and coroner are anachronisms.<sup>127</sup> In a large number of states the shortcomings of the sheriffs have been recognized and legislatures have established state police forces, but few have done much about the coroner.

In most of the states the attempts to patch up the administration of the coroner's office have been very superficial and most inadequate, consisting usually of a weak attempt to relate it somehow to the office of prosecuting attorney. These statutes provide, for example, that the prosecutor shall receive notice of and attend all coroner's inquests,<sup>128</sup> or perhaps they give him authority to order the coroner to hold an inquest or perform an autopsy.<sup>129</sup> In those states where they are separately chosen officials of coordinate rank in the governmental structure, statutory provisions of this nature seem to be the only ones which define the relation between the two offices. The Connecticut statute providing that the judges of the superior court "shall appoint for each county, upon the recommendation of the state's attorney, a coroner" might lead to somewhat closer cooperation between the officials.<sup>130</sup>

Maine and Massachusetts seem to have acted more effectively upon the realization that the office of coroner has outlived its usefulness and have supplanted it by the office of medical examiner. The change has been an improvement in that it has brought competence to the office of medical examiner and largely restricted its duties to the examination of the body. The examination of witnesses and the inquest have been shifted to the prosecutor and the courts.<sup>131</sup>

<sup>127</sup>For a comprehensive discussion of the origin and administration of the offices of coroner and sheriff, see Moley, "Politics and Criminal Prosecution" (1929), ch. V. See also Schultz, "Medical Science and Criminal Justice," 23 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 736 (January-February, 1933).

<sup>128</sup>Examples: Compiled Laws of Colorado (1921), sec. 5977; Revised Statutes of Missouri (1929), sec. 11358; General Statutes of Minnesota (1923), sec. 946; General Laws of Vermont (1917), sec. 6616.

<sup>129</sup>Examples: Compiled Laws of Michigan (1929), sec. 17423; Public Laws of New Hampshire (1926), ch. 376, sec. 10; Oregon Laws of 1925, ch. 138. The laws of Delaware require the coroner to send the attorney-general his records of inquisitions and examinations. (Delaware Revised Statutes (1915), sec. 1357). In Vermont the attorney-general or a superior court judge may order an autopsy performed upon petition of the state's attorney. (General Laws of Vermont (1917), sec. 2621.)

<sup>130</sup>Connecticut General Statutes (1930), ch. 14, sec. 240.

<sup>131</sup>General Laws of Massachusetts (1921), ch. 38; Revised Statutes of Maine (1930), ch. 151; see also Moley, *op. cit.*, pp. 125-6.

In Massachusetts the medical examiner must report to the district at-



Nebraska has united the functions of the two offices by making the county attorney ex-officio coroner with all the duties of the old office. The county attorney, however, may delegate to the sheriff the part of the coroner's duties "as now prescribed by statute which relates to the viewing of dead bodies and serving papers."<sup>132</sup> The California statutes authorize any county board of supervisors to consolidate the offices of coroner and district attorney.<sup>133</sup>

These various statutes which attempt to correlate the functions of the coroner and prosecuting attorney indicate that legislatures wish the prosecutor to take an active interest in the solution of homicides. A few other provisions incline in the same direction by providing that the prosecutor may call upon the state board of health, as in New Hampshire and Michigan, or the state pathologist and bacteriologist, as in Delaware, to make criminal analyses or toxicological investigations.<sup>134</sup> It is the duty of the solicitor in North Carolina to furnish the grand jury with information concerning lynchings.<sup>135</sup> The statute does not specifically require him to gather the information also but that duty certainly is implied.

torney upon every autopsy performed and the district attorney certifies his concurrence in the report to the county commissioners or the county auditor. If the medical examiner thinks that a death has resulted from the act or negligence of another, he must report the case at once to the district attorney and to a justice or judge. The inquest is then held before the court and the district attorney may be present to examine witnesses.

The relation between the medical examiner and the county attorney or attorney-general in the state of Maine is much the same. The inquest is actually conducted by the county attorney or the attorney-general and may be held even if the medical examiner thinks that no homicide was involved.

The laws of Rhode Island provide for a medical examiner for each county, appointed by the governor with the consent of the senate, and a coroner for each town, chosen by the town council. The medical examiner examines the body of the deceased and reports to the attorney-general. The inquest seems to be conducted by the coroner but the attorney-general or an assistant may be present to examine witnesses. The attorney-general may require an inquest to be held when the medical examiner finds that the death was not caused by the negligence or act of another. (General Laws of Rhode Island (1923), ch. 409.)

The New Jersey statutes provide for the office of medical examiner and seem to give it practically the same duties as the previous office of coroner. The relation of the prosecutor to the medical examiner is not covered by the law. (New Jersey Laws of 1927, ch. 106.)

In New York City one medical examiner is appointed for the entire city and performs the duties formerly given to the coroner. In the two counties of New York and Kings the law provides for a medical assistant to the district attorney but Professor Moley states that these two positions are superfluous and merely duplicate the work of the medical examiner. (Moley, *op. cit.*, p. 126.) In New Hampshire a similar official is called the medical referee. (Public Laws (1926), p. 1463.)

<sup>132</sup>Compiled Statutes of Nebraska (1929), ch. 26, sec. 910.

<sup>133</sup>California Laws of 1931, ch. 986.

<sup>134</sup>Public Laws of New Hampshire (1926), ch. 127, sec. 2; Compiled Laws of Michigan (1929), sec. 6461; Revised Statutes of Delaware (1915), sec. 787.

<sup>135</sup>Consolidated Statutes of North Carolina (1919), sec. 4600.

The homicide cases are the ones which attract public attention to the work of the prosecutor's office but, of course, they represent only a small percentage of the felony cases which pass through such an office each year. Nevertheless, except for the implications of the provisions which have been summarized in the preceding paragraphs and with the additional exception of liquor, gambling, and vice cases, the statutes do not contain many references to the prosecuting attorney's duties in specified felony or the more common misdemeanor cases. The legislatures have apparently considered that the duties of the office in these cases are sufficiently covered by the usual blanket provisions making it the duty of the prosecuting attorney to prosecute indictments and complaints. This implies that criminal investigations undertaken by prosecutors to solve the more common felonies are entirely a practical development without much basis in the statutes. The power seems to have grown from the necessity for evidence. In many states prosecuting attorneys may employ detectives or spend their contingent fund to gather evidence to be used in criminal prosecutions, and where there has been no effective police agency, it has been necessary for the prosecuting attorney to solve crimes in his jurisdiction to obtain any convictions at all.

A few states have statutes which indicate that the prosecuting attorney is expected to participate in the investigation of crimes in general. For example, in Vermont the state's attorney may authorize the search and pursuit of criminals.<sup>136</sup> In California, Montana, Oregon, and Utah it is the duty of the prosecutor to institute proceedings before magistrates to have arrests made when he has information that a crime has been committed.<sup>137</sup> In Louisiana, whenever a district attorney or attorney-general learns that a crime has been committed and that no complaint has been made, it is his duty to summon witnesses, question them, and take depositions before a judge or justice of the peace.<sup>138</sup> Indiana has a similar provision.<sup>139</sup> The county attorney in Wyoming is the official who applies to the governor to offer rewards for the apprehension of criminals,<sup>140</sup> and in West Virginia the prosecuting attorney himself offers such rewards.<sup>141</sup>

There seem to be only a few provisions upon the prosecuting

<sup>136</sup>General Laws of Vermont (1917), sec. 3903.

<sup>137</sup>Codes of California (Deering, 1931), Political Code, sec. 4153; Revised Code of Montana (1921), sec. 4819; Oregon Laws (Olson, 1920), sec. 1018; Compiled Laws of Utah (1917), sec. 1610.

<sup>138</sup>Marr's Annotated Revised Statutes of Louisiana (1915), sec. 2443.

<sup>139</sup>Burns' Annotated Indiana Statutes (1926), sec. 11831.

<sup>140</sup>Compiled Statutes of Wyoming (1920), sec. 7692.

<sup>141</sup>Official Code of West Virginia (1931), p. 109.

attorney's relation to persons in custody. It is provided in Pennsylvania that the district attorney may employ fingerprint experts to aid in the investigation of cases and he may order prints taken from any person in the county jail.<sup>142</sup> It is the duty of the county attorney in Maine to see that fingerprints and photographs of the accused are destroyed in case of acquittal.<sup>143</sup> County solicitors in New Hampshire may order Bertillon measurements taken.<sup>144</sup> The district attorney in Nevada is responsible for property taken from an arrested person.<sup>145</sup> It is specifically provided by statute in Missouri that the prosecuting attorney shall not use third degree methods to extort confessions.<sup>146</sup>

Except for these few general provisions which have been described, statutes giving the prosecuting attorney the power or duty to make criminal investigations refer to specific offenses or types of offenses. In five states the statutes impose upon the prosecuting attorney some duty in respect to the investigation of fires. The county attorney in Iowa may call upon the state fire marshal to investigate fires,<sup>147</sup> and in Oregon, North Dakota, and Nebraska it is the duty of the prosecutor to assist the state fire marshal in the investigation of fires occurring within his district or county.<sup>148</sup> The laws of Tennessee provide that the district attorney shall investigate fires of suspicious origin and take steps leading to indictment.<sup>149</sup>

There are dozens of statutory provisions dealing with the duties of the prosecuting attorney under the laws against liquor, gambling, and vice, a large part of which direct him to proceed in equity to abate liquor, gambling, or vice nuisances.<sup>150</sup> Although New York repealed the laws enacted to aid in the enforcement of the Eighteenth Amendment and the Volstead Act long before the Eighteenth Amendment was repealed, the New York courts held that places selling liquor might be nuisances and that district attorneys might employ detectives to make investigations of such places and apprehend offenders.<sup>151</sup> The Montana statutes make it the duty of the prosecutor

<sup>142</sup>Pennsylvania Laws of 1927, p. 415.

<sup>143</sup>Revised Statutes of Maine (1930), ch. 144, sec. 19.

<sup>144</sup>Public Laws of New Hampshire (1926), ch. 362, sec. 18.

<sup>145</sup>Revised Laws of Nevada (1912), sec. 6651.

<sup>146</sup>Revised Statutes of Missouri (1929), sec. 4422.

<sup>147</sup>Code of Iowa (1927), sec. 1624.

<sup>148</sup>Compiled Statutes of Nebraska (1929), sec. 5525; Compiled Laws of North Dakota (1913), sec. 219; Compiled Statutes of Nebraska (1929), sec. 5525.

<sup>149</sup>Code of Tennessee (1932), secs. 5704, 5710.

<sup>150</sup>This will be discussed in detail in a subsequent article.

<sup>151</sup>*United States v. Sumner*, 125 Misc. Rep. 658, 211 N. Y. S. 705 (1925), aff'd 216 App. Div. 782 (1926).

to investigate and prosecute under the liquor laws.<sup>152</sup> In Virginia failure of the commonwealth's attorney to enforce the prohibition is a misfeasance, and the language of the statute appears to require him to enforce the act and not merely prosecute under it.<sup>153</sup> In Arkansas the prosecuting attorney must obtain arrests as well as prosecute under the gambling act,<sup>154</sup> and in South Dakota it is his duty to destroy gambling apparatus.<sup>155</sup> Montana and Nebraska provide that the prosecutor shall destroy obscene literature.<sup>156</sup>

The sale of cigarettes to minors seems at some time to have been a serious matter to the people of the state of Washington for it is provided that the prosecutor shall enforce the laws against such a practice. To expedite enforcement it is provided that he may summon any minor before him and compel him to tell where he purchased cigarettes.<sup>157</sup>

Closely related to these provisions concerning the morals of the community is the Pennsylvania statute which provides that the district attorney may investigate applications for dance hall licenses.<sup>158</sup> Such an investigation is not preliminary to criminal prosecution but obviously the purpose of the statute is regulation to prevent these establishments from becoming nuisances. It seems, therefore, that such a license investigation may well be classed among the criminal investigation powers of the prosecutor.

Statutory provisions relating to the prosecuting attorney contain scores of sections making it his duty to give some sort of aid to the numerous regulatory and specialized law enforcement agencies of the state government. In large part his duties in this respect are restricted to prosecuting or defending civil and criminal actions for these authorities or to giving them legal advice in their investigations. The extent and variety of these provisions will be discussed in other sections of this study, but it seems desirable to mention here a few of the broader provisions of this character which seem to require investigation as well as prosecution or legal advice. It is provided in California that the attorney-general or, under his direction, a district attorney, upon the request of the head of any state department, shall assist in any investigation, hearing, or trial under

<sup>152</sup>Revised Code of Montana (1921), sec. 11109.

<sup>153</sup>Code of Virginia (1919), sec. 4655.

<sup>154</sup>Digest of Arkansas Statutes (Crawford and Moses, 1921), secs. 2647, 2650. See also decision cited in note 189.

<sup>155</sup>South Dakota Compiled Laws (1929), sec. 3920.

<sup>156</sup>Revised Code of Montana (1921), sec. 11139; Compiled Statutes of Nebraska (1929), sec. 926.

<sup>157</sup>Compiled Statutes of Washington (1922), sec. 2701.

<sup>158</sup>Pennsylvania Laws of 1927, p. 969.

laws which that department is required to administer.<sup>160</sup> Several states require the prosecuting attorney to aid the state utility commission in investigations and proceedings to enforce the utility laws.<sup>160</sup> In Ohio the prosecuting attorney is required, under the direction of the attorney-general, to assist the state tax commission in any investigation, hearing, or prosecution,<sup>161</sup> and in Wisconsin the district attorney must give to the state food and dairy commissioners "all the aid he can to secure the enforcement of the law."<sup>162</sup> The Wisconsin statutes similarly require him to aid the state authorities in the enforcement of the securities law.<sup>163</sup> The prosecuting attorney in Indiana must assist the state and county veterinarians in the enforcement of rules and regulations.<sup>164</sup> The reference to the duty to aid the state fire marshal might be appropriately repeated in this connection.

The laws of several states require the prosecutor to make investigations of violations of the various laws regulating economic activity in some form or another. In Oregon, for example, the statute requires him to investigate violations of banking regulations, of the pawnbrokers and small loan act, and of the motor vehicle loan act.<sup>165</sup> The district attorney in Louisiana may examine books of commission merchants to search for violations of laws regulating business methods.<sup>166</sup> The laws of Arizona and Washington provide that on the request of the governor the prosecuting attorney shall investigate the management or affairs of any corporation doing business in the state.<sup>167</sup> In Wyoming and Colorado it is the duty of the prosecutor to investigate and prosecute complaints of unfair competition,<sup>168</sup> and in North Dakota to investigate and prosecute cases of false and misleading advertising.<sup>169</sup> County attorneys in the state of Iowa are required to investigate and prosecute complaints of violation of the child labor law.<sup>170</sup>

<sup>160</sup>California Political Code (1931), sec. 355.

<sup>160</sup>Examples: Michigan Compiled Statutes (1929), sec. 11057; Compiled Laws of Colorado (1921), sec. 2966; Revised Laws of Nevada (1912), sec. 4538; Compiled Laws of Utah (1917), sec. 4839.

<sup>161</sup>Code of Ohio (Throckmorton, 1930), sec. 1465-9.

<sup>162</sup>Wisconsin Statutes (1929), sec. 98.02.

<sup>163</sup>*Ibid.*, sec. 189.824.

<sup>164</sup>Burns' Annotated Indiana Statutes (1926), sec. 8073.

<sup>165</sup>Oregon Laws of 1931, ch. 450, 373, 794, 808, 819.

<sup>166</sup>Marr's Annotated Louisiana Statutes, 1926 Supplement, p. 309.

<sup>167</sup>Code of Arizona (1928), ch. 2, sec. 19; Compiled Statutes of Washington (1922), sec. 10982.

<sup>168</sup>Compiled Statutes of Wyoming (1920), sec. 4373; Colorado Session Laws of 1928, p. 655.

<sup>169</sup>Compiled Laws of North Dakota (1913), sec. 9990.

<sup>170</sup>Code of Iowa (1927), sec. 1541.

Every pawnbroker in Michigan must keep a record of property passing through his hands and the prosecuting attorney may inspect his records at any time.<sup>171</sup> Delaware imposes such a requirement upon both pawnbrokers and junk dealers,<sup>172</sup> and in Massachusetts the district attorney may require any pawnbroker to produce articles for inspection of the court or grand jury.<sup>173</sup>

In Pennsylvania and Virginia it is the right of the prosecutor to examine the records of the state anatomical board showing how the dead bodies under its control have been distributed to the various medical schools of the state.<sup>174</sup>

It is the duty of the state's attorney in Vermont to investigate all railroad and automobile accidents,<sup>175</sup> and in Pennsylvania after railroad injuries the prosecuting attorney must take measures for apprehension and arrest of persons responsible and investigate and prosecute violations of any law involved.<sup>176</sup> The county attorney in Maine must investigate all cases of careless shooting by hunters and failure to do so means a fine of not more than \$1,000 and forfeiture of his office.<sup>177</sup>

In Michigan the prosecutor must investigate infractions of the primary election expense laws,<sup>178</sup> and in Massachusetts it is required that he attend election inquests, which are investigations before a court of complaints concerning election crimes.<sup>179</sup> The state's attorney in Connecticut may initiate investigations concerning election offenses by presenting a written request to a state referee, or a judge of the superior or common pleas court.<sup>180</sup>

A few other items should probably be mentioned to show further the variety of things which the prosecuting attorney may be called upon to investigate. Whenever an alien is convicted of felony in Michigan, it is the duty of the prosecuting attorney to investigate in the hope of finding some ground for deporting him.<sup>181</sup> The county attorneys of Minnesota are enjoined by statute to hold any documents which may be useful in perjury prosecutions.<sup>182</sup> In Tennessee

<sup>171</sup>Michigan Compiled Statutes (1929), sec. 9688.

<sup>172</sup>Delaware Revised Statutes (1915), sec. 1202.

<sup>173</sup>General Laws of Massachusetts (1921), ch. 140, sec. 88.

<sup>174</sup>Pennsylvania Statutes (1920), sec. 8288; Code of Virginia (1919), sec. 1730.

<sup>175</sup>General Laws of Vermont (1917), sec. 5048.

<sup>176</sup>Pennsylvania Statutes (1920), sec. 18541.

<sup>177</sup>Revised Statutes of Maine (1930), ch. 129, sec. 4.

<sup>178</sup>Michigan Compiled Laws (1929), sec. 3313.

<sup>179</sup>General Laws of Massachusetts (1921), ch. 55, sec. 40.

<sup>180</sup>General Statutes of Connecticut (1930), ch. 40, sec. 691.

<sup>181</sup>Michigan Compiled Laws (1929), sec. 1295.

<sup>182</sup>General Statutes of Minnesota (1923), sec. 10021.

the district attorney shall inquire into the use of funds by any clerk of a court and prosecute for unlawful use,<sup>183</sup> and in New York he shall investigate charges against canal officers.<sup>184</sup> It is the duty of the state's attorney in Maryland to inform the grand jury of the neglect or refusal of the clerk or county commissioners to return an assessment of property.<sup>185</sup> In Missouri the attorney-general or the prosecuting attorney may institute proceedings to obtain an inquiry by the circuit court into breaches of trust by a municipal corporation acting in a fiduciary relationship to find fraud or negligence or to administer proper relief.<sup>186</sup> In Massachusetts a permit must be obtained from the district attorney before any person is allowed to eavesdrop by dictaphone or by wiretapping.<sup>187</sup>

The recital of this long list of miscellaneous unrelated items demonstrates that the legislatures have intended in many instances to make the prosecuting attorney a police officer or detective. It is probable that the prosecutor is exclusively responsible for the enforcement of few, if any, of these provisions. In their efforts to insure the effectiveness of their enactments, legislatures have often named several public officers and made them individually responsible for the same law. This seems to be true particularly of liquor, gambling, and vice laws. In respect to the more refined offenses, such as those involved in the regulation of business activity, legislatures may have made investigation a task of the prosecutor because he is usually the only lawyer among the law enforcement officers of the community and is therefore presumed to have superior training and ability. For example, the village constable, the county sheriff, and the metropolitan police officer do not have the training to cope with complex offenses under the "blue sky laws" or embezzlement or fraud statutes.

It is probable that there is little relationship between the existence of statutes such as these and the actual amount of police work performed by the prosecuting attorneys in any particular state. The fact that such provisions can be found indicates that the prosecutor has not entirely usurped his criminal investigation activities. The fact that more are not found probably indicates that administrative

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<sup>183</sup>Code of Tennessee (1932), sec. 9966.

<sup>184</sup>Consolidated Laws of New York (Cahill, 1930), ch. 6, sec. 18.

<sup>185</sup>Annotated Code of Maryland (Bagby, 1924), art. 81, sec. 33.

<sup>186</sup>Revised Statutes of Missouri (1929), sec. 7163.

<sup>187</sup>General Laws of Massachusetts (1921), ch. 272, sec. 99. In the 1932 campaign for the election of a state's attorney in Cook County, Illinois, it developed that the state's attorney's office and the secret six, a private detective arm of the Chicago Association of Commerce, were spending much effort tapping each others telephone wires. This is a situation in which a provision such as the one mentioned might afford much protection to the prosecutor.

assumption of such activities has made it unnecessary for legislatures to act further upon the matter.

#### V. *Procedural Duties.*

Many of the statutory provisions relating to the prosecuting attorney define his duties in the various steps of criminal procedure and these must necessarily be studied along with the laws which define the substantive duties of the office. The discussion which follows is only a description of the statutes on the subject and does not claim to be a balanced treatment of the whole procedure of criminal prosecution. Emphasis is placed upon the extent to which the statutes bestow or restrict the discretion which is given to the office of prosecuting attorney.

In spite of the fact that the major portion of this material sets forth the relation of the prosecutor to the initiation of prosecution, the enactments of the legislature do not define clearly the general duty of the prosecuting attorney to institute criminal proceedings when he has knowledge of a crime. From the statutes alone one would conclude that the prosecuting attorney's duties toward any particular offense begin only after the grand jury returns an indictment or after the preliminary hearing in those states where the prosecutor may initiate proceedings by information.<sup>188</sup> Although the courts have aided in some degree, it is probable that popular attitude alone has made it clear that the prosecutor is expected to instigate criminal action upon his own knowledge as well as to prosecute after the indictment or complaint is filed.<sup>189</sup>

<sup>188</sup>This study has already presented a large number of exceptions to this general statement in the discussion of statutes defining particular duties in respect to both criminal investigation and criminal prosecution. Many of these provisions imply clearly that the prosecuting attorney must prosecute every such offense of which he hears, but there is no such implication in most of the general statutes from which the prosecuting attorney derives his duty to prosecute the major criminal offenses.

The Wisconsin statute, for example requires that the "district attorney shall . . . prosecute all actions, . . . civil or criminal, in the courts of his county in which the state or county is interested or a party." (Wisconsin Statutes (1929), sec. 59.47.)

New Mexico requires him to prosecute or defend in all courts of record in counties of his district all cases, civil or criminal, etc. Oregon requires him to attend all terms of court in his jurisdiction having jurisdiction of public offenses and prosecute.

These provisions do not imply clearly any duty of the prosecutor to initiate the criminal proceedings which it is made his duty to conduct.

The Illinois provision represents an exception in that it requires the state's attorney to "commence and prosecute all actions, . . . civil or criminal, in any court of record," etc. (Cahill's Illinois Revised Statutes (1931), ch. 14, sec. 5).

<sup>189</sup>See *Speer v. State*, 130 Ark. 592, 198 S. W. 113 (1917), in which the



From time to time the foregoing discussion has mentioned statutes which require the prosecuting attorney to institute criminal proceedings upon complaint from some other public authority. It is important to call attention once more to the fact that the prosecuting attorney is required by statute to cooperate with a dozen or more of types of specialized law enforcement agencies and in most provisions it is rigidly made his duty to bring criminal prosecution in

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court stated: "While the law does not impose the duties of a detective upon the prosecuting attorney, it does impose upon him ordinary diligence in discovering and abating crime." It was held that a prosecuting attorney was guilty of neglect of duty when he failed to institute criminal prosecution in spite of the fact that he knew that gambling was being carried on openly in his jurisdiction. An Arkansas statute does require that the prosecutor secure arrests as well as prosecute under the gambling laws but the court seems not to rely upon this statute in its opinion. (See note 154.)

There are similar cases in a few other jurisdictions but it seems likely that in most states popular opinion alone would require any prosecutor to act on his own knowledge. It would hardly be expedient politically for any prosecutor to state that he would not take official cognizance of a sensational murder case because the grand jury had not yet returned an indictment.

An Alabama statute seems to restrain the general power of the prosecuting attorney to institute criminal proceedings in offenses of which he learns. It provides that any solicitor who commences a prosecution for any criminal offense by his own affidavit, except for an offense against his person or property, or for a violation of the revenue or prohibition laws, or unless the affidavit be upon his personal knowledge of the commission of the offense, must be fined not less than \$50. (Code of Alabama (1923), ch. 232, sec. 5513).

In this connection it should probably be mentioned that there are a number of statutes which require some other authority to give information to the prosecuting attorney concerning offenses which come to its attention. The language of these provisions generally seems to imply that when such information reaches him, it is the prosecutor's duty to place such knowledge before the grand jury and take any other steps which may be necessary to commence criminal action.

Among such provisions are the following: The county auditor in Nevada shall notify the district attorney of neglect of duty by the county assessor. The state commissioner of insurance in Virginia must furnish the commonwealth attorney with any evidence of arson. Similar statutes are found in Minnesota, Pennsylvania, and Rhode Island. Boards of equalization and assessment in Nebraska are required to notify the county attorney of any tax violations. In Pennsylvania the inspector who investigates after an accident involving a vessel must report any violations of rules and regulations to the district attorney. The county surveyor in Missouri is required to report the destruction of land marks to the prosecuting attorney. In Michigan the secretary of state must report election law irregularities and similar statutes are found in Delaware and Pennsylvania. The Oklahoma law requires all county and town officials and officers to notify the prosecutor of liquor law violations. Judges and justices of the peace in Montana shall inform the county attorney of any drug addicts appearing before them. Justices of the peace in Minnesota must report all their cases to the county attorney.

The laws of Massachusetts provide that the district attorney shall be notified of divorces granted for adultery and shall be given a list of the witnesses so that he may lay the matter before the grand jury. (General Laws of Massachusetts (1921), ch. 208, sec. 45).

any case where such an agency may so direct.<sup>190</sup> In spite of this tendency to place the enforcement of particular laws in specialized agencies, legislatures have left the actual prosecution of criminal actions almost entirely in the hands of the attorney-general of the state and the local prosecuting attorney. The prosecuting agents of the state board of education in Connecticut, the powers of game wardens in Oklahoma and the power of the New Hampshire state commissioner of law enforcement to prosecute liquor cases are the only indications in the statutes of any tendency to create specialized prosecuting officials.<sup>191</sup>

There are a large number of statutes which relate to the duties of the prosecuting attorney in bail hearings. In general, it may be said that few states would exclude the prosecutor from a preliminary examination, and some states require him to appear. Others require him to appear only if the magistrate requests it.<sup>192</sup> It is quite often, indeed, that he must receive notice of bail hearings and has the right to appear.<sup>193</sup>

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<sup>190</sup>Among the agencies which the statutes permit to direct the prosecutor to institute prosecution are the following state agencies:

Public utility commissions, railroad commissions, industrial commissions, tax commissions, security or "blue sky" commissioners or commissions, corporation commissions, insurance commissioners, commissioner of labor, factory inspector, public banking examiner, state auditor, food and dairy commissioners, state plant board, inspector of mines, optometry board, board of health, pharmaceutical examining board, state bar examiners, board of water purification.

<sup>191</sup>The prosecuting agents in Connecticut have limited power to prosecute violations of laws relating to schools and children (General Statutes of Connecticut (1930), sec. 828), and in Oklahoma game wardens may prosecute under the game laws if the regularly constituted prosecuting attorney fails or refuses to do so (Compiled Statutes of Oklahoma (1921), sec. 6539). Public Laws of New Hampshire (1926), ch. 144, secs. 68 ff.

<sup>192</sup>See the discussion of this point in section II of this article. A California statute provides that the defendant may waive the preliminary hearing but the district attorney may require it to be held. (California Penal Code (Deering, 1931), sec. 860). The Oregon statutes contain an interesting section providing that fees of justices of the peace are not allowed unless the prosecution is authorized by the district attorney. (Oregon Laws (Olson, 1920), sec. 3589.)

<sup>193</sup>Colorado, Massachusetts, Michigan, Nevada and North Dakota. The Oregon statute provides that where bail is a matter of discretion the court may or may not require notice to the district attorney. The commonwealth's attorney in Virginia may move for an increase in the amount of bail, and the Connecticut statutes allow the state's attorney to apply for reduction or increase of amount of bail.

The laws of Delaware provide that the attorney-general may fix the bail of persons arrested on process except in capital offenses. (Revised Statutes of Delaware (1915), sec. 3981). The Iowa statutes give the county attorney power to require the personal appearance of sureties and to examine them under oath as to their sufficiency. (Code of Iowa (1927), sec. 13621.) In Pennsylvania it is provided that the county board if the district attorney ap-

In view of the studies which have been made of the initiation of criminal prosecution by indictment, presentment, or information, it does not seem necessary to discuss the relative extent or desirability of indictment and information. A mass of information on the subject is readily available in other sources—much more than could be repeated within the limits of this study.<sup>194</sup> There are a number of statutes, however, which deal with the relation of the prosecuting attorney to these processes and it may be worth while to summarize those provisions.

It is often said that the grand jury, where it exists, is merely a rubber stamp for the prosecuting attorney and there is no doubt that such may be the case in many communities.<sup>195</sup> The various provisions of law upon the subject make it quite clear, however, that any such control of the grand jury by the prosecutor exists by reason of force of personality and possession of better information rather than by declaration of the statutes. It is very generally provided that it is the duty of the prosecuting attorney to appear before the grand jury, at its request, to give advice or to examine witnesses, but these provisions usually add that neither the prosecutor nor any other person may be present when the grand jury is voting. In many states it is also provided that he has the right to appear either to give advice or to examine witnesses, whether the grand jury wishes to hear him or not.<sup>196</sup> Various other provisions make it the prosecutor's duty to subpoena and swear the witnesses to be brought before the grand jury, and the statutes usually require him to draw all indictments.<sup>197</sup>

proves, may repay a forfeiture to a defendant who surrenders after forfeiture and collection on his recognizance. (Pennsylvania Statutes (1920), sec. 10892.)

<sup>194</sup>Morse, "A Survey of the Grand Jury System," 10 Oregon Law Review; Moley, "Politics and Criminal Prosecution," ch. 6; Moley, "Initiation of Criminal Prosecution," 29 Michigan Law Review 408 (Feb., 1931).

See also Hall, "Analysis of Criticism of the Grand Jury," 22 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 692 (Jan., 1932), and various articles appearing in "The Panel" published by the Grand Jurors' Association of New York City.

<sup>195</sup>Morse, *op. cit.*, pp. 325 ff.; Moley, "Politics and Criminal Prosecution," p. 127; on the other hand, see Hall, *op. cit.*, pp. 698 ff.

<sup>196</sup>As an example of a statute which sets forth this right and duty to attend before the grand jury, see Michigan Compiled Laws (1929), secs. 17234-6. The Utah statute is somewhat broader in that it *requires* the district attorney to attend deliberations of the grand jury.

<sup>197</sup>It is often provided also that indictments must be signed by the prosecuting attorney, and the Iowa statute allows him to amend an indictment for misnomer. In Massachusetts the court may amend an indictment on the motion of the district attorney if the interests of the defendant are not prejudiced. There are provisions in a number of states making it either a contempt or a misdemeanor for the prosecuting attorney or any other person to disclose

The laws of Virginia provide that the commonwealth attorney may not appear before the grand jury except as a witness but he is allowed to give advice to the foreman or to any member who asks for it. It is provided by the Kentucky statutes that no person may be present before the grand jury during discussion or voting except a stenographer appointed by the commonwealth's attorney, and it is sometimes provided that the grand jury shall keep a record of its proceedings which shall be given to the prosecuting attorney.

There is little in the statutes upon the power or duty of the prosecuting attorney to inform the grand jury of any crime within the jurisdiction. The general power to appear and advise is unquestionably sufficient to enable him to present such information if he wishes, and in Oregon there is a provision stating definitely that the prosecutor may submit an indictment to the grand jury in any case of crime committed in his jurisdiction.<sup>198</sup> The Oregon statutes further provide that he must submit an indictment and supporting evidence to the grand jury in the case of any person held in the court to answer a criminal charge, and Tennessee has a similar law.<sup>199</sup> The only other provision of this type which has been found requires solicitors in North Carolina to give information to grand juries upon lynchings.<sup>200</sup> It appears, therefore, that there are few situations in which the statutes require the prosecutor to appear before the grand jury and advise it of the commission of a criminal offense.

The extent to which the information may be used to initiate prosecution varies from one state to another. In many places there is no restriction; in others it may be used for all but capital offenses, or for misdemeanors only, or for prosecutions before justice courts.<sup>201</sup> Wherever it is provided by constitution or statute that criminal offenses may be prosecuted by information, the prosecuting attorney is the official who signs and files the information.<sup>202</sup> Various supplementary statutes sometimes provide that he shall draw all informations or that they must be verified by oath.

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that an indictment has been returned until after the arrest of the defendant. This injunction of secrecy seems, however, to be quite ineffective.

The Arizona statutes add the provision that he shall examine the grand jurors concerning their qualifications. (Revised Code of Arizona (1928), sec. 4960.)

<sup>198</sup>Oregon Laws (1920), sec. 1423.

<sup>199</sup>*Ibid.*, sec. 1422; Code of Tennessee (1932), sec. 9966.

<sup>200</sup>Consolidated Statutes of North Carolina (1919), sec. 4600.

<sup>201</sup>See Professor Moley's discussion in 29 Michigan Law Review 403 (Feb., 1931).

<sup>202</sup>As an example of such a provision see Wisconsin Statutes (1929), sec. 355.13.

For the purpose of this study, the most interesting provisions of the laws relating to the use of the information are those by which legislatures have attempted to restrict the discretion which it places in the prosecuting attorney. At least fourteen states have a statute similar to the following Idaho provision:<sup>203</sup>

"It shall be the duty of the prosecuting attorney to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail or become recognized or held to bail, and if the prosecuting attorney shall determine in any case that an information ought not to be filed, he shall . . . file with the clerk of the court a statement in writing containing his reasons in fact and in law. . . . The court may examine said statement and the evidence, and if the court shall not be satisfied with such statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial."

A similar provision in Colorado adds that the judge may compel compliance by the district attorney by fine, attachment, or imprisonment. The mere existence of such provisions does not guarantee that in practice the discretion of the prosecuting attorney is much restricted by such limitations, but such provisions demonstrate the devices by which legislatures have attempted to provide for some control of the prosecutor's discretion in the initiation of prosecution.

The dismissal of prosecutions is another aspect of criminal procedure in which the legislatures have attempted by statute to restrict the discretion of the prosecuting attorney. The statutes of West Virginia provide that it is malfeasance in office, subjecting the prosecuting attorney to removal, for him to compromise or suppress an indictment unless the consent of the court is entered in the record.<sup>204</sup> The laws of Missouri impose a fine of \$300 and three months imprisonment upon any prosecuting attorney who enters a dismissal or *nolle prosequi* in a case as a result of any corrupt agreement.<sup>205</sup> In many other states a *nolle prosequi* or dismissal may not be entered unless the court gives its consent.<sup>206</sup> To this requirement some of the statutes add that the motion must be accompanied by a written statement of reasons,<sup>207</sup> and others provide that this statement of

<sup>203</sup>Idaho Compiled Statutes (1919), sec. 8814.

<sup>204</sup>Code of West Virginia (1931), p. 1517.

<sup>205</sup>Revised Statutes of Missouri (1929), sec. 3951.

<sup>206</sup>Arkansas, Colorado, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nevada, Ohio, Utah, and Washington. See Note: "Enforceability of Prosecutor's Agreement Not to Prosecute," 24 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 600 (Sept.-Oct., 1933).

<sup>207</sup>Maine, Massachusetts and Indiana.

reasons must be entered in the record of the case.<sup>208</sup> The laws of California, Idaho, Oklahoma, and Oregon state that the *nolle prosequi* is abolished, but in every instance they add that the court may dismiss a case upon the motion of the prosecuting attorney.<sup>209</sup> In New Mexico it is provided that a *nolle prosequi* cannot be entered after the defendant has introduced testimony.<sup>210</sup> It is not possible to determine from the statutes how often the consent of the court becomes a perfunctory formality but it is very apparent that legislatures have been unwilling to leave the prosecuting attorney entirely unrestricted in his authority to dismiss criminal prosecutions *which he has initiated*. How to compel the prosecutor to initiate prosecution where the circumstances of the case demand it is a legislative problem which has found no solution to date.

The statutes contain practically nothing upon the powers or obligations of the prosecuting attorney in the actual trial of a criminal case,<sup>211</sup> and his duties upon appeal vary considerably from one state to another as section II above has already described. In respect to appeals it is probably sufficient to repeat here that the prosecuting attorney conducts cases in the appellate as well as the trial courts in some states and in others the attorney-general of the state conducts appeals while the local prosecuting attorney has only the duty to give such aid as may be required by the attorney-general.

Various other provisions require the prosecuting attorney to perform such duties as attending *habeas corpus* hearings,<sup>212</sup> investigating applications for extradition,<sup>213</sup> submitting records of previous

<sup>208</sup>Arkansas, Colorado, Kentucky, Michigan, Nevada and Utah.

<sup>209</sup>California Penal Code (Deering, 1931), sec. 1386; Idaho Compiled Statutes (1919), secs. 9179-80; Compiled Statutes of Oklahoma (1921), sec. 2917; Oregon Laws (Olson, 1920), secs. 1704-5.

<sup>210</sup>New Mexico Statutes Annotated (1915), sec. 4445.

<sup>211</sup>There are a few incidental provisions providing, for example, that the prosecutor must administer oaths to officers of the court and aid the judge in organizing the court (Georgia), that he may have any material witnesses arrested and detained in any prosecution involving a penitentiary sentence (Connecticut), or that he may take specimens of dairy products as evidence in prosecutions for violation of the dairy laws (Vermont).

<sup>212</sup>The laws of Maryland, North Carolina and North Dakota provide that the prosecuting attorney shall be notified, by the court or petitioner, of applications for writs of habeas corpus. In Florida, Illinois and Missouri it is provided that the prosecuting attorney shall be present at all habeas corpus proceedings, and the laws of Massachusetts state that the district attorney may institute habeas corpus proceedings. In Arkansas it is the duty of the prosecutor to petition for a writ in any case where a married woman or infant is detained by a religious association.

<sup>213</sup>It is provided in some states that the prosecuting attorney is the official to apply to the governor for a requisition for a person charged with crime who has fled the state. In several it is the duty of the prosecutor, on the request of the governor, to investigate demands for extradition of fugitives to

convictions of the defendant in criminal trials,<sup>214</sup> aiding probation officers,<sup>215</sup> or approving the petition for the discharge of an indigent prisoner committed for failure to pay a fine.<sup>216</sup>

There are many statutes providing for reports by the prosecuting attorney to some state officer, usually the attorney-general, either upon request of that officer himself or as provided by the statute. These provisions were described in detail in a previous article dealing with the provisions of law organizing the office of the prosecuting attorney and it seems unnecessary to repeat that summary. There are a few other provisions requiring cooperation between the prosecuting attorney and various other agencies such as sheriffs and constables, or the state toxicologist.<sup>217</sup>

A large group of statutory provisions involves the prosecuting attorney's duties in the administration of the pardon and parole laws. His duties in any criminal case do not end with the determination of guilt or innocence. In a number of states the prosecutor is required by statute to furnish a statement of the prisoner's history and the facts of his case to the penal institution to which he is committed,<sup>218</sup> and in some places a similar statement must be sent to the parole or pardon board.<sup>219</sup> The laws of nearly half the states require that the governor, the applicant, or the state board must notify the prosecuting attorney of applications for pardons or paroles, and these provisions

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other states, and some statutes provide that it is the duty of the prosecuting attorney to notify the governor in case of the arrest of any fugitive.

<sup>214</sup>In North Dakota he must notify the court if the offender has two previous convictions so that the maximum sentence will be imposed, and in Michigan, if the person convicted has a previous conviction against him, the prosecutor must file an information under the habitual criminal act. The statutes of Maine require the county attorney to allege any previous convictions of the defendant in a liquor case. The laws of Michigan also require the prosecutor to find grounds for deportation if the person convicted is an alien.

<sup>215</sup>Provisions bearing on the prosecutor's duties in probation have been found in the statutes of Colorado and Missouri which provide, respectively, that the prosecutor may file petitions under the probation act and that he shall give aid and information to probation officers.

<sup>216</sup>In New Hampshire the prosecutor may approve the discharge petition of an indigent prisoner, and the Connecticut statutes provide that the state's attorney, with the advice of the superior court, may discharge a convict held in jail for non-payment of fine and costs if he has no means to pay. The prosecuting attorney in Idaho may recommend an allowance for good behavior of five days in every month to prisoners in the county jail.

<sup>217</sup>A Wisconsin statute requires the state toxicologist to circularize coroners and district attorneys annually to tell them the proper way to submit material for the analyses which he is prepared to make for them. (Wisconsin Statutes (1929), sec. 32.266.)

<sup>218</sup>Massachusetts, Minnesota, Missouri, North Dakota, Pennsylvania and South Dakota.

<sup>219</sup>California, Connecticut and Idaho.

seem at least to imply the right of the prosecutor to appear before the state board and be heard concerning the application. Many of these statutes require him to report upon the merits of the application to the governor or board immediately upon receiving the notice, and others require that a statement must be furnished upon the request of the state agency involved.<sup>220</sup>

The statutes of Missouri and North Dakota require that a statement from the prosecutor must accompany every application for a pardon.<sup>221</sup> From the language of the provisions it appears that a vindictive or unreasonable prosecuting attorney might seriously hamper a prisoner in obtaining a pardon by refusing to provide the statement which these statutes require.<sup>222</sup>

The picture which is presented by these statutes dealing with procedural duties of the prosecuting attorney is far less complete than that afforded by the laws concerning criminal investigation or offenses to be prosecuted. Where prosecution begins with indictment, the statutes seem to assume that the grand jury is the check upon the prosecutor's discretion in the initiation of prosecution. The only modification which occurs is found in those provisions making it his duty to prosecute upon complaint from some other law enforcement agency. In the states which initiate criminal prosecutions by information, the legislatures have sought to make the courts the agency to check or balance the prosecutor's discretion. In much the same way the legislatures have attempted to attack the evils of dismissals of prosecution by requiring statements of reasons and the consent of the court. Study of the crime surveys—or any one of them—shows that these statutes are not more than rudimentary scratches on the power of the prosecuting attorney to control the process of criminal prosecution.

## VI. *Conclusion.*

The office of prosecuting attorney is found to be very much the same from one state to another. The problems with which it is confronted are almost the same in every state and the defects which characterize the administration of our criminal law are found in about

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<sup>220</sup>In some of the states, Maine for example, the statutes allow the governor or board to require the prosecutor to appear in person.

<sup>221</sup>Compiled Laws of North Dakota (1913), sec. 11104; Revised Statutes of Missouri (1929), sec. 8518.

<sup>222</sup>The conclusion that the prosecutor's statement is essential is borne out by the Missouri statute which states specifically that it is bribery for any prosecuting attorney to accept any fee or gratuity for signing a pardon application. (Sec. 11357.)



the same degree throughout the entire United States, with some variation, of course, from such factors as density of population, racial grouping, or political corruption. The prosecuting attorney is so intimately connected with every phase of the process of criminal prosecution that renovation of this office could improve tremendously the administration of criminal justice. It is idle to place the blame entirely or even largely upon the individuals who hold this office throughout the country.

In spite of this, there is no indication in the statutes that any state, or group of states, has assumed leadership in any extensive movement to reconstruct the office of prosecuting attorney. Legislatures have dabbled here and there to conciliate civic or social organizations which have studied the problem but if all of the changes were concentrated in one state the aggregate improvement would be comparatively small. It is true that hundreds of statutes bear upon the administration of the office of prosecuting attorney but these enactments are largely piecemeal or patchwork legislation and almost every section of these statutes affects the office only by requiring investigation or prosecution of some particular, unimportant offense. There is very little legislation on the vital points of criminal procedure—particularly the dismissal of criminal cases—and the statutes contain practically nothing on the still more vital point of the “discretionary” power of the prosecuting attorney to initiate or not to initiate criminal proceedings in cases which have not come to preliminary hearing.

Legislatures seem to be entirely content to pass only opportunist bills which involve some petty problem of the moment. The process has been something like this: A legislator visits a self-styled “painless” dentist. When the operation turns out to be painful, he rushes to the state capitol and pushes a bill through the legislature making it a misdemeanor for any dentist to advertise himself as “painless.” Such an act probably will provide further that it is the duty of the prosecuting attorney to prosecute violations of this act. This example may seem absurd but the statute books are cluttered up with provisions even more ridiculous. There are no signs of any consistent legislative policy to rewrite or even to consider the whole law governing the administration of the office of prosecuting attorney.

All of this demonstrates that there is need for a model administrative code, resembling in form the present Model Code of Criminal Procedure, to set forth intelligently the requirements of legislation designed to control the office of prosecuting attorney and to suggest

practical devices to regulate the discretion of the prosecutor at those crucial points in criminal procedure where no control now exists. Such a code may go even further and consider the entire problem of the relationship which should exist between all public agencies involved in the administration of criminal justice. The present distribution of the function of law enforcement among a half-dozen uncoordinated agencies makes it utterly impossible to fix responsibility for miscarriages of justice.

To raise the administration of criminal justice to a satisfactory standard it may be found desirable to attack from two directions and neither approach is necessarily a first or second step. As one step, it may be necessary to centralize in one official in each locality full responsibility for the entire process of criminal prosecution from the time the complaint of a crime first reaches the public authorities to the final disposition of the case.<sup>223</sup> It seems essential that observation and control of one official be all that is required of the public in order to supervise the entire process. The other step must be the invention of devices to control the exercise of the discretion which is now given to law enforcement agencies and particularly to the prosecuting attorney.

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<sup>223</sup>On this point see particularly W. F. Willoughby, "Principles of Judicial Administration," chapters X and XI. His discussion contemplates, primarily, the absorption of the police department by the office of prosecuting attorney. It is possible, although hardly probable, that the process might be reversed and involve the absorption of the office of prosecuting attorney by the police department. This would result in a system of prosecution resembling the present English system. Concerning this second possibility, see Bruce Smith, "Municipal Police Administration," *Annals of the American Academy of Political and Social Science*, vol. CXLVI, pp. 18-19 (November, 1929), where it is especially strongly proposed. See also Raymond Moley, "Tribunes of the People" (1932), ch. X.