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POWERS AND DUTIES OF THE PROSECUTING ATTORNEY: QUASI-CRIMINAL AND CIVIL

EARL H. DE LONG¹ and NEWMAN F. BAKER²

I. Introduction

The prosecution of criminals undoubtedly constitutes the most important task of the prosecuting attorney although his success in office usually depends upon the manner in which he handles a few sensational cases and the public generally gives little attention to the administration of the routine matters which really form the bulk of the work in the office. The preceding article of this series analyzed many of the statutory provisions which set forth the duties of the prosecuting attorney in the prosecution of those who violate the law and it described the variety of situations which come within the range of his criminal law duties.³ It summarized the statutes which define his duties in respect to each step of the process of criminal prosecution and pointed out some of the inadequate devices by which legislatures have attempted to curb or regulate the exercise of discretion by the prosecutor. In considering those items the discussion touched upon much territory which has been studied before but in turning from that analysis to the *civil duties* of the prosecuting attorney this discussion reaches a subject the significance of which has hardly been mentioned.

The importance of the prosecuting attorney in the administration of criminal justice has monopolized the studies of the office. Professor Moley's writings, the crime surveys, and the report on "Prosecution" by the National Commission on Law Observance and Enforcement have analyzed the shortcomings of the prosecutor in criminal cases and have attributed those failures to various factors such as popular election, political control of the prosecutor, outworn constitutional guarantees, the requirements of obsolete criminal procedure, and many others. Only incidentally, however, do any of them recognize the wide range of duties of a civil character which devolve upon the prosecuting attorney and it is not clearly pointed out that

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³Baker and De Long, "Powers and Duties of the Prosecuting Attorney: Criminal Prosecution," 24 *Journal of Criminal Law and Criminology* 1025 (March-April, 1934).

the burden of civil duties may interfere seriously with the administration of his criminal law duties. Criticisms of the prosecuting attorney seem usually to assume that he may devote his entire attention to the apprehension and punishment of criminals, yet during the last three years the collection of delinquent taxes, to mention one general civil duty of the prosecutor, has become a tremendous task which has overloaded the facilities of prosecutors' offices in many jurisdictions. The collection of those taxes is probably as fundamental to the welfare of the communities involved as the enforcement of the criminal law. The description of the statutes which impose these duties cannot be a quantitative study of their importance but there is something to be gained in depicting the nature and variety of the duties of the prosecuting attorney in civil matters.

The study of these statutes indicates that most of the present duties of the prosecuting attorney can be classified into two primary functions which are (a) the administration of criminal justice and (b) legal advice and assistance to particular governmental agencies in matters not related to the administration of criminal justice. This study proceeds upon the assumption that, as far as possible, all of the duties of any one public office should involve only one major function. The public interest is best served by dividing a mass of duties between two offices—giving all of one function to each rather than giving both functions to the same office.⁴ In general, we believe that those duties which are related to the administration of criminal justice should be left to the prosecutor, and he should not be compelled to perform those duties which are not so related. But such a division of duties, based upon function, is not easily made and a general classification shows that many of the prosecutor's duties may touch

⁴To quote W. F. Willoughby: "The principle of departmentalization should be that of grouping services according to their purpose or function rather than the character of activities engaged in." "Principles of Public Administration," p. 92. See his general discussion of this subject in Chapter V, especially pp. 90-91.

While the statement quoted was made with reference primarily to the allocation of duties of one centralized administrative organization, it applies with equal force to the distribution of the functions of local government among the various independent agencies which perform them. This discussion regards the office of prosecuting attorney as one department of the local government of his community and not as an independent administrative organization.

The present duties of the prosecuting attorney have been given to him because he is a lawyer and these duties involve legal proceedings—in other words this is a classification of the activities of local government on the basis of character of the activity. A classification on the basis of function would give the prosecutor only those legal proceedings which relate to the administration of criminal justice and other activities, not actually legal proceedings, which also involve criminal justice.

each function. The discussion in this and the preceding article divides those duties into the following five classes which are characterized as indicated:

I. The first division includes all of those duties which involve criminal prosecution and this was analyzed at length in the preceding article. In proceedings of this character the prosecuting attorney acts as the agent of the whole state and represents the general public interest and welfare. The objective of such proceedings is the prevention of crime or the punishment of criminal offenders.

II. The second classification consists of those civil proceedings which relate to the administration of criminal justice and, perhaps, might be designated as quasi-criminal. The objective of any proceedings in this class is the same as in criminal prosecutions and the prosecuting attorney acts in the same capacity. The difference lies in the form of the proceeding alone—one is criminal, the other civil.

III. This class includes those general civil duties which are performed in behalf of some particular governmental agency. The prosecuting attorney acts in the capacity of attorney for the particular agency involved; he gives legal advice or represents it in some civil action involving its revenues, property, or duties. The prosecutor does not act as the representative of the state in general in the same way as in the first two classes.

IV. The fourth division consists of those civil proceedings in which the prosecuting attorney represents the general public interest and welfare in the same manner as in I and II but which involve only indirectly or not at all the administration of criminal justice.

V. This classification includes all of those duties, imposed by statute, which cannot be allocated to any of the foregoing four classes. These are largely miscellaneous administrative duties of one sort or another which are not related in any way to the fact that the prosecutor is an attorney.

II. *Quasi-criminal Duties*

Since the duties of the prosecuting attorney in criminal prosecutions were taken up in the preceding article, the first classification to be studied in detail in this discussion consists of the civil proceedings which relate directly to the administration of criminal justice. For purposes of convenience this class may be designated here as *quasi-criminal*. The duties which are included in it are such that they ought to remain in the office of the prosecuting attorney even if all duties not related to the administration of criminal justice should

be taken away. The following proceedings are included in this classification:⁵

- A. Proceedings in equity to enjoin or abate nuisances.
- B. Actions to recover statutory penalties.
- C. Certain types of proceedings involving *quo warranto*, removal from office, license revocation, etc.
- D. Actions to collect forfeited bonds, recognizances, fines, etc.

A short time ago the press directed many vehement protests at the enforcement of liquor laws in the United States and some of the loudest have attacked the use by the Federal courts of the injunction and its corollary the padlock. Federal officers were the ones who initiated proceedings to invoke this device for this particular purpose, but it is interesting to observe that the laws of many states are sprinkled with sections which make it the special duty of the prosecuting attorney to bring injunction or abatement proceedings.

The provisions of this type which appear most frequently are those which require the prosecuting attorney to institute proceedings to enjoin or abate houses of assignation, ill-fame, or prostitution, as the statutes variously designate, but a number of laws require similar action against violations of the liquor laws or against places often designated in the statutes as liquor nuisances.⁶ In the same way the laws of several states provide that the prosecutor shall or may proceed to enjoin or abate nuisances in general, or a number of other specified nuisances such as gambling establishments, or violations of the health laws or orders of the state board of health.⁷

⁵The term *quasi-criminal* is unsatisfactory at best because it has no well defined meaning. It is used here to designate all civil duties or proceedings which are related to the administration of criminal justice and does not include some proceedings which are sometimes termed *quasi-criminal*. An example of this is the bastardy proceeding in Illinois. Although in that state it is considered to be *quasi-criminal*, this discussion has classified it entirely differently upon the basis of the purpose for which it is brought. (See Section IV.) Insanity prosecutions are listed under this classification in the conclusion of this article but for purposes of discussion and analysis these prosecutions are taken up in Section IV.

⁶Such provisions concerning houses of prostitution have been found in thirteen states and are very much the same. For example, see the Code of Iowa (1927), sec. 1588. Although only in nine states have provisions been found specifically requiring the prosecutor to proceed in equity against liquor nuisances, this procedure is at least permitted in most of the states. As an example of these statutes see Revised Civil Statutes of Texas (1925), art. 5108.

⁷Nuisances in general: See Compiled Laws of Michigan (1929) sec. 9094. This section is merely permissive. The Nevada provision is quite drastic in that it requires the prosecuting attorney to bring action to abate nuisances and the penalty for failure to bring such action is forfeiture of his office. (Revised Laws of Nevada (1912), sec. 1562). The California statute requires that the prosecutor must bring such action if the county board requests it. (California Political Code (1931), sec. 4156.)

Gambling nuisances: The Kansas and Massachusetts statutes refer to

Other items toward which the statutes require similar procedure include violations of jail sanitary regulations, encroachments upon the state highways, violations of the building fire laws, violations of trust and pool laws, operation of a railroad company lacking a charter, attempts to suspend business illegally, gambling in stocks, bucket shops, and many others.⁸ It is obvious that all such proceedings are instituted to prevent violation of the law and therefore relate directly to the enforcement of criminal law.

On the other hand, there are many statutes which make it the duty of the prosecuting attorney to bring civil actions to collect penalties for violations of the law and the element of prevention enters only in the deterrent effect of such punishment. Most such provisions are directed at corporations and particularly against railroad corporations. They require suits to collect penalties for a wide variety of things such as violations of unfair discrimination, trust, or restraint of trade acts, violations of banking or mortgage loan acts, insurance company violations, failure of corporations to file annual reports required by law, or violations of other statutes such as that prohibiting a corporation from making a political contribution.⁹ The provisions directed at railroad companies may apply to general acts or to specific items such as headlights, brakes, stops, labor laws, failure to disinfect as required by statute, or to laws

gambling in such provisions, and an Idaho law contains the broader declaration that the prosecuting attorney may maintain action to abate a moral nuisance. (Idaho Compiled Statutes (1919), sec. 7043.)

Health laws: Carroll's Kentucky Statutes (1922), sec. 2060 b. 11.

Orders of state board: Compiled Statutes of Oklahoma (1921), sec. 8695.

⁸Louisiana, Utah, Montana, Missouri, Rhode Island, Michigan, New Hampshire, and Vermont, respectively. Other connections in which this action may be brought are violations of restraint of trade laws (Massachusetts) violations of currency act (Kentucky), misapplication of public funds (Ohio), unlicensed boxing match (Massachusetts), bridge nuisances (West Virginia), highway obstructions (Iowa), violations of the salt water fisheries law (Florida), nuisances of falling buildings or stagnant water (New Jersey), complaints of the commissioner of dams and reservoirs (Rhode Island), orders of the commissioner of agriculture (Washington and Iowa), public utilities act (Colorado and Rhode Island), or orders of the board of water purification (Rhode Island).

⁹Restraint of trade, etc.: Arizona, Indiana, Iowa, North Dakota, Oklahoma, and Texas.

Banking acts: Iowa, Louisiana, and Missouri.

Insurance companies: Iowa and Florida.

Corporation reports: Colorado and Nevada.

Political contribution: Minnesota.

Other provisions which might be listed require fines from toll roads companies which fail to keep roads in repair (Idaho), from corporations which fail to display corporate name (Delaware), or from corporations which fail to comply with organization requirements (Missouri).

regulating the blowing of train whistles or the ringing of bells.¹⁰

Among the other offenses for which such a penalty may be recovered are infractions of a law prohibiting an employer from discharging a man for his political opinions, failure to report births, deaths, and marriages, violations of the cigarette laws, failure to obey the orders of the state engineer, failure to report a boiler to the boiler inspector, or violations of optometry acts.¹¹ A Tennessee law requires the prosecutor to bring suit against any physician who divides his fees and the penalty is forfeiture of treble the amount of the fees.¹²

In a number of states a similar action must be brought by the prosecuting attorney against various public officers for neglect or misconduct in office. For example, in Colorado he "shall prosecute" to recover a civil penalty from boards of commissioners who fail to return a list for jury service or to draw and summon names. In Missouri the prosecuting attorney, in the same way, "shall institute action against a clerk of election" who fails to send in returns and in Tennessee he shall "bring proceedings" against a county board of equalizers which assesses property at less than the cash value.¹³ All of these terms mean a civil action to recover the penalty. There are similar provisions for prosecution of officials who fail to perform their duties under tax laws.¹⁴

¹⁰Arkansas, Indiana, Maryland, and Ohio (general railroad acts); Minnesota (headlights); Missouri (brakes); Iowa (stops); Kansas and Oregon (labor laws); Tennessee (disinfecting); Idaho (bells and whistles).

In other states penalties are similarly inflicted for failure of railroad to report, to destroy weeds on its right of way, or failure of a street railway company to provide a proper front platform.

¹¹Louisiana (political opinions); Massachusetts (vital statistics); Oklahoma (cigarette laws); Colorado (state engineers and boiler report); Pennsylvania (optometry act).

Many others might be added: Hedge fence penalties, failure to string electric wires properly, violations of coal and oil inspection act, violations of laws relating to diseases of animals, violations of fire regulations, sale of adulterated wine.

In general the discretion of the prosecuting attorney in these *quasi*-criminal cases is probably as broad as in criminal prosecutions. The following Mississippi law presents, therefore, an interesting restriction upon this discretion: "No district attorney of this state without the consent in writing of the attorney-general, shall institute or prosecute any civil suit for a violation of the anti-trust laws of this state and no court shall take cognizance of any such suit without such written consent of the attorney-general." (Code of Mississippi (1930), sec. 4370.)

¹²Code of Tennessee (1932), sec. 11358-9.

¹³Compiled Laws of Colorado (1921), sec. 5846; Revised Statutes of Missouri (1929), sec. 10174; Code of Tennessee (1932), sec. 1441.

¹⁴Tax duties: \$50 to \$500 fine for officers who neglect duties in assessment or taxation (Kansas); similar provision in Washington.

Other duties: Misconduct of county officers (South Dakota); failure of clerk of election to send in returns (Missouri); \$100 fine for failure of president of any police jury which fails in its duty (Louisiana); failure of clerk

These proceedings to recover fines from officers do not specify that the action shall be brought against the bond of the official concerned but it is probable that, in most cases, the bondsmen would be liable if the officer failed to pay. There are a few provisions, however, which specify that the action shall be brought against the officer's bond to collect the designated penalty. An illustration is the Indiana provision requiring the prosecuting attorney to recover the fee collections of the current quarter from officials who fail to make reports required by law or who fail to pay over funds.¹⁵ A Virginia statute requires the recovery of a five dollar fine from the bond of county commissioners who fail to report on the bond of the treasurer.¹⁶

All of the provisions mentioned requiring suits against public officers or against private persons or corporations provide for the collection of a fine the amount of which is specified in the statute. There are other provisions which seem to make removal from office or revocation of a privilege the penalty for violating the law. A Louisiana provision makes it the duty of the prosecutor to proceed against the clerk of any court who fails to report if his judge neglects to render an opinion in thirty days.¹⁷ Under a Nevada provision the prosecutor, upon the request of the attorney-general, "must bring an action" to remove county commissioners for voting excess taxes.¹⁸ A Connecticut statute requires the state's attorney to investigate and proceed to remove town clerks and treasurers for misconduct in office.¹⁹ These laws provide definitely that the removal proceedings be brought as a result of some misconduct in office and specify "action to remove" and not *quo warranto*.

Many similar provisions require the prosecuting attorney to bring *quo warranto* proceedings to remove an officer for some act by which he forfeits his office. An example is the Maryland statute which provides that *quo warranto* shall be brought against any officer who is in default to the public treasury.²⁰ Under many of these statutes

to exhibit execution docket (Tennessee); failure of board of supervisors or constable to serve notice of appointment as road overseer (North Carolina); failure of supervisors to return list of names of those eligible for military service (Michigan); \$500 fine or less for public administrator who fails to file inventory within three months (Kansas); failure of public officer or employee to provide female attendant for insane woman (Pennsylvania).

¹⁵Indiana Statutes (Burns' Annotated, 1926), sec. 7890.

¹⁶Code of Virginia (1919), sec. 2778.

¹⁷Marr's Annotated Revised Statutes of Louisiana (1915), sec. 2456.

¹⁸Revised Laws of Nevada (1912), sec. 3828.

¹⁹General Statutes of Connecticut (1930), ch. 15, sec. 273.

²⁰Annotated Code of Maryland (1924), art. 69, secs. 4-5. A Kansas statute similarly states that it is the duty of the county attorney to bring action against

it is the duty of the prosecuting attorney to bring *quo warranto* or an information in the nature of *qua warranto* against private corporations as well as against the holders of public office.²¹ There are a number of sections which require the prosecutor to bring such proceedings against a corporation for some violation of law. A Minnesota statute requires the prosecuting attorney to institute proceedings to forfeit the right of a corporation to do business if it makes a political contribution. A Michigan statute requires such a proceeding against a corporation which violates the monopoly laws, and in Indiana it is brought upon the failure of an insurance company to make its annual report. A Delaware provision states that the prosecutor may proceed to enjoin a corporation from exercising its franchise if it is delinquent in the payment of its taxes.²² Failure to perform the obligations required by a franchise is a situation which, under many of these statutes, requires the prosecuting attorney to proceed to annul either the franchise itself or the right of the corporation to do business.²³

Although the proceedings may not be the same in form nor called by the same name, any proceeding to revoke a business or professional license certainly effects a result which is similar to the revocation of a corporate franchise or charter for some violation of law. The duty to proceed to cancel physicians' licenses for unprofessional conduct, to conduct disbarment proceedings, to seek the revocation of a real estate broker's license, or to proceed to revoke the license of a steam power carrier who fails to make a monthly statement to the state treasurer are some of the duties of this kind which the laws impose upon the prosecuting attorney.²⁴

A proceeding closely related in purpose to these franchise or

officers who, by their acts, have forfeited their offices. (Revised Statutes (1923), ch. 60, secs. 1601 ff.)

²¹Arkansas, Idaho, Louisiana, and Tennessee. Many of these *quo warranto* statutes provide that the prosecutor shall proceed against usurpations of offices or franchises. Such requirements do not relate to the administration of criminal justice in the same way as the provisions described in the text and probably do not come within the classification of *quasi-criminal* duties.

²²General Statutes of Minnesota (1923), sec. 565; Compiled Laws of Michigan (1929), sec. 16648; Indiana Statutes (Burns' Annotated, 1926), sec. 8908; Revised Statutes of Delaware (1915), ch. 6, sec. 108. In addition to the states mentioned in the text, similar provisions are found in Connecticut, Kansas, Kentucky, Oklahoma, Oregon, and Utah.

²³A Colorado statute requires the prosecutor to proceed to cancel the franchise of an electric railroad for failure to begin work or give service. An Idaho statute requires forfeiture of the highway lease of a toll road company which fails to fulfill the conditions of the lease.

²⁴Iowa and Idaho (physician's license); Arkansas, Florida, Oregon, Washington, and Wisconsin (disbarment); Oregon (broker's license); Delaware (steam power license).

license revocations is found in those statutes which require the prosecuting attorney to institute condemnation or forfeiture proceedings against merchandise which does not meet the requirements of the law. The forfeiture is a revocation of the right or privilege, as the case may be, to sell the merchandise involved. The Texas provision requiring the condemnation of adulterated or misbranded foods or the Florida statute requiring the forfeiture of adulterated turpentine are examples.²⁵

These various civil proceedings which have been mentioned either involve the imposition of a penalty for the violation of a law or relate to some proceeding to make it impossible for that particular violation to recur. For that reason they have been considered as civil proceedings in form but as criminal proceedings in purpose and effect. In addition to the statutes setting forth the duties of the prosecuting attorney in these proceedings, it is very generally provided that he shall take such steps as may be necessary to collect fines, forfeited bonds and recognizances, or other penalties and forfeitures which accrue to the state or county.²⁶ In several states there are accompanying provisions which refer specifically to peace or contempt bonds.²⁷ These duties which involve the collections on these bonds, fines, etc., are obviously adjuncts to the administration of criminal justice. The proceedings are brought to enforce the collection of a penalty which has already been assessed, to enforce the conditions of a peace bond, or to insure the appearance of a defendant in a criminal proceeding. Without these proceedings effective criminal prosecution would be impossible.

These statutes which have been cited as *quasi*-criminal duties seem quite clearly to fall within that classification. It is somewhat difficult, however, to know exactly where to draw the line between this class and the civil duties of class III. The basis for distinction is the fact that the criminal and *quasi*-criminal duties involve the prevention of crime and the punishment of offenders while the civil duties of class III involve the revenues, property, or duties of some particular governmental agency. It is well illustrated by a com-

²⁵Revised Civil Statutes of Texas (1925), art. 4470; Compiled General Laws of Florida (1927), sec. 7039.

²⁶The Iowa statute is typical: "The county attorney shall enforce all forfeited bonds and recognizances, and prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties, and forfeitures accruing to the State or his county, or to any school district or road district within his county. . . ." (Code of Iowa (1927), ch. 258, sec. 5100.) A Colorado statute provides that this duty to collect recognizances is exclusive.

²⁷Arkansas, Indiana, Idaho, Iowa, Mississippi, Missouri, Nebraska, Utah, and Michigan (contempt bond).

parison of two types of suits on official bonds. It has already been stated that many statutes require the prosecuting attorney to bring suit against the bond of a delinquent official to recover a statutory penalty. Such proceedings have been classed as *quasi*-criminal and are so closely related to the criminal prosecution of offenders that one official should be responsible for both. Most of the suits, however, which the statutes require the prosecutor to bring against official bonds seem to be instituted to collect money due some governmental treasury and not to punish the act which caused the debt.²⁸ These proceedings are classed among the civil duties of the prosecuting attorney. Such actions to recover public funds, proceedings to halt the usurpation of a franchise or a public office,²⁹ and most of the duties to be described from this point on are not related to the administration of criminal justice. It is quite probable that where they form part of the duties of the prosecuting attorney they interfere with the effective operation of the office in the enforcement of the criminal law and should be transferred to some other officer.

This officer should be a general county attorney chosen by the legislative authority of the county, or by the chief executive in those few counties which have a centralized administrative organization. It would be his duty to give legal advice to or represent the county and its officers in all civil matters, except those specified as *quasi*-criminal, and including particularly those to be described in the next section.

III. *General Civil Duties*

The laws of most of the states contain general sections making it the duty of the prosecuting attorney to prosecute or defend all actions, civil or criminal, in which the state or county is a party or interested.³⁰ Although such provisions are broad enough to allow, in fact in most instances to require, the prosecuting attorney to prosecute or defend all civil actions which are now part of his duties, legislatures have particularized in the same manner as with criminal

²⁸These sections are directed variously at delinquent public administrators (Idaho), misuse of public funds in general (Oklahoma), county treasurers (Ohio), and other officials who handle money. A Florida statute requires the state attorney to proceed against the bond of a former official to recover the expense of having work done which it was his duty to finish before leaving office.

²⁹See note 21. Such proceedings to halt usurpation of an office or franchise should be classed with the civil duties to be taken up in section III.

³⁰For example: "The District Attorney shall . . . prosecute or defend all actions, applications, or motions, 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.)

prosecutions.³¹ The statutes which specify these duties or the agencies for which they are to be performed appear to be a satisfactory cross section of the civil duties of the prosecutor and supply the material for the following analysis.

In only a few states do the statutes require that the prosecuting attorney act as a general legal adviser to state officers. In Rhode Island, of course, where the attorney-general is the prosecutor, he is the legal adviser for all state officers, boards, and commissions. Michigan provides that the prosecuting attorney shall give opinions to any civil officer in matters affecting the state or county, and New Mexico has a similar requirement. The Louisiana laws direct that the prosecutor shall be the attorney for every state board or commission which is domiciled in his district.³² Except for these few sections of this type which have been found, the laws requiring the prosecutor to aid state officials specify the agency to which he must give his assistance.

Some of these provisions requiring legal assistance to these state officers or agencies have already been mentioned in preceding portions of this study because in many instances the same section of the statutes may direct the prosecuting attorney to bring criminal prosecutions, injunction proceedings, civil actions to recover penalties, or civil actions for any other purpose, or to give legal advice, all under the direction of the same board or officer. Sections of this kind have been mentioned in connection with each type of action which it is the duty of the prosecuting attorney to conduct. It is provided in many states that the prosecutor must assist state tax commissions,³³ public service or railroad commissions,³⁴ state banking examiners,³⁵ or boards of public health,³⁶ and there is a long list of agencies each of which is the subject of such a provision in one or two states.³⁷

³¹See the preceding article of this series. 24 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1025 (March-April, 1934).

³²General Laws of Rhode Island (1923), sec. 297; Compiled Laws of Michigan (1929); sec. 1288; New Mexico Statutes Annotated (1915), sec. 1859; Marr's Annotated Revised Statutes of Louisiana (1926 supplement), p. 60.

³³Kansas, Kentucky, Michigan, Mississippi, Ohio, and Washington.

³⁴Florida, Indiana, Maine, Nevada, North Dakota, South Dakota, and Rhode Island.

³⁵Arizona, Colorado, Georgia, Missouri, Nevada, Tennessee, and Wyoming.

³⁶Oklahoma.

³⁷State road commission (Utah, West Virginia), state engineer (Oregon, South Dakota, Oklahoma, North Dakota, New Mexico), workmen's compensation commission (North Dakota, Arizona, Colorado), public welfare departments or commissions (Idaho, Maine, Rhode Island), commissioners of lands (Oklahoma), conservation department (Michigan, Wisconsin), game wardens (Wisconsin), shell fisheries commission (Florida), state plant board (Florida), state department of finance (Idaho), dairy commission (Utah), law examiners (Washington), state fire marshal (Iowa), supervisor of public accounts (Lou-

Since the prosecuting attorney is nearly always a local officer, it is to be expected that his duties in civil matters should involve local affairs more frequently than those of the state. It is quite generally required that he shall participate in all actions in which the county is interested,³⁸ and in addition there are many provisions which specifically require him to give legal advice or opinions to various county officers. Some of these provisions specify the county board of supervisors or commissioners;³⁹ others are somewhat broader and refer generally to all county officers.⁴⁰ A few relate to particular officers such as county treasurers,⁴¹ collectors of revenue,⁴² road commissioners,⁴³ sheriffs,⁴⁴ county judges,⁴⁵ or to the veterans' compensation board of the county, as in Kansas.⁴⁶ It is important to emphasize that the duty to advise county officers is not as small a matter as it may seem. Many of these statutes add a requirement that the prosecutor shall give written opinions in such matters but whether or not such a requirement is present, many problems raised

isiana), factory inspector (Rhode Island), board of pharmacy (Michigan), board of agriculture and state apiarist (Missouri), corporation commission (Virginia), state water commission (West Virginia), state treasurer and comptroller (Maryland), food and dairy commissioners (Wyoming, Wisconsin), traveling auditor (New Mexico), insurance commissioner (Washington), industrial commission (Ohio, Wisconsin, and Utah).

³⁸Usually this is specified in the statute which gives a general definition of the duty of the prosecuting attorney such as the Wisconsin statute quoted in note 30.

³⁹These provisions are found in about one-third of the states and many of them require the prosecutor to attend the meetings of the board and to oppose all claims which seem to him to be illegal or unjust. As an example see the Idaho provision, *Compiled Statutes* (1919), sec. 3658.

⁴⁰Arizona, California, Colorado, Iowa, Kansas, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wisconsin, Wyoming.

The Iowa statute on this subject makes it the duty of the county attorney to commence, prosecute, and defend all actions in which any county officer in his official capacity or the county is interested or a party. (*Code of Iowa* (1927), sec. 5180.) The language of this section is somewhat more inclusive than comparable provisions in other states but, nevertheless, the provision seems to be typical of the actual duty of the prosecutor in this respect.

⁴¹*Compiled Laws of North Dakota* (1913), sec. 8996. (Requiring the state's attorney to represent the county treasurer in tax matters.)

⁴²*Carroll's Kentucky Statutes* (1927), sec. 122.

⁴³*Wisconsin Statutes* (1929), sec. 59.47.

⁴⁴*Digest of Arkansas Statutes* (Crawford and Moses, 1921), sec. 8314.

⁴⁵*Arkansas Statutes, ibid.*; *Carroll's Kentucky Statutes* (1922), sec. 126; *Official Code of West Virginia* (1931), p. 109. In Missouri the prosecuting attorney must give an opinion to any county court on any case in which the state or county is concerned. (*Missouri Revised Statutes* (1929), sec. 11321.) The Rhode Island Statutes require the attorney-general to attend the general assembly and the supreme and superior courts to advise and assist in respect to any criminal matters. (*General Laws* (1923), sec. 294.)

⁴⁶*Revised Statutes of Kansas* (1923), ch. 73, sec. 147.

by county officers may require extensive opinions or memorandums and even appearances in court.

While it would appear from the statutes that the county supplies the major portion of the prosecutor's civil duties, there are many other agencies which he is required to assist. Justices of the peace are mentioned particularly in some of the provisions,⁴⁷ and many sections provide that township or precinct officials may come to him for legal advice and assistance,⁴⁸ School districts and their officers are specially mentioned in several states,⁴⁹ and the statutes provide an extensive collection of agencies including library boards, stumping districts, memorial districts, and others, which may require the assistance of the prosecuting attorney.⁵⁰

In addition to these statutes which require the prosecutor to give general legal advice and aid to these various officers or agencies, there are several provisions which require some special type of service to the designated agency. Condemnation is the subject of several statutes of this kind. For example, a Michigan provision requires the prosecuting attorney to conduct condemnation proceedings for municipalities; and an Iowa statute requires the county attorney to conduct condemnation proceedings for counties, townships, and school districts. A similar statute in Oregon requires such aid to schools. In Missouri and Idaho it is specified that he shall conduct condemnation suits for the county commissioners and a Minnesota statute requires that the prosecutor proceed to condemn land for county buildings. In Tennessee the district attorney must represent the state highway department in condemnation proceedings and there are

⁴⁷Digest of Arkansas Statutes (Crawford and Moses, 1921), sec. 8314; Illinois Revised Statutes (Cahill, 1931), ch. 14, sec. 5.

⁴⁸California, Michigan, Montana, Nevada, North Dakota, Ohio, Texas, Utah. In Iowa he is required to appear in behalf of township trustees in counties under 25,000 unless town and county interests are adverse. (Code of Iowa (1927), sec. 5544.)

⁴⁹Arizona, California, Iowa, Montana, Nevada, North Dakota, Ohio, Washington, West Virginia, Virginia. The Washington statute seems to be the only one which refers to superintendents of schools. (Compiled Statutes of Washington (1922), sec. 4132.)

⁵⁰Supervisors and inspectors of elections, county library trustees, and insane asylums (Ohio); drainage districts, fourth class cities, and charter commissions (Michigan); drain commissioners (North Dakota); irrigation officers, port districts, and ditch districts (Washington); stumping districts (Idaho); state and local boards of health (Kentucky); boards of public trust (Nebraska); memorial districts (California); water commissioners (Wyoming); game wardens (Missouri).

In California, North Dakota, Nevada, Montana, Texas, and Utah the statutes also provide that the prosecuting attorney shall give legal advice to district officers. It is not clear from these statutes whether they refer to all special districts, such as sanitary districts, etc., or only to officers of judicial districts.

other statutes requiring assistance to some governmental agency in condemnation suits.⁵¹

In California the prosecutor is required to do the legal work on school bond issues and in Idaho to give an opinion on the bonds issued by school districts. In Georgia it is the duty of the solicitor general to undertake proceedings for the validation of county or municipal bonds. The Alabama statutes require that the prosecutor give written opinions to county officials in any suits against their official bonds. The Washington statutes specify that the district attorney shall draw contracts for county officers, and on the request of the county auditor or treasurer the district attorney in California must defend or prosecute, as the case may be, any action to test the constitutionality of an act requiring the payment of county funds.⁵²

The statutes which are involved in the foregoing discussion impose duties which must be performed in behalf of some specified governmental agency and some of them, in addition, set forth the type of service to be rendered. There are, however, many provisions which impose civil duties of one sort or another without making any special reference to the governmental agency for which they must be performed. Since almost every state has a general section providing that the civil actions which the prosecutor must conduct are those in which the state or county may be interested, these duties which are detailed in the statutes involve in almost every case one or both of these units of government. Because these statutes are concerned with particular phases of public administration, a description will help to complete the picture of the civil duties of the prosecuting attorney.

A very large part of these provisions make it the duty of the prosecuting attorney to institute suits to recover money which is due the state or the county. Among others, these include actions against public officials who are delinquent in paying over public money which they have collected,⁵³ suits to recover public funds which have been

⁵¹Compiled Laws of Michigan (1929), sec. 3787; Code of Iowa (1927), sec. 7823; Oregon Laws (Olson, 1920), sec. 4983; Revised Statutes of Missouri (1929), sec. 7983; Idaho Compiled Statutes (1919), sec. 1312; General Statutes of Minnesota (1923), sec. 6559; Code of Tennessee (1932), sec. 3207.

Other condemnation proceedings involve removal of highway or waterway obstructions (California), land for highways or waterways (Washington), or acquisition of dams or lands to maintain inland lake levels (Michigan).

⁵²California Political Code (1931), sec. 4153 (both references to California statutes in this paragraph); Idaho Compiled Statutes (1919), sec. 2692; Park's Annotated Code of Georgia (1914), Political Code, sec. 446; Code of Alabama (1923), sec. 5948; Compiled Statutes of Washington (1922), sec. 4132.

⁵³For example: a Massachusetts statute requires the treasurer to notify the district attorney if any public official fails to account within ten days and the district attorney must bring suit to recover. (General Statutes (1921),

paid out illegally,⁵⁴ or suits to collect claims which have been turned over to the prosecutor by some public officer for collection.⁵⁵ There are a number of statutes requiring the prosecutor to proceed to collect the cost of services performed by some public agency. Several of these involve actions to recover from relatives the cost of maintaining some person in state institutions such as insane asylums or tuberculosis sanitariums.⁵⁶ The statutes of nine different states require, respectively, that the prosecutor recover from private persons the costs of the following items: Removal of mill dam which interferes with commerce, removal of obstructions to navigation, cost of making a mine map, expenses of an inquest (to be collected from the estate), destruction or treatment of bees, burying dead animals, treating infested plants, destruction of infested trees or plants, and trimming hedges (on relation of supervisor or road superintendent).⁵⁷

In Mississippi the prosecuting attorney is required to bring suit to set aside fraudulent conveyances if such a procedure is necessary to aid in collecting a judgment due the state and in Arkansas he "shall proceed" to set aside fraudulent concealment of assets by a public debtor.⁵⁸

Not only must the prosecuting attorney collect money which is due the state or county, but many states have laws requiring him to obtain possession of land which escheats to the state. For example, at least fifteen states require the prosecutor to conduct all proceedings

ch. 35, sec. 21.) An Arkansas provision requires the prosecutor to recover delinquencies. (Digest of Statutes (Crawford and Moses, 1921), sec. 10189.) The district attorney in New York must sue to recover any money collected for any public agency and not turned in to its treasury. (Consolidated Laws of New York (1930), ch. 11, sec. 244.)

⁵⁴A Montana provision requires the prosecutor to bring action for money illegally paid out by the county clerk plus twenty per cent damage or penalty. (Revised Code (1921), sec. 4451.) Somewhat similar provisions occur in Indiana and Utah.

⁵⁵For example: Compiled General Laws of Florida (1927), sec. 4748; Park's Annotated Code of Georgia (1914), practice code, sec. 4926.

⁵⁶Insane asylums: Michigan and Louisiana. Tuberculosis sanitarium: Texas. Hospital: Massachusetts. State institutions in general: Pennsylvania and Colorado.

⁵⁷The states in which these provisions appear are, respectively: Virginia, Rhode Island, Iowa, Utah, New Mexico, South Dakota, West Virginia, Minnesota, Indiana. The Indiana statute provides that if the owner fails to trim the hedges as required, the cost shall be assessed against him and collected like delinquent taxes. Other states have similar provisions requiring the prosecutor to collect damages from persons who injure bridges or highways (North Carolina, Tennessee, Texas).

⁵⁸Digest of Arkansas Statutes (Crawford and Moses, 1921), sec. 9305; Mississippi Code Annotated (1930), sec. 4369. An Iowa statute requires the county attorney to demand security from persons in debt to the state or its agent. (Code of Iowa (1927), sec. 12152.)

to reduce such land to the possession of the state.⁵⁹ At least five other states require him to enforce the laws concerning the ownership of land by aliens such as the Illinois statute requiring the state's attorney "to compel the sale of . . . land" of any alien who has not become a citizen within six years after taking title.⁶⁰ A Missouri statute requires the forfeiture of land owned by aliens who violate the alien property laws.⁶¹ A Washington law requires him to "bring actions to annul patents," and a Virginia provision requires that the prosecutor proceed to forfeit real estate not entered in the land book.⁶²

Perhaps the most important work of the prosecuting attorney as a collector lies in the field of taxation. The statutes involving taxation require the prosecutor to institute suits to collect delinquent real estate⁶³ and personal property taxes,⁶⁴ inheritance taxes,⁶⁵ corporation taxes,⁶⁶ and various other types of taxes.⁶⁷ There are various other statutes which require the prosecutor to perform some duty in the collection of taxes such as to institute suits to collect back taxes on property which has been omitted or undervalued,⁶⁸ to re-

⁵⁹An Arkansas statute, for example, requires the prosecuting attorney to act to preserve an estate when there are no known heirs and to file an information to obtain possession of the property for the state. (*Digest of Statutes* (Crawford and Moses, 1921), sec. 4085-7.)

⁶⁰Illinois Revised Statutes (Cahill, 1931), ch. 6, sec. 2.

⁶¹Missouri Revised Statutes (1929), sec. 10415.

⁶²Compiled Statutes of Washington (1922), sec. 1047; Code of Virginia (1919), sec. 2452.

⁶³The Illinois provision seems to be the broadest in this respect in that it requires the state's attorney "to appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and see that all the necessary preliminary steps have been taken to make the judgment legal and binding." (*Illinois Revised Statutes* (Cahill, 1931), ch. 14, sec. 5.) Other provisions requiring collection of real estate taxes appear in Minnesota, Nevada, North Dakota, Oklahoma, and Texas.

⁶⁴Idaho Compiled Statutes (1919), sec. 3321.

⁶⁵Most of these provisions merely require the prosecutor to sue for the collection of inheritance taxes (North Carolina, Nebraska, Oklahoma, Oregon, Tennessee, Texas, South Dakota, Utah, Wisconsin), but some of them require that he shall represent or assist some state officer such as the treasurer or auditor in such matters (Arizona, Idaho, Iowa). The attorney-general in Rhode Island must approve any agreement for the settlement of inheritance taxes, and in Missouri it is provided that the prosecuting attorney may, with the consent of the state treasurer, come to an agreement as to inheritance taxes on personal property. (*General Laws of Rhode Island* (1923), sec. 534; *Revised Statutes of Missouri* (1929), sec. 586.)

⁶⁶Delaware and Indiana. A Michigan statute provides that if a corporation fails to file a statement the prosecuting attorney shall obtain a summons to require an officer of the corporation to appear in court where he can be questioned under oath as to the property of the corporation. The corporation pays the costs. (*Compiled Laws of Michigan* (1929), sec. 3407.)

⁶⁷Express company taxes (Kansas and Iowa), insurance companies (Maine), railroad company taxes (Missouri), cigarette taxes (Kansas and Iowa), poll taxes (Missouri), tonnage taxes (Florida), gasoline taxes (West Virginia).

⁶⁸Iowa, Kentucky, Oklahoma, and West Virginia.

cover taxes wrongfully remitted,⁶⁹ to collect ditch assessments,⁷⁰ to enjoin persons from removing structures or material from land until the tax lien is paid, or to defend in suits for the recovery of taxes paid under protest.⁷¹ In those states where the statutes may not specially require the prosecutor to institute proceedings to collect any of these various taxes, it is probable, nevertheless, that his duties include the prosecution of delinquent tax suits under the general requirement that the prosecuting attorney shall give legal advice and assistance to county officers, one of whom is usually the tax collector.

While most of the statutes imposing tax duties involve the collection of delinquent taxes, there are a few statutes which require the prosecuting attorney to render some other type of service in tax administration. Some of these are the general provisions, mentioned in the preceding paragraph, making it his duty to give advice on tax matters to boards of equalization, county supervisors, or tax collecting officials.⁷² Others require that he render any type of assistance needed by the state tax commission and this may involve criminal prosecutions, civil suits against delinquent taxpayers or public officials charged with the collection of taxes, or perhaps legal advice to the commission.⁷³

A few scattered provisions impose upon the prosecutor duties relating to the assessment of taxes. In North Carolina he must bring suit against public officials who falsify the assessment roll or in some other way cause loss to the government. In California and Utah it is provided that corrections may be made in the assessment books only with the approval of the prosecuting attorney. In New Mexico he must represent county boards of commissioners in assessment hearings before the state commission. In Iowa he is directed by statute to protest any raise in the taxable value of property in the county, and a Nevada provision requires that the prosecutor shall take steps to render void an excess tax levy.⁷⁴

It is probable that the duties of the prosecuting attorney in regard

⁶⁹Revised Statutes of Kansas (1923), ch. 79, sec. 1703.

⁷⁰Compiled Statutes of Washington (1922), sec. 4489.

⁷¹Code of Tennessee (1932), sec. 1797.

⁷²Delaware, Michigan, Mississippi, Missouri, and Ohio.

⁷³See note 33.

⁷⁴Consolidated Statutes of North Carolina (1919), sec. 3933; California Political Code (1931), sec. 3881; Compiled Laws of Utah (1917), sec. 6083; New Mexico Laws of 1921, ch. 133, sec. 508; Code of Iowa (1927), sec. 7142; Revised Laws of Nevada (1912), sec. 976. This North Carolina statute provides that any county board of commissioners which fails to comply in good faith with provisions concerning collection are liable for any resulting loss in the collection of taxes and it is the duty of the solicitor to collect from the members.

to tax sales are broader than is indicated by the few provisions which specially mention the subject. The provisions which have been found on this matter require the prosecuting attorney to represent the state and county in proceedings to set aside tax sales, to defend in proceedings for relief against sales of land for delinquent taxes, and to bring suits to quiet title where the tax has become a lien upon the property.⁷⁵

Closely related to these tax prosecutions are the various statutes which require the prosecuting attorney to collect unpaid licenses and fees. The duty may refer to licenses in general,⁷⁶ to dog licenses,⁷⁷ peddlers' licenses,⁷⁸ fees levied upon particular types of corporations such as banks,⁷⁹ express companies,⁸⁰ or foreign corporations doing business in the state,⁸¹ or license taxes on dealers in motor fuel.⁸² A Kentucky statute provides that the commonwealth's attorney shall oppose the improper granting of licenses, and a Pennsylvania provision states that the district attorney may investigate applications for dance hall licenses.⁸³

There are many other provisions which impose a miscellaneous variety of civil duties which, among other things, require the prosecutor to prosecute suits involving school lands or funds,⁸⁴ to defend actions against land registration indemnity funds,⁸⁵ to represent the public in railroad abandonment proceedings,⁸⁶ to represent the public before the public service commission,⁸⁷ or to protect the interests of the state in the acquisition of dam sites and the construction of dams.⁸⁸ An Illinois provision specifically requires the state's attorney "to prosecute all suits in his county against railroad or transportation companies, which may be prosecuted in the name of the

⁷⁵Minnesota, Virginia, and Idaho, respectively.

⁷⁶Alabama, Idaho, Tennessee, and West Virginia.

⁷⁷Compiled Laws of Michigan (1929), 4122.

⁷⁸New Mexico and Wisconsin.

⁷⁹Code of Virginia (1919), sec. 4122.

⁸⁰Idaho Compiled Statutes (1919), sec. 3358.

⁸¹Code of Tennessee (1932), sec. 9966.

⁸²Oregon Laws (1920), sec. 4826.

⁸³Carroll's Kentucky Statutes (1922), sec. 129; Pennsylvania Law of 1927, p. 969.

⁸⁴A Kansas law requires him to represent the state in appeals from surveys of school lands. An Iowa statute requires that he sue in the name of the county for money due the schools and Florida has a similar provision. In Missouri he must prosecute suits to recover money accruing from the sale of school lands.

⁸⁵Oregon, South Dakota, and Washington.

⁸⁶General Laws of Vermont (1917), sec. 5216.

⁸⁷*Ibid.*, sec. 5051.

⁸⁸Nebraska. This provision requires the county attorney to intervene, if the court so directs, in the petition for the right to build the dam. (Compiled Statutes (1929), ch. 56, sec. 106.)

people of the State of Illinois."⁸⁹ A Louisiana statute requires the prosecutor to proceed for the recovery of land obtained by fraudulent public land entries;⁹⁰ a New York provision directs him to bring suit against trespassers on state lands.⁹¹ The state's attorney in Vermont must act for the state to recover unclaimed bank deposits and the Florida statutes require that the prosecutor recover wrecked derelict property for the state from persons who refuse to turn it over.⁹²

At least six states have laws which provide that the prosecuting attorney may bring suit to recover money or prizes won in a wager or lottery.⁹³ Most of these statutes seem to provide that any property so recovered belongs to the state. The Indiana provision, however, states that the prosecuting attorney may sue for the benefit of the wife or children of the loser or for the benefit of the common schools.⁹⁴

The statutes have little to say about the power of the prosecuting attorney to settle or compromise these various civil actions which it is made his duty to prosecute. In Florida, with the approval of the state comptroller, he may compromise any suits or claims against defaulting collectors of revenue.⁹⁵ The only other provision on this question which has been found is the New Mexico statute which gives the district attorney the very broad power "to compromise or settle any suit or proceeding, or grant a release or enter satisfaction in whole or in part, of any claim or judgment or take any other steps or proceedings therein which to him may appear proper and right."⁹⁶ The discretion of the prosecuting attorney seems to be as uncontrolled by statute in civil actions as in criminal proceedings.

In almost every state these duties are imposed by statute upon the prosecuting attorney and it is primarily his responsibility to see

⁸⁹Illinois Revised Statutes (Cahill 1931), ch. 14, sec. 5.

⁹⁰Marr's Annotated Revised Statutes of Louisiana (1915), sec. 5937.

⁹¹Consolidated Laws of New York (Cahill, 1930), ch. 47, secs. 8, 9. There are somewhat similar provisions in other states. In California the district attorney must notify the governor if any person intrudes on waste or ungranted lands of the state, and in Florida it is the duty of the state attorney to report trespasses on state lands to the trustees of the internal improvement fund and to institute such legal proceedings as they or the governor direct.

⁹²General Laws of Vermont (1917), secs. 5386-90; Compiled General Laws of Florida (1927), sec. 5799.

⁹³California, Florida, Indiana, Iowa, Massachusetts, and Montana.

⁹⁴Indiana Statutes (Burns' Annotated, 1926), sec. 8073.

⁹⁵Compiled General Laws of Florida (1927), sec. 4752.

⁹⁶New Mexico Statutes Annotated (1915), sec. 1863. In actions involving bail bonds, it is provided in Connecticut that the state's attorney may settle or compromise after forfeiture as well as before, and in Massachusetts he may present a certificate to the court that the interests of justice would be furthered by judgment on only part of a forfeited recognizance.

that they are performed. Many legislatures, of course, have provided assistants for the prosecutor and they may be assigned to civil as well as to criminal duties.⁹⁷ Only a few statutes seem to open the way for the county board to employ an attorney to take over the civil duties of the prosecuting attorney. In Washington the county commissioners may appoint other attorneys when they deem that such action is for the interest of the county.⁹⁸ A Kansas statute provides that in counties with over 100,000 population the county board may hire some attorney to do all civil work with the exception that the regularly chosen county attorney must prosecute tax foreclosures in counties of more than 120,000 population.⁹⁹ The county board in New York may appoint a county attorney, fix his salary, and prescribe his duties.¹⁰⁰ It is probable that the powers of county boards in many other states are broad enough to allow this to be done without any such specific authorization from the statute but in any case the duty remains in the office of the prosecutor unless the county board chooses to relieve him by hiring an attorney to take over these civil duties.

The statutes which have been analyzed in this section are concerned almost entirely with situations in which the prosecutor acts as the attorney for some governmental agency in matters involving public funds, revenues, or property, or the duties of the public agency concerned. None of the duties which have been described in this connection are related directly in any way to the administration of criminal justice and all of them clearly can be separated from those duties of the prosecuting attorney which look toward the prevention of or punishment for violations of the law.¹⁰¹

⁹⁷See DeLong and Baker, "The Prosecuting Attorney: Provisions of Law Organizing the Office," 23 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 926 (March-April, 1933).

⁹⁸Compiled Statutes of Washington (1922), sec. 4130.

⁹⁹Revised Statutes of Kansas (1923) ch. 19, sec. 246 ff.

¹⁰⁰Consolidated Laws of New York (Cahill, 1930), ch. 11, sec. 210.

¹⁰¹There are many statutory provisions which are incidental to the civil duties in that they require accountings and reports on funds collected. For example, an Illinois statute requires the state's attorney "to pay all moneys received by him in trust, without delay, to the officer who by law is entitled to the custody thereof." (Illinois Revised Statutes (Cahill, 1931), ch. 14, sec. 5.) There are other statutes which require monthly accountings with the county treasurer or auditor (South Dakota, Texas, Utah), quarterly accounting with the state comptroller (Connecticut), semi-yearly with county treasurer (Oregon), annually with some county or state officer (California, Minnesota, Nevada, Oklahoma, Tennessee, and Vermont). A Nevada statute provides forfeiture of office, \$1000 fine, and one year's imprisonment for any district attorney who fails to pay over taxes collected. A New Hampshire provision requires the prosecutor to report to the county commissioners at the close of each term on all pending civil actions in which the county is interested. A Vermont statute requires him to report all state claims to the

IV. *Duties as Public Representative*

The statutes which have been discussed have been divided into *quasi*-criminal duties and general civil duties in order to indicate which duties should continue to be assigned to the office of prosecuting attorney if it should be relieved of all duties except those relating to the administration of criminal justice. This basis for division has placed in one group those duties which involve the prevention of crime and the punishment of offenders and in a second group all of those duties so far described which do not relate to the administration of criminal justice. The process of making this classification suggests, however, another factor, briefly mentioned in the introduction, which might help to distinguish between *quasi*-criminal and civil duties. In criminal prosecution and in *quasi*-criminal proceedings the prosecuting attorney represents directly the general public interest or welfare and his client is an abstract state or community. In the civil duties, discussed in section III, he represents the state as exemplified by some particular tangible agency such as a county treasurer or a state utility commission. A situation arising under this second class does not involve directly the public interest or welfare in the same way as a criminal prosecution. These duties which have been examined and classified as civil invariably present a question relating to the mechanics of some particular phase of *public administration*. The prosecutor acts as the attorney for some instrument of the state to aid in determining its duty or the method of performing the duty, or to assist in performing the duty.

This distinction may seem rather tenuous in view of the examples, mentioned in the previous article, of criminal prosecutions conducted upon the request of some state agency. While such a specialized law enforcement agency of the state may have gathered the evidence and ordered the prosecution, when it is once begun the purpose and effect is fully analogous to a murder trial and the prosecuting attorney stands in the same relation to the state. In no sense is he advising or assisting the state board as he does in the civil proceedings mentioned.

There are many statutes which have not been considered in the foregoing discussion, and a large number of these are exceedingly difficult to classify because they cannot be placed unreservedly in either of these two groups. In general the actions under these statutes are more closely related to criminal prosecution than to the strictly civil duties because they require the prosecutor to represent directly the general public welfare in the same manner as in a crim-

inal prosecution. In some of these proceedings the resemblance ends there because they do not involve in any way the prevention of or punishment for crime. In others the relation to the administration of criminal justice is close and will become closer as society realizes that criminality and insanity must be treated in much the same manner.

The provisions which have been assigned, up to this point, to the function of criminal law administration are those which very clearly have been placed there by past and present approaches to the problem of criminal law enforcement. It is necessary to consider some duties, now imposed upon the prosecutor, which, upon the basis of present and past procedure, cannot accurately be classed with his criminal or *quasi*-criminal duties but which in the future will be integrally related to the administration of criminal justice.

The most important of these are the statutes which make it the duty of the prosecuting attorney to represent the state in hearings to determine whether or not some person should be committed to a state institution for the insane. In general this duty to represent the state seems primarily to require the presentation of evidence to show that the person in question is insane.¹⁰² The prosecutor has little discretion in the matter and must so prosecute the allegedly insane person if a third person petitions a court for commitment. A few of these statutes define his duties in criminal proceedings in which insanity is offered as a defense to avoid conviction or punishment and to this extent these insanity statutes impose duties which, even by present standards, belong among the criminal or *quasi*-criminal duties of the prosecuting attorney.¹⁰³ It is probable that any of these duties to prosecute insanity hearings might be explained theoretically upon the basis that the state seeks incarceration of the insane person to prevent him from injuring himself or others. It probably has been given to him because he was the only available official. If the prosecuting attorney should develop, in the future, into the official entirely

attorney-general, and in Wyoming he must make a semi-annual report on estates to the attorney-general.

¹⁰²See, for example, the Colorado Statute. (Compiled Laws (1921), sec. 558.)

The insanity and sterilization proceedings which are discussed here are classified in the conclusion with the *quasi*-criminal proceedings taken up in section II. Section II was confined to the four sub-classes presented because obviously they relate directly to criminal justice. Insanity and sterilization laws, as administered at present, are at best only indirectly related and, therefore, seem to deserve the separate discussion given here.

¹⁰³A Montana law states that he shall attend the insanity hearing of a person condemned to death. Missouri has a similar law. The Washington statutes specifically direct the prosecutor to proceed in criminal insanity trials.

responsible for the enforcement of criminal law in his locality, the training necessary to qualify him for his position would also qualify him to be responsible for the disposition of psychopathic as well as criminal cases.

Statutes on the subject of sterilization involve much the same problem as those on insanity. An Idaho provision requires the prosecuting attorney to prosecute the special proceeding which is required, in the absence of consent, to obtain a court order for the sterilization of insane, epileptics, habitual criminals, and others.¹⁰⁴ The Michigan statutes merely provide that the prosecuting attorney shall be notified of sterilization proceedings and in North Dakota he must investigate a prisoner's record to determine whether or not he should be sterilized.¹⁰⁵ The Nebraska statute presents a somewhat different situation in that it requires the county attorney to assist the state board of control in the enforcement of the sterilization statute by conducting the court proceeding to order sterilization.¹⁰⁶ This seems, however, to resemble the Idaho statute in the same manner that a criminal prosecution of a utility company at the instance of a utility commission resembles a murder trial.¹⁰⁷

These insanity and sterilization statutes are examples of duties in which the prosecuting attorney appears for the general public in the same way as in a criminal or *quasi*-criminal proceeding. He acts as a public prosecutor and these duties are closely related to crime prevention or punishment. There are many other statutes under which the prosecuting attorney appears for the general public in somewhat the same way, although not strictly as a prosecutor, but these cases do not involve in any degree the administration of criminal justice. Examples of these statutes are the provisions defining duties of the prosecuting attorney in divorce cases. An Oregon law provides that "In any suit for the dissolution of the marriage contract the state is to be deemed a party defendant." Notice must be served on the

¹⁰⁴Idaho Session Laws of 1925, p. 361.

¹⁰⁵Michigan Compiled Laws (1929), sec. 6649; Compiled Laws of North Dakota (1913), sec. 11435.

¹⁰⁶Compiled Statutes of Nebraska (1929), ch. 83, sec. 1508.

¹⁰⁷There are a number of statutes which prescribe duties which are more or less incidental to these insanity hearings, e. g., duty to appear for the petitioner in petition for appointment of guardian for feeble minded person (Iowa), to represent hospital board in application for transfer of dangerously insane patient (Iowa), to cause insane person to be removed from hospital immediately upon discharge (New Hampshire), act as member of county mental hygiene commission (West Virginia), petition for guardian for estate of insane person and see that state is reimbursed from estate for expense of care (Oklahoma), pass on petition for removal of insane from penitentiary (Pennsylvania).

district attorney and it is his duty to appear and prevent fraud and collusion. If the defendant does not appear, he must conduct the defense.¹⁰⁸ A number of similar provisions in other states require, variously, that the prosecutor resist all applications for divorce,¹⁰⁹ defend in undefended petitions for divorce,¹¹⁰ see that the grounds are legal and sustained by proof,¹¹¹ or oppose the granting of a divorce where there are children under sixteen years of age or the public good requires.¹¹²

From a practical standpoint it is probable that these provisions are not very important but it would be desirable to classify them somewhere. However, they seem to constitute a group by themselves. Certainly, they do not belong in the office of a "prosecuting" attorney but neither do they belong among the duties of a general attorney for the county board or other public officers. Perhaps they supply a transition from those actions in which the prosecutor appears directly as the representative of a general public to those actions in which he represents the general public interest by acting as attorney for those who may be considered to be wards of the state.

The preceding references to the duties of the prosecuting attorney in insanity cases have described statutes which made it his duty to prosecute the case for commitment of an insane person. Now, on the other side of the scale, there are a few statutes which require the prosecuting attorney to defend against a petition to commit a person who is insane or alleged to be insane. In the one case he acts as the public prosecutor and in the other as the public defender. An Indiana law requires, in a general way, that he protect the interests of those of unsound mind.¹¹³ A Kentucky statute declares that it shall be the duty of the commonwealth's attorney to prevent any sane person from being found insane.¹¹⁴ In Minnesota he is required to appear in behalf of the party in an insanity examination.¹¹⁵ In Idaho he shall "appear for such defendant" in any suit for divorce brought on grounds of insanity.¹¹⁶ A Washington law

¹⁰⁸Oregon Laws of 1927, ch. 18.

¹⁰⁹Carroll's Kentucky Statutes (1922), sec. 2119.

¹¹⁰Indiana, Washington, and Wisconsin. The Wisconsin statute provides that the prosecuting attorney shall act as "divorce counsel" in counties over 250,000 and his duty in this capacity shall be to appear in defaulted cases. (Wisconsin Statutes (1929), sec. 247.13.)

¹¹¹Park's Annotated Code of Georgia (1914), Civil Code, sec. 2974.

¹¹²Compiled Laws of Michigan (1929), sec. 12763.

¹¹³Indiana Statutes (Burns' Annotated. 1914), sec. 1073.

¹¹⁴Carroll's Kentucky Statutes (1922), sec. 272 a 18.

¹¹⁵General Statutes of Minnesota (1923), sec. 8957.

¹¹⁶Idaho Compiled Statutes (1919), sec. 7039.

requires him to appear for minors and insane persons upon applications for guardian.¹¹⁷

There are many similar statutes which require the prosecutor to represent the interests of children. These involve various proceedings such as adoption proceedings,¹¹⁸ proceedings to annul adoptions,¹¹⁹ cases involving neglect of children,¹²⁰ conservation of orphans' estates,¹²¹ or proceedings to commit a child to a state home.¹²² In South Dakota and Washington the prosecutor is required to institute mothers' pension proceedings.¹²³ Many provisions require the prosecutor to conduct the proceedings in bastardy, illegitimacy, or filiation cases.¹²⁴ Since such cases usually are brought to require the father to support the child, they illustrate situations in which the prosecuting attorney acts for the state in representing the interests of its wards.

There are several other situations in which the prosecuting attorney must act in a similar capacity, e. g., to bring action against relatives of needy blind or destitute aged parents to obtain money for their support,¹²⁵ to protect the rights of inebriates,¹²⁶ to represent unknown beneficiaries or interests in trusts or land sales matters,¹²⁷ to enforce the conditions of charitable trusts and gifts to educational institutions,¹²⁸ or to certify the articles of incorporation of agricultural associations.¹²⁹

When the prosecuting attorney acts in this capacity in behalf of some private person whom the state deems unable to take care of himself, his function is very similar to that of a public defender

¹¹⁷Compiled Statutes of Washington (1922), sec. 1571.

¹¹⁸Revised Code of Arizona (1928), sec. 118.

¹¹⁹Code of Iowa (1927) sec. 10501 b7.

¹²⁰Colorado, Michigan, Minnesota, Montana, Nebraska, Pennsylvania, and Wyoming.

¹²¹Consolidated States of North Carolina (1919), sec. 2198.

¹²²Revised Statutes of Missouri (1929), sec. 14102. Arkansas has an interesting statute which provides that the prosecuting attorney, if called by the juvenile court, shall give aid and counsel and appear for the state but "it is understood that such officer appears in such cases as defender in behalf of the child for its best interest and to aid in redemption of such child from delinquency and its restoration to citizenship, as well as he appears on behalf of the state." (Digest (Crawford & Moses, 1927 Supplement), sec. 5715d.)

¹²³South Dakota Laws of 1931, ch. 252: Compiled Statutes of Washington (1922), sec. 9998.

¹²⁴Such statutes have been found in nineteen states. See note 5.

¹²⁵California and Michigan. A recent Oregon statute requires the prosecutor to petition for a guardian for a spendthrift.

¹²⁶General Statutes of Minnesota (1923), sec. 4539.

¹²⁷Connecticut, Michigan and Nebraska.

¹²⁸Maryland and North Carolina.

¹²⁹Marr's Annotated Revised Statutes of Louisiana (1926 supplement), p. 9.

who defends a man accused of crime but who cannot pay a lawyer. By the very nature of his duties, it was impossible to make the prosecuting attorney both the public prosecutor and the public defender in criminal cases, but in nearly every other situation where legislatures have thought it the duty of the state to provide legal aid, the prosecuting attorney has been given the duty to render this aid. The office of prosecuting attorney, like the judicial system as a whole, has been created for a rural society, and it is probable that the prosecutor was the most available, if not the only, public official upon whom this duty could be placed. If it should be possible to reorganize the prosecutor's office to relieve him of everything except the administration of criminal justice, certainly these "legal aid" functions are among those which should be taken away. Where to put them is another question. The extent of this legal aid function does not compare, of course, with the importance of the two general classes of civil and criminal duties which have been discussed at length but it should constitute a separate class of duties which probably will grow as the state recognizes larger obligations in this direction. The creation of the office of public defender in a few of the metropolitan centers has been a first step toward the establishment of a public agency to fulfill adequately the obligations of the state toward those who are unable to look after their own interests in the courts, and as the office spreads and develops it will absorb these functions of the prosecuting attorney.

The legal aid functions described in this section should be transferred from the office of prosecuting attorney. The duty to prosecute insanity and sterilization cases, while not strictly criminal or *quasi*-criminal as those terms have been used in this discussion, is so closely related to the administration of criminal justice that it should continue to be a responsibility of the prosecuting attorney.

V. *Miscellaneous*

While we may not agree that legislatures have always acted wisely in giving to the prosecuting attorney the duties which have been presented up to this point, it is evident, nevertheless, that they do bear some relation to the function of a general county attorney. In fact the imposition of these duties shows clearly that the prosecutor has been considered to be a county attorney and not merely a prosecuting attorney, whatever the name of the office may be. Except for the judges, the prosecutor often may be the only licensed attorney holding public office in his county and it is not surprising

that those duties which have required the services of an attorney have been given to him. There are many other statutes, however, which involve a great variety of board memberships and miscellaneous duties which seem to have been bestowed upon the prosecuting attorney merely because the office happened to be the first to occur to some legislator who wanted some particular duty performed. There is little relation between the duties listed in this section and the qualifications of the prosecuting attorney.

In North and South Dakota it is provided by statute that the state's attorney shall be president of the county board of health, and in West Virginia the prosecuting attorney is a member of this board.¹³⁰ Under the laws of Michigan the prosecutor must inspect the jail and the place for holding court.¹³¹ In Pennsylvania he is a member of a board which has the control and management of the county jail.¹³² A Washington statute requires him to visit and report on county jails and the laws of Iowa designate the county attorney and the clerk of the district court as inspectors of the jails.¹³³ The attorney-general of Rhode Island is an "official visitor" to state prisons.¹³⁴ In various states he is required by statute to act as a member of an election board, election recount board, election canvassing board, county boundary commission, concealed weapon licensing board, board of trustees of port districts, board of insanity, board of sinking fund trustees, and Spanish War veterans' relief board.¹³⁵ In Nebraska it is the duty of the county attorney to act with the county clerk and county treasurer to fill any vacancy in the county board.¹³⁶ A California law provides that the county board may consolidate the offices of district attorney and public administrator.¹³⁷

The governor of Connecticut is required by statute to choose one state's attorney in the state to be a member of the state judicial council but this is one board membership which is quite closely related to the duties of the office.¹³⁸ A similarly related provision appears in

¹³⁰Compiled Laws of North Dakota (1913), sec. 404; Compiled Laws of South Dakota (1929), sec. 7657; Code of West Virginia (1931), p. 345.

¹³¹Compiled Laws of Michigan (1929), secs. 13954-6.

¹³²Pennsylvania Statutes (1924 Supplement), sec. 12527a-1.

¹³³Compiled Statutes of Washington (1922), sec. 10199; Code of Iowa (1927), sec. 5505.

¹³⁴General Laws of Rhode Island (1923), sec. 6558.

¹³⁵Virginia, Michigan, Washington, New Mexico, Michigan, Washington, South Dakota, Ohio, and Michigan, respectively.

¹³⁶Compiled Statutes of Nebraska (1929), ch. 32, sec. 1703.

¹³⁷California Statutes of 1931, ch. 986.

¹³⁸Connecticut General Statutes (1930), sec. 5382.

the Michigan statute requiring the prosecuting attorney to attend the annual meeting of the prosecuting attorneys' association.¹³⁹

In several states the prosecuting attorney is required by the statute to audit the accounts or expenditures of various public agencies. For example, the Maine statute states that the county attorney shall approve the expenses of the county commissioners. In Tennessee the prosecutor must inspect jailers' accounts and examine the books of the clerks of courts. In Kentucky both the county and commonwealth's attorney are directed to examine the report of the trustee of jury funds. The statutes of Connecticut require the state's attorney to examine the bills of costs for boarding prisoners in the county jails and certify to their correctness. He is also required to audit the expense account of the county grievance committee. Under the laws of Mississippi the circuit court must approve all public accounts but not until the district attorney has submitted an opinion on the accounts. The district attorney in Massachusetts must approve extra compensation allowed by law to public officials for meritorious service.¹⁴⁰

The prosecuting attorney acts in a similar capacity under those statutes which require him to protect public funds by passing on the bond of the county depository,¹⁴¹ to approve the bond of the contractor in the construction of public works,¹⁴² or to examine and approve official bonds.¹⁴³ A Louisiana statute requires him to test the bonds of auctioneers in "the same manner as bonds of notaries are tested."¹⁴⁴

It is the duty of the county attorney in Kansas twice yearly to make an inspection and inventory of all the property owned by the county, and a California statute provides that the district attorney, the county auditor, and the chairman of the county board of supervisors must "count the money in the county treasury" once a month and verify in duplicate statements the amount found there. In Ohio he is the official authorized to sell unclaimed stolen property and in South Dakota to sell public property which is no longer used.¹⁴⁵

¹³⁹Compiled Laws of Michigan (1929), sec. 1309.

¹⁴⁰Revised Statutes of Maine (1930), ch. 125, sec. 43; Code of Tennessee (1932), secs. 10072, 12051; Carroll's Kentucky Statutes (1922), sec. 2287; General Statutes of Connecticut (1930), secs. 5349, 6541; Mississippi Annotated Code (1930), sec. 4365; General Laws of Massachusetts (1921), ch. 262, sec. 47.

¹⁴¹Compiled Statutes of Washington (1922), sec. 5563; Oregon Laws of 1929, ch. 353.

¹⁴²Wisconsin Statutes (1929), sec. 289.16.

¹⁴³Compiled Statutes of Washington (1922), sec. 4133; Compiled Statutes of Wyoming (1920), sec. 1455; Compiled Statutes of Idaho (1919), sec. 1482; General Laws of Rhode Island (1923), sec. 1089, 4667, 4815.

¹⁴⁴Marr's Annotated Revised Statutes of Louisiana (1915), sec. 2444.

¹⁴⁵Revised Statutes of Kansas (1931 supplement), ch. 19, sec. 2624; Cali-

Another section of the Kansas statutes provides that the county attorney shall approve the plats of towns or additions to towns. In Connecticut the state's attorney, together with the county commissioners, shall see that towns keep the public roads in proper condition. A Kentucky statute provides that the county attorney "shall oppose the wrongful opening, alteration, or discontinuance of any public road, and oppose the improper granting of tavern, merchants', and drug licenses, and may, if he thinks a license has been improperly granted, prosecute an appeal without securing to the circuit court in the name of the commonwealth." The prosecuting attorney in Indiana shall have all powers of a notary public, and in Nevada the district attorney may demand the services of the state veterinarian whenever his district is overrun with animal diseases. It is further provided in Kentucky that the county attorney shall be a special examiner to hold examinations for the office of county tax commissioner. A California provision requires that no sacramental wine shall be delivered without a permit from the district attorney.¹⁴⁶ Many other examples might be given but those listed above should be sufficient to illustrate this class of "miscellaneous duties."

There is nothing to be gained in attempting to decide what public officers should be given these various duties if they should be taken away from the prosecuting attorney. Many of these provisions are relatively unimportant and often are ignored. Even if not ignored they could involve only a negligible portion of the activities of the office of any prosecuting attorney. They have been listed here to complete the picture of the duties of the prosecuting attorney and to illustrate the fact that many of his responsibilities do not relate to the administration of criminal justice.

VI. *Conclusion*

This and the preceding article constitute a survey of hundreds of statutory provisions which define in part the duties of the prosecuting attorney. The general outline of the discussion presents a classification of the prosecutor's duties on the basis of function. Under general classes and sub-classes which have been suggested, the discussion has been a detailed listing of particular statutory provisions

fornia Political Code (1931), sec. 4097; Code of Ohio (Throckmorton, 1930), sec. 12465; South Dakota Laws of 1931, ch. 111.

¹⁴⁶Revised Statutes of Kansas (1923), ch. 12, sec. 401; General Statutes of Connecticut (1930), ch. 79, sec. 142; Carroll's Kentucky Statutes (1922), sec. 129; Indiana Statutes (Burns' Annotated, 1926), sec. 11835; Revised Statutes of Nevada (1912), sec. 4379; Carroll's Kentucky Statutes (1922), sec. 4042 a 11; California General Laws (Deering, 1931), Act 3794.

in an attempt to depict the extraordinary variety and complexity of the duties of the prosecuting attorney.

It is quite evident, at this stage of the study, that the writers believe that many of the shortcomings of our prosecuting attorneys can be explained by the manner in which their office is set up in the statutes. The study of the duties in criminal prosecution has indicated a conviction that the office of prosecuting attorney is likely to expand to such an extent that he will be the official entirely responsible for the administration of criminal justice in his locality.¹⁴⁷ If this expansion occurs, it will be doubly important for us to develop devices to control the discretion which necessarily is present at every stage of criminal prosecution and which will grow as the responsibilities of the office expand.

To that thesis this present discussion has added the suggestion that the prosecuting attorney should be given only those duties which relate to the administration of criminal justice. If we expect the prosecuting attorney to specialize sufficiently to make the quality of prosecution comparable or equal to the quality of defense, he should not be required to spend from one-third to one-half of this time on the various civil duties with which the statutes burden his office. However, in suggesting which duties of the prosecutor should be transferred, it has been necessary to classify on the basis of purpose and effect of some particular proceeding rather than upon its form or character.

From this examination the following suggestions have been presented concerning the reorganization of the present duties of the prosecuting attorney:

I. The duties of the prosecuting attorney in respect to criminal investigation and criminal prosecution should continue to be duties of this office. It is probable that the duties relating to criminal investigation should be expanded, and there is need for a careful restatement of the statutes which designate the offenses to be prosecuted, the duties of the prosecutor in the investigation of crime, and the procedure of criminal prosecution.

II. The following duties, civil in character, are sufficiently related to the administration of criminal justice to be termed *quasi-criminal* and to be placed logically among the duties of a criminal prosecuting attorney:

A. Proceedings in equity to enjoin or abate nuisances.

¹⁴⁷See section VI of the preceding article, 24 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1063 (March-April, 1934).

- B. Actions to recover statutory penalties.
- C. Certain types of proceedings involving *quo warranto*, removal from office, license revocations, etc.
- D. Suits to collect forfeited bonds, recognizances, fines, etc.
- E. Insanity proceedings, sterilization hearings, etc.

III. The various civil duties which should be taken from the prosecuting attorney and placed in some official such as a general attorney for the county involve the following:

- A. Legal advice and opinions in non-criminal matters to state or local officers or agencies.
- B. All civil actions conducted in behalf of any particular governmental agency to recover property, to define the duties of the agency, or to perform its duties.¹⁴⁸
- C. All particular types of proceedings, often specified by the statutes, such as condemnation of land or collection of delinquent taxes.

IV. The prosecuting attorney should be relieved of all legal aid duties involving the defense of the interests of wards of the state. Such duties are closely related to those performed by the "public defender."¹⁴⁹

V. All of the various duties to approve bonds, to audit accounts, to be a member of the county board of health, etc., should be placed in offices performing related functions.¹⁵⁰

If the office of prosecuting attorney were reorganized on the basis of the suggestions of this discussion, his duties would involve criminal investigation (including control of the police force), all criminal prosecutions, and only the civil actions specified in the paragraph II above. This reorganization of duties, however, is not all that the

¹⁴⁸One exception, or rather clarification, should be mentioned. Criminal or *quasi*-criminal prosecutions ordered by some specialized law enforcement agency would be conducted by the criminal prosecutor and should not be considered as actions conducted in behalf of such agency within the scope of the recommendation.

¹⁴⁹The term "public defender" seems to be used in popular speech in some places to refer to the prosecuting attorney when he acts as defense attorney of wards of the state. The term as used here refers to a public officer *who is specially created to defend impecunious criminals* and who has no prosecuting duties.

¹⁵⁰The duty to study and approve the form of bonds is undoubtedly a duty for an attorney and should be given to the official who handles the civil matters for the county. The duty to approve bonds as to sufficiency should probably be given to the legislative agency of the county.

The only contact which the prosecutor should have with these activities is that which might arise, occasionally, when criminal investigation or prosecution might involve incidentally such an activity. For example, it might be his duty to prosecute some official for neglecting to perform some such activity.

office requires. An adequate reconstitution of the office also requires consideration of the territory which the prosecutor should serve, the salary and qualifications of the office, the selection of assistants, and the relation of the office to the state government. In addition to these, of course, the regulation of the discretion of the office is a most important problem, and perhaps the most pressing question of all is the manner in which the prosecutor should be chosen.

It would be absurd to conclude that these alterations in the structure and duties of the office of prosecuting attorney would constitute in any manner a panacea for the present ills of criminal law enforcement. There are those who ask us to forget these matters of form and structure—who say that the way to get good government is to place good men in office. The fact remains that we do not always choose the best men to be prosecuting attorneys and, if we do, they seldom accomplish as much as we think that they should.¹⁵¹ This cannot be explained away by public apathy and lethargy alone. When the structure of government is so complicated that only a professional politician can know how it operates, it is not surprising that the electorate does not take an intelligent interest in public affairs. While improvement of personnel is the simplest approach to good government wherever it is possible, structural changes should be made where they seem to be necessary to facilitate administrative efficiency. The changes suggested merely would make it more easy for a vigilant public to enforce a demand for efficient law enforcement and make it more easy for the honest and able prosecutor to direct his full energy to the control of crime.

¹⁵¹How often there is a public upheaval which causes the removal of a prosecutor and the substitution of a popular figure who promises reform in the office! And then the reformer, being unable to produce, is in turn removed by an ungrateful public and another chosen to do the impossible. E. g., the Swanson election in 1928 in Cook County, Illinois, followed in 1932 by the overwhelming defeat of Swanson by Courtney. It is notorious that able and honest men have found it absolutely impossible to carry out their campaign pledges due to the complexity of local government and the political importance of the office. Swanson, while "he did not live up to expectations," proved to be a reputable public official. The public displays more "impatience" with this office than with any other in local government.