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THE PROSECUTING ATTORNEY AND HIS OFFICE*

Newman F. Baker¹ and Earl H. DeLong²

I. Introduction

In the analysis of criminal law enforcement which Dean Pound presents in "Criminal Justice in Cleveland" he suggests that perhaps the major factor in the breakdown of the office of prosecuting attorney in the United States is the fact that our legislatures are continually increasing the number of criminal offenses.³ The probability that this diagnosis is correct certainly seems great in the light of the survey of statutes specifying the criminal law duties of the prosecutor which has already been presented in these pages. Nevertheless, the perspective of practical observation of the prosecutor's office in actual operation shows clearly that numerous other elements contribute to this breakdown. In fact it becomes apparent from such observation that the astonishing range of the criminal law duties of the office must be placed far down the list in any scale of importance and that any serious attempt to renovate the office may well ignore this element and devote its attention to the elimination of other difficulties.⁴ In spite of the great number of offenses which he must prosecute, the overwhelming majority of the cases to which the prosecutor's office must give its attention are those comparatively few major offenses which have been crimes for several centuries. The office of prosecuting attorney in the United States would have broken down even if its duties in criminal law enforcement involved only these few offenses. The explanation of its collapse must be

*This is one of a series of articles on criminal prosecution which have appeared in the *Journal of Criminal Law and Criminology*. See "The Prosecutor: Initiation of Prosecution," 23 *Journal of Criminal Law and Criminology* 770 (January-February, 1933); "The Prosecuting Attorney: Provisions of Law Organizing the Office," 23 *Ibid.* 926 (March-April, 1933); "The Prosecuting Attorney: Powers and Duties in Criminal Prosecution," 24 *Ibid.* 1025 (March-April, 1934); "Powers and Duties of the Prosecuting Attorney: Quasi-criminal and Civil," 25 *Ibid.* 21 (May-June, 1934); "Powers and Duties of the State Attorney-General in Criminal Prosecution," 25 *Ibid.* 358 (September-October, 1934).

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³"Criminal Justice in Cleveland" (1922) pp. 620, ff.

⁴For an interesting discussion of the actual use which the prosecutor makes of the criminal code, see Thurman Arnold, "Law Enforcement—An Attempt at Social Dissection," 41 *Yale Law Journal* 1 (November, 1932).

found not in the length of the criminal code but rather in the answers to questions such as the following: Why do incumbents seek the office of prosecuting attorney? What concessions must they make to get and stay in office? Does the prosecutor have adequate personal assistance? Are his office facilities adequate? Does he have a library? Is it necessary for him to maintain a private practice on the side in order to live? Does he receive cooperation from other law enforcement agencies? How much of his time is taken up by non-criminal duties? To answer these questions and others it is necessary to turn away from the statutory picture which has been sketched and learn something of the clothing which political and administrative practice has thrown about the legal skeleton.

The office of prosecuting attorney is found in some form in every part of the United States and it is hardly possible, therefore, to find some one typical office which may be studied and described. The problems of the prosecutor vary both in kind and in degree from one county to another. To those who live in metropolitan sections of the United States the typical prosecuting attorney is an executive at the head of an office of twenty-five, fifty, or even more, assistants and perhaps an equal number of clerks, stenographers, and investigators. This concept, however, is hardly accurate for the country as a whole. Instead of an office of seventy-five or one hundred people, the American prosecutor is far more likely to be the head of an office consisting of himself, perhaps one assistant, a stenographer, and an investigator or evidence man. It seems probable that at least three-fourths of the offices in the United States contain less than ten persons and only a small number indeed will have more than twenty-five. There is no doubt that in hundreds of offices the prosecutor does not have even a stenographer to aid him.

There are in the United States approximately 2,150 prosecuting attorneys (excluding county attorneys in those states which also have district attorneys) and the average population served by each of these officers is 57,000. About 1,725 of these prosecuting attorneys are found in the thirty states which choose that official by counties or by cities. The average population of the prosecutor's jurisdiction in these thirty states is 47,000. Within this group of states, however, are found twenty-one of the twenty-five largest cities of the country and the population of at least 24,000,000 in these twenty-one cities is served by only twenty-five prosecuting attorneys. Consequently, excluding these urban areas from our computations, we find that 1,700 prosecutors in these thirty states are chosen for counties having an

average population of 34,000. 1,300 of these 1,700 counties have less than 100,000, 1,150 less than 50,000, 800 less than 25,000, and 400 have populations less than 10,000.

In sixteen states the general prosecuting official is chosen by districts which include several counties. There are about 400 districts in these states and the average population is 96,000. In seven of the sixteen the statutes provide for county attorneys as well as district attorneys. It would not be worth while to spend the effort necessary to determine how many counties in these states actually have county attorneys, but the average population of the 758 counties is only 22,000. The other two states to be accounted for are Rhode Island, which makes its attorney-general the prosecutor for the whole state (population 687,000), and Connecticut (population 1,600,000), which seems to divide the work of prosecution among the state's attorneys of nine superior courts and the prosecuting attorneys of five common pleas courts.

It would be an almost impossible task to gather information on the size of the prosecutor's staff in every jurisdiction in the United States for it would be necessary to use a questionnaire which at best is inaccurate. In the state of California, however, the statutes set forth in detail the number of assistants, stenographers, and others who are authorized for the district attorney in each of the fifty-eight counties of the state.⁵ The following table which presents this information for a few representative California counties will serve to illustrate the relation between the population of the jurisdiction and the size of the prosecutor's staff:

County	Population	Assis- Depu-		Stenog- Detec- Process				Total
		tants	ties	Clerks	raphers	tives	Servers	
Alameda	474,883	2	13	1	5	2	1	24
San Diego.....	209,659	1	11	1	4	6		23
Santa Clara.....	145,000	4	1	1	1	1		6
Frenso	144,000	1	6		4	1		12
Orange	118,679	1	4		3	1		9
San Joaquin....	102,940	4			3	1		8
Kern	82,570	1	2		2	1		6
Riverside	81,624		3		2	2		7
Sonoma	62,223	1	1		1	1		4
Monterey	53,705		2		2			4
Marin	41,648		1		1			2
Butte	34,097		2		1			3
Kings	25,385		1		1			2
Madera	17,164				1			1
Lassen	12,589				1			1
Nevada	10,596		1 ^e		1 ^e			1
Modoc	8,038				1			1
Lake	7,166							

⁵California Political Code (1931), secs. 4230-4287.

^ePart time.

It is clear that with the exception of a very few metropolitan areas the problems of the office of prosecuting attorney are problems of the small office. Nevertheless, both must be studied. Whether he is a rural or a metropolitan officer, the prosecuting attorney is probably the most powerful official in local government. In either situation the discretion given to his office by provisions of law or by expansions of administrative practice is so broad and unrestricted that if he wishes to do so he can easily dominate the political life of his community. His position, whether his jurisdiction has twenty thousand people or two million, affords a tremendous opportunity for extraordinary public service and, equally, for irreparable injury to the welfare of the community. Because different factors condition the effectiveness of the prosecutor in different environments, the small and the large office will be described separately. The analysis of the small office, which comes first, is based upon personal observations in Missouri and Oklahoma, upon the findings of the numerous crime surveys, and upon a report by the Michigan Crime Commission on the prosecutors of that state.⁷ The discussion of the large office is based almost entirely upon personal observation of the office of the state's attorney of Cook County, Illinois.

II. The Small Office: Why it is Sought

Many of the deficiencies in the administration of the rural office of prosecuting attorney are explained by a study of the type of men who fill the office and the manner in which they are chosen. Perhaps the most pertinent question to be asked is this: Why do men seek this office?

The experience of a young man recently graduated from law school illustrates vividly one reason why men run for the office of prosecuting attorney. Upon his admission to the bar, he began to practice in partnership with an experienced attorney in a downstate Illinois county having a population of about 35,000. He had hardly settled himself in his new surroundings when the older man suggested: "Well, you should get out and run for state's attorney."

"But I have no experience behind me. I have no political connections. Why should I run?"

"Because it's the only way that you can print your name and

⁷Criminal Justice in Cleveland (1922), Missouri Crime Survey (1926), Illinois Crime Survey (1929). The 1930 Report of the Michigan Crime Commission contains a very interesting tabulation of material relating to the prosecuting attorneys of that state.

picture on some cards and scatter them broadside over the county to advertise that you're a lawyer."

He lost the election by a very narrow margin but as a result of that campaign he has more business than he can handle. Some time later he was asked, "What would you have done if you had been elected?" The answer: "I would have been very, very much embarrassed. I don't know anything about criminal law. I'm not interested in it."

Many fledgling lawyers are not so fortunate in making a connection with an established attorney. To these young men election to the office of prosecuting attorney means the opportunity to get much needed practical experience and the assurance of a fair living during this "internship." A recent inquiry by the California State Bar Association reveals that the average earnings of California lawyers during their first year of practice amount to \$986.⁸ Salaries paid in the office of prosecuting attorney are small as compared with the responsibilities of the office but there are few places where the salary does not exceed \$1,000.

In a recent class at the law school of the University of Missouri, almost every member except those living in the largest cities of the state intended to return home and run for prosecuting attorney. In many communities it has become almost a custom to confer the office of county attorney upon a local boy recently graduated from law school. Family and friends "play politics" with the local party leaders and the young man himself participates during vacations. If he is properly sponsored, he is elected to office almost as soon as he has passed the state bar examination. In fact, it sometimes happens that he is elected before he has taken the bar examination.⁹ We recall an instance of a man who was elected prosecuting attorney and then had the misfortune to fail the bar examination.

There are, of course, many prosecuting attorneys who are men of ability and experience but the "Missouri Crime Survey" shows that the median age class of prosecuting attorneys in that state was 25 to 29 years and that the median of experience before election to office was 1 to 4 years.¹⁰ The "Illinois Crime Survey" shows a much higher median of age and experience for that state but personal

⁸James E. Bremmer, "A Survey of Employment Conditions Among Young Attorneys in California," Proceedings of the Fifth Annual Meeting of the California State Bar (1932), pp. 33 ff.

⁹See *Moore v. Wesley*, 125 Kan. 22, 262 Pac. 1035 (1928), involving the election of a county attorney in Grant County, population, 3062.

¹⁰P. 131.

observation indicates that the Missouri situation is typical at least of states in the Southwest.

Professor Moley, after examining the histories of a large number of public officials who had held the office of prosecuting attorney, makes the following statement:¹¹

"This sample, drawn as it is from the nation as a whole and therefore fairly typical, shows that the American prosecutor attains that office very early in his legal career, holds it only a short while, and finds it a very successful way to attain the public attention necessary to be elected to higher office."

A statement from "County Government in Virginia," a survey made by the National Institute of Public Administration (1928), indicates that the experience of Missouri is typical of other parts of the country besides the Southwest. "The office is usually occupied by a recently admitted member of the bar who views it as a kind of training place."¹²

The office of prosecuting attorney is valuable to the young lawyer not only for the salary and the training which it offers but also for the wide acquaintanceship and publicity upon which he can capitalize later in private practice or in political life. Professor Moley's survey of governors and members of Congress shows conclusively that the office of prosecutor is often a first step in a long political career.¹³ The "Missouri Crime Survey" lists a number of prominent men from that state who formerly were prosecutors.¹⁴ Personal observation in Oklahoma shows that many former county attorneys move on to higher political office.

This discussion shows that the personnel of the office of prosecuting attorney does not tend to rise much higher than the statutes require. As already pointed out in a previous article, the only general age restriction is the requirement that he be old enough to vote. The only qualifications generally required by the statutes are local residence and membership in the bar. Disbarment of an incumbent removes him from office.¹⁵ In some states there are cases which indicate that disbarment does not deprive the prosecutor of his

¹¹"Politics and Criminal Prosecution" (1929), p. 79.

¹²Quoted by Moley, *ibid.*, p. 81.

¹³*Ibid.*, pp. 78-79.

¹⁴P. 131.

¹⁵See *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021 (1909).

office nor affect his power to appear in court and perform the duties of the office,¹⁶ but this certainly is not common.

The conclusions concerning the youth and inexperience of prosecuting attorneys which appear in the foregoing discussion and in statements by other writers seem to be based entirely upon the experience of states which elect county prosecutors. These conditions occur particularly in counties where the population is small and the prosecutor's salary is low. In those states where the prosecuting attorney is chosen by judicial districts, the population within his jurisdiction is much larger, the salary is higher and the men elected are far more likely to be men of experience and ability. The larger electorate makes it more necessary for him to base his appeal for election upon experience and ability. Legislatures have been inclined to make salaries proportional to the population served. Consequently, the more populous counties or judicial districts pay salaries which, although not commensurate with the importance of the office, are high enough to attract men of fair experience and ability. The thinly settled county is the place where an inexperienced youth becomes the prosecuting attorney.

The majority of our prosecuting attorneys, however, are elected by counties of small population. For that reason, if the prosecuting attorney of such a territory is not a young man seeking experience, publicity, or the salary, he is a man, young or old, who has political ambitions or an older man who lacks the ability or ambition to make a higher income in private practice.

We recall the case of a county attorney in Oklahoma who served for two terms—four years—taking office soon after his graduation from law school. He was able and well trained but, as a leading attorney of the county characterized him, he was just "plain lazy." He was slovenly in his personal appearance. His callers constantly found him asleep in his office during the hours when presumably he should be working. He neglected the preparation of his cases and continually contracted small personal debts which he never repaid. As a result he was defeated several years ago. However, his habits in private practice were no different and here there was no assured income if he did not work. Recently he was re-nominated for county attorney and re-elected, content with his small salary for which he gave little in return. It is not uncommon to find men holding the office because it insures an income which is not dependent upon the

¹⁶*In re Maestretti*, 30 Nev. 187, 93 Pac. 1004 (1908); *Snyder's Case*, 301 Pa. 276, 152 Atl. 33 (1930).

skill or energy of the incumbent. Nor is it uncommon to re-elect a man who has proved himself unfit for public office. In general, the public gets what it pays for.

III. The Small Office

In many respects the office of prosecuting attorney is the most thankless office within the gift of the people and the difficulties which arise in its administration cannot all be explained away by the fact that the public often chooses youth and inexperience to perform this function of government. In addition to the personal qualifications of prosecuting attorneys, the functioning of the office is effected by lack of assistance, inadequate library facilities, failure of other public agencies to cooperate, the mass of civil duties which he must perform, the fact that salaries are often so low that the prosecutor must maintain a private practice on the side to making a living, and the political nature of the office. Many of these factors affect particularly the small office. At least they affect it differently than the large office and consequently, it is necessary to analyze in some detail the effects of these various items.

It is quite evident that the state stands at a great disadvantage when it is represented by an inexperienced prosecutor who has just been admitted to practice while the defense is conducted by a veteran attorney who knows all the fine points of his profession. Such a defense attorney tangles the bewildered youngster in a maze of legal procedure—delays, continuances, motions, rules of evidence—and with a sweeping emotional appeal insinuates a “reasonable doubt” into the minds of the jury in the face of facts which would clearly show guilt if capably presented. The young prosecutor knows neither the law nor people, and ignorance of one is just as disastrous as ignorance of the other. Only by experience can he learn to handle witnesses and juries. The alibi defense, perjured witnesses, and “fixed” juries are things which his law school training has not taught him to meet.

On the other hand there may be something to be said for the young prosecutor. To quote William D. Knight:¹⁷

“It is true that to elect to the office a young, inexperienced man means that the state will be represented by a beginner, who must match his untried hand against veterans of the profession, who represent the defense. There are ample illustrations of how this one-sided combat has had sad results for the state. But on the other hand, the young man has his reputation

¹⁷“Illinois Crime Survey,” p. 252.

to make; he is vigorous and aggressive in prosecution and may compensate in energy for what he lacks in experience."

Unquestionably this would be true of all communities if the young men who sought the office were the best from their respective law schools but unfortunately the most able and ambitious men are attracted to the cities or are taken into private practice with established firms. A brilliant young prosecutor will make mistakes but he will profit by his mistakes and perhaps the county can afford to train him for a few months to receive the energetic service he will give afterward. However, the men who are left to run for prosecutor are likely to be the lower and not the upper members of their classes at law school. They are the ones who do not readily learn by their mistakes and consequently their training period is a long one and expensive for the county. In one Oklahoma county the situation became so acute during a recent term of court that the county board hired an experienced attorney to handle most of the cases, civil and criminal.

One lawyer from the same state, elected county attorney just after graduation from law school, confesses that "my only convictions during my first term were accidents." In view of the importance and responsibilities of the office of prosecuting attorney, it is certainly false economy for legislatures to set salaries so meager that competent and experienced men are not attracted to the office. As the "Missouri Crime Survey" points out, "Handicapped as he is by the rules of procedure governing the trial of the case, the prosecuting attorney should not be lacking in adequate experience, preliminary educational equipment and those qualities which make for success as a lawyer, nor should he be lacking in office facilities and such clerical assistance as will enable him to interview his witnesses, brief the law, and do the other necessary things involved in the proper preparation and presentation of the state's case."¹⁸

If in spite of the foregoing discussion, we assume that the prosecuting attorney is sufficiently able, experienced, and eager to render adequate service, the other factors which have been mentioned make it difficult if not impossible to do so. The office of the county attorney in rural communities usually is small and dingy and furnished with a table, a few odd chairs, and an assortment of spittoons. The library facilities provided for the prosecutor of the small and often the large county are altogether inadequate and, unless he has a library of his own, he is greatly handicapped. Most prosecutors have

¹⁸P. 135.

in their libraries a set of the local reports and a statute book but nothing else of value to the modern lawyer. Text books and treatises are uniformly lacking. It is rare to find copies of such works as the Decennial Digests, R. C. L., A. L. R., Shepard's citations or the other necessary aids to legal research. Although "ballistics" testimony is now admitted without question in a dozen states as a result of direct holdings by State supreme courts in reported decisions, the experts in identification of firearms of the Scientific Crime Detection Laboratory of Northwestern University Law School on numerous occasions have been asked by the prosecutors, their clients, to furnish them with lists of such cases as the citations were not available in their local communities. This but illustrates the lack of library facilities. But the usual library, meagre as it is, often attracts the recent graduate to the office. To the young lawyer, perhaps with school debts to meet, the equipment of a law office for himself is a mountainous task and with the rapid increase of the reports this is a problem more and more difficult to meet.

The analysis of the statutes in a preceding article indicated that legislatures have been most niggardly in providing assistance for prosecutors. In the preparation of the "Missouri Crime Survey" the prosecuting attorneys of that state were asked this question: "Does the county court authorize the expense of clerical help which you may need?" Seventy out of eighty-six prosecutors answered in the negative. From this the survey concluded, "In a vast majority of counties in Missouri the prosecuting attorney has no clerical help of any kind."¹⁰ If the county attorney himself must pound out his informations on a battered typewriter or write them with pen and ink under these conditions, is it surprising that the service rendered by the prosecutor's office is, at best, mediocre?

The discussion in a preceding article has already pointed out that the statutes relating to the prosecuting attorney quite definitely contemplate that he shall prosecute upon evidence supplied to him by citizens or other governmental agencies. In few instances is he directed to be a detective or policeman. Nevertheless, in many parts of the United States he must perform not only the duties of his own office but many of the duties of the police, the sheriff, and the coroner in addition.

The prominent position of the prosecuting attorney makes it entirely natural that complaints of crime should come to him first and that many communities should regard him as the chief law

¹⁰P. 136.

enforcement officer of the locality. To quote the "Illinois Crime Survey":²⁰

"He, of course, is looked upon as the protector of the public in all things which have to do with the enforcement of the law. This is especially true in those sections of the state which are not within the boundaries of the larger cities. In these sections there is no police protection and the instinct of the citizen . . . is to go to the state's attorney. In this way a large amount of current information concerning real and imaginary infractions pass through the office of the state's attorney. He thus becomes the clearing house for complaints and difficulties of all kinds. In many respects the influence and power which he exercises exceeds that of the judges. He is always available, whereas the judge, having duties in other counties in the circuit, may frequently be absent. The prosecutor is more closely in touch with local current events and is more easily approached. Under the law and in practice he is more powerful than the sheriff, who is rapidly ceasing to be a law enforcement officer and is becoming an administrative arm of the court. Moreover, the state's attorney is a lawyer, perhaps possessed of more education than the average sheriff; he is, therefore, consulted more frequently by citizens who have complaints."

The fact that his office is the clearing house for complaints of offenses makes it necessary for him to waste a large part of his time sifting out the real criminal cases from the mass of rumors and spite complaints which come his way. The failure of the public to cooperate by reporting violations of the law and the fact that so many persons attempt to use the prosecutor as a cat's paw to drag their private chestnuts from the fire throw a tremendous burden upon the prosecuting attorney in the small community. In larger communities the police department and the prosecutor's secretary and assistants take over the burden of this work.

In the preparation of the "Illinois Crime Survey" the following question was asked of the 102 prosecutors in the state: "Do you make your own investigations in preparing cases on the facts, or do you rely on sheriff, police, or constables to get the evidence?" Nineteen said that they made their own, four relied upon the officers mentioned, and fifty replied that they used both methods.²¹ Questionnaires returned by the Missouri prosecutors indicated that in seventy-five per cent of the counties the sheriffs and constables give assistance but Lashly comments, "this may and probably does amount to very little real assistance."²² It is clear that in fifteen or twenty per cent of the counties of these states the prosecuting attorney must

²⁰P. 250.

²¹P. 269.

²²P. 139.

do practically all of his own police work if he is to conduct prosecutions, and it is probable that the percentage of such counties is actually much higher. Inquiry among the county attorneys of Oklahoma indicates that in that state the situation is no better. The utter inadequacy of the office of sheriff as a law enforcement agency is well summarized by Moley.²³ The statutes of many states permit the prosecuting attorney to employ investigators or evidence men to supplement the work of other governmental agencies, but generally the prosecutor in the small county must gather his evidence where he can find it and his success is almost entirely dependent upon his own initiative.

The "Missouri Crime Survey" points out at some length that even where the prosecutor receives cooperation from other law enforcement agencies it is important for him to visit the scene of the crime immediately and to attend inquests to obtain statements from witnesses and to make sure that all evidence is uncovered,²⁴ and this statement is quoted with emphatic approval by Mr. Knight, an experienced state's attorney, in the "Illinois Crime Survey."²⁵

"The situation in this respect is far better in those states which have established well-trained state police forces to provide protection for the rural districts. While it may still be desirable for the prosecutor to attend investigations and inquests, the actual burden of investigation is assumed by trained detectives.

Although there may be some question as to what the criminal investigation functions of the prosecutor should be, there is no doubt that the exigencies of the present situation require him to perform police duties for which he does not have adequate facilities. In the face of such conditions, it is hardly possible for an experienced, competent, and energetic prosecuting attorney to administer this office satisfactorily. How absurd it is to expect the young and inexperienced prosecutors, who are so often elected to office, to master the intricacies of criminal procedure and, in addition, be proficient in the technical science of crime detection!

IV. The Small Office: "Distractions"

The factors which have been taken up in the preceding discussion are such that their existence alone would make satisfactory admin-

²³"Politics and Criminal Prosecution," pp. 95-110. See also Bruce Smith, "Rural Crime Control" (1933), Ch. II.

²⁴Pp. 140-2.

²⁵Pp. 268-9.

istration of the office of prosecuting attorney improbable. These factors definitely are obstacles to efficient administration. The others which have been mentioned but which remain to be described might more accurately be designated as "distractions." No matter how competent the prosecutor might be and however well supplied with assistance and equipment, even if relieved of all duties of criminal investigation, these "distractions" alone are sufficient to make adequate operation of the office impossible.

The question of salaries has already been raised to show that competent, experienced men avoid the office of prosecuting attorney because it does not afford them an adequate living. Beyond this, the payment of low salaries practically makes it necessary for a prosecutor to engage in private practice with the result that the public interest is often sadly neglected. One Oklahoma prosecutor, with a salary of \$2,400, is said to make at least this much more through real estate transactions. Another prosecutor, drawing \$2,000, made about \$7,500 in one year from royalties and by brokerage of oil and gas leases. Under such circumstances the state's business becomes a secondary interest to be looked after when there is nothing else to do, and many of these men, in private conversation, admit that such is the fact.

The "Illinois Crime Survey" states that "in a great majority of the counties in Illinois, the state's attorney engages in *private practice* in addition to his work as state's attorney."²⁶ The Missouri survey and the 1930 report of the Michigan Crime Commission indicate that the same thing is true in those states, and a glance at the salaries provided in the statutes of most other states shows conclusively that many prosecuting attorneys are forced to engage in private practice unless they are independently wealthy or can supplement the salary with graft.

It sometimes happens that the prosecuting attorney betrays the interest of the public in favor of his private practice when the two conflict, and there are situations in which the prosecutor has made vicious use of his official position to further the interests of his clients. For example, in Montana some years ago a county attorney made a practice of collecting unjust claims for clients by threatening criminal prosecution in cases where there was utterly no basis for any prosecution. He carried his practice so far that he had warrant forms signed by a friendly justice of the peace, filled them out, and had them served in cases where his initial bluff failed. Fortunately, his right to practice law was suspended.²⁷

²⁶P. 278.

²⁷See *In re Bunston*, 52 Mont. 83, 155 Pac. 1109 (1916).

Up to this point this discussion has ignored the fact that the prosecuting attorney is a creature of politics. There can be no doubt, however, that popular election necessarily involves the prosecuting attorney in politics and the office will continue to be political at least as long as this is the method of choice. In view of this fact, it is altogether unreasonable to expect the prosecuting attorney to ignore considerations of political expediency. Professor Moley, in "Politics and Criminal Prosecution," presents an excellent description of the political factors which characterize the administration of the office. It certainly is not necessary to repeat that analysis here but certain angles of the political picture apply particularly to the small office and should be emphasized.

Aside from inexperience and incompetence, perhaps the greatest handicap which confronts the prosecuting attorney in the small county is his intimate acquaintance with every citizen of the community. The county attorney's office is the news center of the countryside. Town visitors drop in to gossip and farmers from ten or twenty miles away come to take advantage of the chairs and spittoons and to learn what has happened since their last visit to town. The prosecutor cannot afford, politically, to offend these people by refusing to spend his time visiting with them. The net result is that he may spend the day giving free legal advice to his friends and the voters of the county, and literally has been forced by his visitors to neglect the duties of his office.

It is especially true in the smaller communities, although by no means exclusively confined to them, that the office of the prosecuting attorney must spend a great deal of time listening to the complaints of those ignorant or impoverished citizens who think that he is hired by the county to furnish them with free legal advice in their own private affairs.

With respect to complaints involving private civil matters, one prosecutor writes: "The people of my county seem to think the county attorney is their personal attorney. They come to me for advice on many civil as well as criminal matters. I must spend considerable time with them. While I have never kept an accurate check upon these interviews I should state, off-hand, that at least half of my time is given over to listening to civil matters. I must hear them through before I can direct them to seek another attorney to handle their affairs. Day after day it is the same routine. I have a constant stream of callers and only a few of them present matters pertinent to my office. The average citizen seems unable to understand that the county

attorney is the attorney for the people as a whole, rather than attorney for each one individually."

It is certain that most prosecutors will indorse this statement. It makes no difference that those who bring these complaints are the more ignorant citizens or those who are unable to pay fees to a personal attorney. Merely hearing these problems takes a great deal of the prosecutor's time because these citizens cannot be hustled off without a hearing and it so happens that quite often the prosecutor actually uncovers a violation of the criminal law in a situation which appears at first to be an ordinary civil matter. The prosecutor never knows what the visitor has in mind until he has finished his story. A brusque dismissal of a citizen who is in trouble may cause difficulties at election time, and there is always the possibility that the party aggrieved may be called as a juryman when an important criminal case is being tried.

What matters of this type may be listed to illustrate the average prosecutor's "day in office"? The wide variety of the cases makes it a most difficult thing to do, but, after sifting through a large number of daily work sheets, the writers, with considerable hesitation, present the following situations which represent, at least in some degree, a day's work in this field of the prosecutor's activities.

A type of case most often presented is the effort of an irate landlord to get a renter out of his house or apartment. The owner calls and explains that the renter is behind in his rent several months. The prosecutor listens patiently and advises the owner to take the case to an attorney. But the owner feels that the matter is one for the prosecutor because of the fact that the renter at the last interview slammed the door in the owner's face and threatened bodily harm if the owner appeared again. Still the prosecutor declares the situation is a civil matter between the owner and renter and he must exert all his diplomacy to get the irate landlord out of the office without arousing his anger or creating the impression that the prosecutor lacks zeal in administering his office. Everyone's troubles loom large in his own eyes and it is difficult to placate the person already distracted by the state of his personal affairs.

There are also numerous cases where the prosecutor is asked to collect debts. As pointed out elsewhere in this series of articles the prosecutor may use the threat of prosecution primarily to collect the sum due in order to avoid criminal proceedings but generally this occurs in the cases of bad checks or petit larceny actually committed. But the prosecutor often faces this situation:

Visitor: "I loaned my friend X \$50 last year and now he will not pay it back. I told him yesterday if he didn't pay me I'd come to you and place the matter in your hands.

Prosecutor: "What do you want me to do?"

Visitor: "Well, I want my money back."

Prosecutor: "You'd better bring a civil suit. I'll give you the names of several attorneys who would be glad to serve you at the minimum expense."

Visitor: "But, I have lost the note."

Prosecutor: "If that is the case you probably are just out of luck. But, what can I do? Why come here?"

Visitor: "Well, he admits to me he owes me the money but he says he'll never pay it and I thought you would help me out. Why, the man's just a plain thief."

Prosecutor: "That may be, but the statutes do not cover his case. There is nothing I can do. We have no basis to prosecute. Have you any record of the loan or any witnesses? Did you give him a check or cash? The only thing you can do is to hunt up an attorney."

It is difficult to convince the ignorant that it is no business of the prosecutor to recover debts. This conversation is typical of this type of case. The man who loaned the money feels sure that the prosecutor in some way or another can help him out. Often they become disgruntled when "aid" is refused.

A party comes in and tells the prosecutor that he left his battery to be charged at a battery service station. Now they want to charge him rental in addition, because they installed a battery in his car for him to use while his battery was being charged. He states that he positively will not pay that rental but the station will not give up his battery. The prosecutor advises the caller to pay the rental and smoothes him down as best he can.

A farmer came to the prosecutor seeking advice on the law of stray animals. A saddle horse had wandered into his pasture and no one had appeared to claim the animal. He wanted to know whether he could keep the horse without being guilty of larceny so he came directly to the prosecutor. He advised him to advertise the horse, pointing out to him the statutory requirements.

The organization of an "Operators and Service Station Employes Association, Inc." was brought to the prosecutor's attention. He asked whether the organization was intended primarily to control the price of gasoline and oil at filling stations. His visitor said it was not so intended, but its chief purpose was to promote "a better understand-

ing" among filling station operators and employees. The prosecutor, fearing the development of a "racket", declared that a "close watch" would be kept on all the activities of the organization.

A woman complained that her husband, a carpenter, had done sixty-eight dollars worth of labor on a vending machine ordered by a man who now refused to accept the machine after ordering it and furnishing the materials for construction. Of course, the prosecutor advised her to get an attorney and make a civil case out of it.

Another woman declared that she had delivered five dressed chickens to a housewife at her request, the latter promising to pay for them that same evening. Now the complainant declared that the housewife had not and would not pay for them and the chickens were eaten. The prosecutor gave the same advice as in the preceding case, saying after the woman departed, "I do not recall that name (the housewife's) and I do not suppose there is anything to this story. If anyone else complains I may have to call her in and find out about it."

The sheriff brought in two young girls who had been picked up in an empty box car early that morning. The prosecutor learned that they had innocently started out to see the world, coming from a city about one hundred miles distant. Already, they were repentant and anxious to return home. The prosecutor wired the parents and asked the sheriff to take care of the girls until their parents arrived.

Another woman then came in and she told the prosecutor that her sister's husband had just died, leaving a will. She wanted to know what to do. The prosecutor sketched the local probate system to her and referred her to an attorney. It is interesting to take note of this case. The reason this woman came to the prosecutor may be indicative of the public's feeling toward him. The prosecutor was "the people's attorney" and, even when the woman knew that a will was not his business, she wanted his disinterested advice. She was quite willing to go to any man he recommended but she wanted his reference. It goes without saying that the prosecutor is in position to turn much legal business to his former partners or friends.

Another case involved the complaint of a woman that a carpenter had filed a labor lien against her after she had failed to pay him for work in roofing her house. She said she could not pay the man nor did she have the money to hire an attorney for proper legal advice. As a result she came to the prosecutor who spent more than fifteen minutes in telling her what she wanted to know. In the larger centers the attorneys for the united charities, legal aid organizations,

or law school clinics care for these cases. In the smaller places they naturally drift into the prosecutor's office.

A physician came in for information as to the procedure in securing an order to send a badly deformed child to the State Children's Hospital. The prosecutor often is called upon for advice regarding the certificates of births, burials, or hospitalization of citizens. Most of the insanity hearings originate in complaints lodged with the prosecutor.

A man came in to present to the prosecutor his story of an automobile accident. He claimed that the car with which he collided had only one headlight burning. He wanted to know if that was a violation of the statutes covering the operation of motor vehicles and, if so, what were his chances of securing damages. The prosecutor referred him to an attorney.

A property "owner" came in to report "trespassers" on his land. After some questions the prosecutor found out that a couple had sought his permission to camp in his pasture. He had given such permission in exchange for a promise to cut weeds in the garden. This had been done and after a dispute the complainant had ordered them off. They refused to go so he went immediately to the prosecutor. Another question revealed that the man really did not have title to the land but that it belonged to his daughter. So the prosecutor merely advised him to get his daughter to file a forcible entry and detainer action. The man went out angry.

A man came in and asked how he could force his wife to take treatment for syphilis. He said she reported a history of infection dating back four years but she refused to undergo treatment. The prosecutor found from the statutes that he could secure an order for her treatment and declared he would take the necessary steps.

The prosecutor, after the departure, of his visitor, related the facts of another case wherein a girl of twenty years had complained that a married man in the town had infected her with gonorrhoea. He had called the man who was an intelligent man of good standing. The man admitted the sexual relation but denied the infection, claiming that he had never had the disease. He was sent to the county physician who reported an inspection with an urethroscope which proved the man's statement. Nevertheless, the man paid for the medical treatment of the girl and her upkeep regardless of the fact that he was not responsible for her condition. Thus considerable neighborhood scandal was avoided.

Two farmers complained that the operators of two oil wells

being drilled along a certain creek caused the drilling mud to come down the creek depositing the slimy oily mud on their property. The owners knew that it was a civil matter but were more interested in securing immediate relief than damages later on. The prosecutor heard their story, asked for additional evidence and promised to search the statutes to see if he could assist them to secure the stopping of the drilling.

Another visitor spun a tale of a loan to a man who agreed in exchange to repay a repair bill on an automobile, to buy tires and gasoline for the car, and then to transport the man who made the loan to a town two hundred miles distant. It seems that all the details were attended to except the transportation. The recipient of the loan left the complainant where he was. So, he came to the prosecutor about it. It was explained to him that this probably was merely a breach of contract and that the case did not fall within the province of the prosecutor. Many situations of this kind constantly appear in the prosecutor's office.

In many contract cases the injured party often feels that the other party might be prosecuted if the prosecutor could be interested in the affair. Take the case of the machine shop owner who undertook to build a machine for an inventor, delivery to be on June 1. When that day arrived the inventor found one or two minor variations from the specifications and refused to accept delivery. The builder refused to make changes and demanded and was refused payment. Thereafter the builder sold the machine to a third party. The inventor, of course, called the builder a "thief" and rushed to the prosecutor with his complaint. The prosecutor explained that this might be "larceny by bailee" but declared that inability to prove the intent to steal probably would make criminal prosecution useless. Then, the injured party asked the prosecutor at least to start criminal proceedings "because if a warrant is sworn out I think I can get my machine back."

A prosecutor writes: "Civil duties of prosecutors in this State are becoming increasingly complex. Due to the depression we have an increasingly large number of requests for advice from citizens of my county. Most of these people should go to regular attorneys but many claim that they cannot pay attorney's fees and expect to get the information from, us gratis. During each day we have to deal with mortgage foreclosures, liens, attachments, garnishments, bad debts and a variety of civil matters that are no concern of ours. I think I can divide my time as follows: 35 per cent in court and

consultation on civil matters; 10 per cent in court and consultation on criminal matters; and 55 per cent in the office on original interviews, civil and criminal cases, legal advice, etc."

These statements and illustrations have been taken from the experience of men who hold this office in the smaller communities. They are the communities in which the prosecuting attorney himself gives personal attention to all the affairs of his position and these complaints are matters to which he himself must listen. Almost all of the situations which are set forth above involve questions which are not germane to the duties of the prosecutor, but it is quite apparent that it would be political suicide for any such officer to refuse to listen to their stories. The visitors at these interviews are invariably asking for "advice" but the result is almost always a recommendation to secure an attorney to bring a civil suit. The time which the prosecutor devotes to these matters is a generous donation to the visitors and a complete waste as far as the public is concerned. Nevertheless, the prosecutor has no alternative. He must listen.

This same personal acquaintance often makes the task of prosecution most difficult. It is not surprising that the prosecutor finds it hard to press a theft charge against some poor farmer whom he knew as a boy in school. It becomes doubly hard to prosecute when he realizes that the man has turned to dishonesty as a last desperate effort to save his home from being sold for taxes. The prosecuting attorney in the small county is so close to his constituency that it takes a very strong man to give an impartial administration, and the decision whether or not to prosecute often turns upon a boyhood experience or the influence of a local minister or a relative.

The close ties of the community circle may not begin to bind the prosecutor until after the charge is filed. In an Oklahoma county recently a complaint of rape was filed. On the same day, the relatives of the accused man began to come to the county attorney's office in a steady stream to plead, threaten and cajole. He would not relent. The family then worked on the close friends of the prosecutor, his wife, his pastor, and his neighbors, but without any result. On the following day they begged and pleaded with the girl and her father, and finally secured her promise not to prosecute. As a result the case did not go to trial, and it well illustrates the terrific pressure brought in the name of friendship which the county attorney is expected to withstand.

Many of these concessions to personal friendship which the prosecuting attorney must make are directed, of course, at some future

election. Inasmuch as the election of the prosecuting attorney in many states recurs every two years, the time which actually must be spent in primary and election campaigns seriously cuts into the time which the prosecutor can spend upon the duties of his office. Beyond this, his situation naturally draws him into the local political party organization of which he is likely to be a leader, with the resulting demands on his time. His political future practically dictates that he become a "joiner" of a church, a lodge, or klan, and that he participate actively in all public affairs.

Thus it is that the elements of salary, politics, and personal friendship combine to make the rural prosecutor's task almost an impossible one, and those who happen to hold the office can hardly be held with fairness to be personally responsible for their failures. Under the circumstances the ambitious young man who seeks this or some other office can hardly be expected to do otherwise than keep in mind this question: "What will be the effect of this action on my political future?"

V. *The Small Office: Non-criminal Duties*

In an earlier article there was presented a comparative description of the various statutory provisions which impose non-criminal activities upon the office of prosecuting attorney, and indicated a very definite belief that the imposition of these non-criminal activities seriously impairs the efficiency of the office in the administration of its criminal law enforcement functions. It is evident from that previous discussion that these non-criminal activities are so large a part of the work of the prosecutor in most jurisdictions that the titles "county attorney", "district attorney", or "solicitor" much more accurately express the real character of the office than the term "prosecuting attorney." It seems necessary to analyze somewhat further and to illustrate the manner in which the prosecuting functions of the prosecutor are effected by the demands of non-criminal matters upon his time and his energy.

To any prosecutor whose staff is small the burden of the civil duties imposed by statute must loom large indeed, and especially so during a time of economic depression when it becomes necessary to invoke every device for the enforcement of real estate tax laws in order to collect revenue and prevent the utter collapse of the institutions of local government. At the time this is written, this particular problem has become a question of major importance in

almost every prosecuting office in the United States, for the prosecutor is the man who is charged with the duty to enforce the payment of taxes in most jurisdictions.

In a county of two hundred thousand in a southwestern state, a man recently elected to the office of prosecuting attorney found that his official inheritance consisted of two thousand tax suits, some of which had been pending three years and were still awaiting appeal to the supreme court of the state. The amount involved in these appealed cases was about \$350,000, and this particular official was determined to collect every dollar due the county. In order to achieve this objective, however, it was necessary to prepare these cases thoroughly and to prosecute them vigorously if compromise was to be avoided, and this has meant that nearly all of his assistants had to be employed on these matters. His staff had to defend suits by taxpayers to recover taxes paid under protest. It had to be ready to advise the county assessor and be ready to participate in hearings before the board of equalization. It was the duty of the prosecutor to see that the tax claims of the county were properly protected when mortgages were foreclosed. He had to supervise all sales of unpaid taxes. In addition, his opinion as a lawyer was requested time and again on such matters as the validity of a tax levy, inheritance taxes, franchise taxes, license taxes, tax anticipation warrants and the like. In this particular county, as in scores of others throughout the United States, a Taxpayers' Association had been organized to force the trend of governmental expenditure downward and to conduct an orderly "strike" by the taxpayers to force the reduction of taxes. Ostensibly such an association is formed to push test litigation and cannot be charged with conspiracy against the government. In actual fact, however, such organizations attract to their standards many persons who otherwise would pay, and it becomes necessary for the prosecutor to combat them step by step.

Under ordinary conditions it is not unusual to find that a prosecutor who has two assistants must assign at least one of them to give most of his time to tax matters and must spend perhaps a third of his own time in consultation, study or trial on tax matters. In most prosecuting offices political reputations are made in the spectacular criminal cases and the civil side of the office is very incidental and usually sadly neglected. Nevertheless, in time of financial emergency the work of tax enforcement is so pressing that it cannot be ignored, and in many prosecuting establishments the work of law enforcement has practically become the incidental work of the office. This, coupled

with the fact that the necessity for retrenchment in local government has made it impossible to increase the size of prosecuting staffs, means that the work of law enforcement is often seriously impaired.

In the field of election administration, perhaps even more than in the field of tax administration, the office of prosecuting attorney has reached out and assumed a large measure of control over a function of government which the statutes have given to another agency. His activity at election time overlaps his duties as a criminal law enforcement officer in a larger measure than his tax duties and it has developed from the fact that he is the legal adviser of the election officials. The extent to which the prosecutor often participates in decisions on policies relating to the administration of elections, in checking registration, in watching the polls, and in preventing frauds and disturbances may result in a very serious diversion of attention from his other duties as a law enforcement official. This phase of the work of the prosecutor's office might be illustrated by reference to almost any county at election time, but it is well depicted by the activities in a primary in midsummer, 1932, of the prosecutor of a county adjacent to that mentioned above in which the new prosecutor inherited two thousand tax suits.

The event which brought the prosecutor into the situation first was the filing of a claim that the number of illegal registrations was much larger than usual. He conferred with the secretary of the election board and promptly sent out his evidence man to check registrations. A large number of names were taken at random from the list and it was found that many could not be located at the addresses given. In one precinct where one hundred persons were registered, fifteen could not be found. Others who were registered were not entitled to vote. One fifteen year old girl, for example, had been given a certificate. Many addresses were found, when checked, to be vacant lots, empty buildings, business houses, or places where it was manifestly impossible for a person to live. The prosecutor found that many negroes who had voted as Republicans in the previous election had registered as Democrats without giving the ninety day notice of intention to change party which the statute required. In one precinct one hundred fifty negroes had made this change in political allegiance. The prosecutor laid these matters before the secretary of the election board who ordered all registrations made in the ten day period immediately preceding the closing of the books be checked. Of seven thousand certificates issued, one thousand were found to be irregular.

These, of course, were thrown out, and the prosecuting attorney immediately initiated an investigation to determine whether any candidate or campaign manager sponsored such illegal registrations, promising prosecution if such was found to be the case. All that resulted, however, was the disclosure that the election machinery was woefully disorganized. One registrar, for example, had allowed a party worker to take the registration book into a negro district and there record names directly. Both claimed "ignorance" of the law and since prosecution seemed hopeless, the matter was dropped, but at least the registration books had been purged for the first time in years.

These disclosures resulted in vehement charges of fraud by the rival candidates, and as the election drew near popular interest became so aroused that it was necessary for the prosecutor to take special precautions to guard the polling places. All day long he received complaints of violations of the election laws—matters which it is the primary duty of the election officials to enforce. Perhaps workers were standing within three hundred feet of the polls, or one faction was destroying the literature of another. One legislative candidate found his rival's picture on the sidewalks leading to the polls, and the prosecutor ordered the police to tear them off. Since this particular matter had been covered by a statute passed only a short time before, the prosecutor had to explain the law to most of the candidates. All day long the prosecuting attorney himself found it necessary to tour the polls with the secretary of the election board to see that the election was orderly and to rule on the validity of ballots which were being counted. For many days following he was kept busy listening to the protests of defeated candidates, checking and advising election officials in matters relating to the validity of the count, and preparing for the general election a few weeks later. All in all, it was a busy period for the prosecutor, with few moments to spare for his ordinary duties.

The situation is further complicated when, as may frequently be the case, the prosecuting attorney is a candidate for re-election. His power to investigate fraud in registration and voting gives him tremendous power for good or bad as the case may be, and the importance of his advice and assistance to the election authorities in matters involving election contests enables him to cause a great deal of trouble for those who may oppose him or his party. This is especially true in the smaller counties where the prosecutor is by a wide margin the dominant public official.

Taxation and election matters by no means exhaust the list of

civil duties of the prosecuting attorney as the statutory analysis in the previous article has already indicated. The duty to give "every county official an opinion in writing on any matters connected with the duties of his office" may spell a great deal of work for the prosecutor. This may mean that fifteen or twenty officers or employees in the smaller county or that fifteen hundred or two thousand in the large metropolitan county depend upon him for legal advice and assistance. In the smaller counties it is seldom that a written opinion is requested but it is very certain that the prosecutor is called upon frequently for oral opinions on matters affecting the administration of county affairs and often for advice on the personal or private matters of the officials themselves. Since he comes in constant contact with the others who work in the courthouse, they often expect him to handle their minor personal matters as a part of his official duties.

He may be called upon to instruct the county officials in the operation of a new statute which changes the procedure to be followed in making purchases and requisitions for supplies. He may have to give an opinion on the title to land which the county board contemplates purchasing, and he is responsible for all other legal details of the transaction. If the board finds it necessary to bring condemnation proceedings, the prosecutor is the man who takes charge. He must be present at county board meetings to act as parliamentarian for the president as well as legal adviser for the board as a whole. An almost innumerable variety of questions may arise in the administration of county affairs to require his advice and assistance. The complexity of local government and the wide range of its activities bring to the prosecutor's doorstep all kinds of problems and his rulings and advisory opinions on all the matters are of vital importance in the operation of these local governments.

In addition to these matters attention might be called once more to the fact that the prosecuting attorney is required to collect on forfeited bail bonds and recognizances, and to sue for the recovery of fines and costs which may have been imposed on persons involved in criminal prosecutions or civil litigation. By aggressive attention to these duties alone he may return to the county annually more than the expenses of his office.

It is often suggested that the prosecuting attorney is the most important local official, and this conclusion is usually, and rightly, based upon his power in criminal cases—his discretion to bargain or to refuse to prosecute. His importance hardly diminishes, however, when we look at his office entirely with reference to the non-criminal

duties which are imposed upon it. Under the present system, by which these duties are combined in one office, the demands of the civil duties require time and attention which the prosecutor should devote to criminal prosecution, and the publicity value of his criminal work leads him to neglect the civil duties of his office. Specialization in law is as common and as reasonable as specialization in medicine. Certainly it is not usual to find a lawyer engaged in private practice who specializes in both taxation and criminal law. Yet this is what is expected of the prosecuting attorney. If the office is large enough to permit the formation of a separate staff to handle the civil matters, perhaps the disadvantage of combining these various functions in one office is not serious, but in the hundreds of smaller offices throughout the country such a division of labor is not possible and both functions have suffered.

(To be continued)