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POWERS AND DUTIES OF THE STATE ATTORNEY-GENERAL IN CRIMINAL PROSECUTION*

EARL H. DE LONG†

I. The Office of Attorney-General.

Criminal prosecution for violation of the enactments of state legislatures is almost entirely a responsibility of the local prosecuting attorney under the traditional allocation of governmental powers and responsibilities in the United States. Occasionally, however—and it has happened with increasing frequency in recent years—state legislators and constitution makers have had some vague recognition that this function of government requires more than local attention. The statute books give evidence of this realization in scores of provisions which load upon the attorney-general of the state some power or obligation in the prosecution of criminal offenders.

Much attention has been given by those engaged in the observation and study of government to the creation of state bureaus of criminal identification and state police forces which supplement and parallel the work of local authorities in the field of police administration, but little attention has been given to the related trend toward state participation in the prosecution of criminal cases. Because the office of attorney-general is by far the most important instrumentality by which the state government exercises administrative control over the process of prosecution, this discussion will be devoted to an analysis of the relation of the attorney-general to the administration of criminal justice.

The attorney-general is the chief law officer of the state in much the same way that the prosecuting attorney is the legal advisor of the county or that the federal attorney-general is the chief law officer

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of the federal government. Since the local county or prosecuting attorney prosecutes criminal offenders in his locality and the attorney-general of the United States supervises and controls prosecutions under the federal criminal laws, it is quite natural that the attorney-general should be chosen when legislatures think it wise to impose duties in criminal prosecution upon some state official.¹

The office is clearly established by constitutional provision in all but five states.² Thirty-eight of these provisions require also that it be filled by election. In the other five states where the constitution establishes the office, it provides for selection as follows: in Maine, by the legislature; by the supreme court in Tennessee; by the governor in New Hampshire, New Jersey, and Pennsylvania.³ The constitution of Connecticut does not definitely create the office but it implies that it shall be filled by election.⁴ The office is created by statute in Indiana, Oregon, Vermont, and Wyoming.⁵ It is elective in Oregon and Vermont; in Wyoming the statutes provide that the governor shall appoint; and in Indiana a recent statute provides that the office shall be filled by appointment by the governor after the expiration of the term of the present incumbent. The term is either two or four years in every state except Tennessee where it is eight and New Jersey where it is five years.

The constitutional provisions concerning the attorney-general quite generally state that he shall be an officer of the executive department of the state government and leave to the legislature the task of prescribing the duties. Some add that he shall be a member of the board of pardons or prison commissioners. A few state constitutions impose upon the office some further duties in the administration of criminal justice. For example, the Louisiana constitution establishes a department of justice headed by the attorney-general and gives to that department full power to institute or intervene in criminal proceedings in any of the courts of the state. The con-

¹The recognition of the need for some central control in criminal prosecution is not altogether a recent development. Professor Mathews points out that the desirability of greater centralization in the administration of the criminal law was urged a century ago in the New York Constitutional Convention of 1821. Mathews, *Principles of American State Administration* (1917), pp. 427-8. This passage is quoted in Willoughby, *Principles of Judicial Administration* (1929), pp. 119-120.

²The exceptions are Connecticut, Indiana, Oregon, Vermont and Wyoming.

³Constitution of Maine, art. IX, sec. 11; constitution of Tennessee, art. VI, sec. 5; constitution of New Hampshire, sec. 46; constitution of New Jersey, art. VII, sec. II, par. 4; constitution of Pennsylvania, art. IV, sec. 8.

⁴Constitution of Connecticut, amendment XXX.

⁵Indiana Acts of 1933, p. 8; Oregon Laws (1920), sec. 2769; General Laws of Vermont (1917), sec. 382; Wyoming Compiled Statutes (1920), sec. 147.

stitution of Maryland requires the attorney-general to prosecute or defend all state cases in the court of appeals and to aid state's attorneys. In Delaware the constitution declares that the attorney-general is a "conservator of the peace," and he is required in Georgia to conduct the supreme court proceedings in cases involving capital felonies and if the governor so directs he shall conduct proceedings in any criminal cases in the supreme court. A section of the Texas constitution requires the attorney-general to participate in all supreme court cases in which the state is interested or a party.⁶ Except for provisions like these, most of the state constitutions either make no mention whatever of duties or state that they shall be such "as may be prescribed by law." The definitions of the attorney-general's powers and duties must be found in the enactments of legislatures and in the opinions of the courts.

A mere glance at the statutes of almost any state is sufficient to show clearly that in the view of our state legislatures the powers and duties of the attorney-general are primarily civil in character. The following excerpt from the statement of duties in the Illinois statutes is typical:⁷

First—To appear for and represent the people of the state before the supreme court . . . in all cases in which the state or the people of the state are interested.

Second—To institute and prosecute all actions and proceedings in favor of or for the use of the state.

Third—To defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or the United States.

Fourth—To consult with and advise the several state's attorneys . . . ; and when, in his judgment, the interest of the people of the state requires it, he shall attend the trial of any party accused of crime, and assist in the prosecution.

Fifth—To consult with and advise the governor and other state officers

Sixth—To prepare . . . proper drafts for contracts and other writings relating to subjects in which the state is interested.

Seventh—To give written opinions, when requested by either branch of the general assembly or any committee thereof, upon constitutional or legal questions.

Eighth—To enforce the proper application of funds appropriated to the public institutions of the state . . . and prosecute corporations for failure to make the reports required by law. . . .

* * * .”

⁶Constitutional provisions: Louisiana, VII, 55; Maryland, V. 1; Delaware, III, 21; Georgia, VI, 10; Texas, IV, 22.

⁷Illinois Revised Statutes (Cahill, 1933), ch. 14, sec. 4.

Some such general statute appears in the laws of almost all states and most of them, as does the provision quoted, contain some brief reference to criminal law powers or duties in the office of attorney-general, but clearly it is the major function of the incumbent of this office, under these statutes, to be the attorney for the state in its capacity as a public corporation and for its officers in the exercise of their official duties.

Notwithstanding this fundamental character of the office, however, it is often given some very substantial responsibility in the administration of criminal justice. Delaware and Rhode Island make the attorney-general entirely responsible for the prosecution of those who violate state criminal laws,⁸ but it is more usual to require or permit only occasional participation by the attorney-general in the general process of criminal law enforcement or to impose upon his office the specific duty to prosecute for some particular offense.

The subsequent discussion will be in large measure an attempt to describe the nature and operation of these statutory provisions and to evaluate them, but this statutory study is not alone sufficient to give a full picture of the criminal law functions of the office of attorney-general. It is the application and interpretation of these provisions by the courts which have determined their character and utility, and in the performance of this service the courts often have been influenced by the fact that the English attorney-general under the common law was the chief law officer of the crown and the direct ancestor of the chief law officer of the modern American state. Because of this common law origin, specific statutory grants of power have been interpreted and applied very broadly and it has been held that the attorney-general enjoys not only those powers given to him by statute or constitution but also any other powers which may have pertained to the office under the common law.

In view of the fact that the statutory provisions are merely a super-structure erected upon this common law base in many states, it is necessary to analyze both the common law power and the statutory or constitutional power of the attorney-general to participate in the enforcement of the criminal law.

II. Common Law Power to Conduct Criminal Prosecutions.

Although many courts in the United States have agreed that the attorney-general of the contemporary American state is endowed

⁸Revised Statutes of Delaware (1917), ch. 17; General Laws of Rhode Island (1923), sec. 295.

with the common law powers of his English forebear, consideration of this question can hardly be ended merely by this statement and a citation of cases. The application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter.

At 2 Ruling Case Law 916 appears the following statement on the common law powers of the attorney-general:⁹

"Although in a few jurisdictions the attorney-general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except in so far as they have been limited by statute. . . . Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require; and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights."

Upon this most inadequate authority, apparently without much critical evaluation of the cases which it cites, many of our courts have stated that the attorney-general has all the powers which pertained to the office at common law in addition to those specified by statute. An analysis of the cases may indicate that generalization as broad as that quoted is not justified, particularly with respect to criminal cases.

In 1850 the supreme judicial court of Massachusetts assumed without citation in *Parker v. May*¹⁰ that the attorney-general of that state might exercise the common law powers of the English attorney-general. The decision, however, which is regularly cited by the treatises and the courts as the leading case on the common law power of the attorney-general is *People v. Miner*¹¹ in which a New York lower court in 1868 sustained the right of the attorney-general to exercise common law powers and made an elaborate attempt to specify what were the common law powers of the office. This was not a criminal case,¹² but its attempt to delineate these powers and the extent to which the enumeration has been accepted as authoritative in

⁹The statement appearing at 6 *Corpus Juris* 809 is very similar.

¹⁰5 Cushing (Mass.) 336 (1850).

¹¹2 Lans. (N. Y.) 396 (1868).

¹²This was a suit brought by the attorney-general in the name of the people to enjoin the issuance of certain bonds by town commissioners.

other states make it necessary to quote at some length from the opinion:¹⁸

"Most, if not all, of the colonies appointed attorney-generals, and they were understood to be clothed, with nearly all the powers, of the attorney-generals of England, and as these powers have never been defined we must go back to the common law in order to ascertain them. The attorney-general had the power, and it was his duty:

1st. To prosecute all actions, necessary for the protection and defense of the property and revenues of the crown.

2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.

3d. By '*scire facias*,' to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.

4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.

5th. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.

6th. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.

7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.

8th. By proceedings in rem, to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove, &c. (3 Black. Com., 256-7, 260 to 266; id., 427 and 428; 4 id., 308, 312.)

9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown. (Mitford's Pl., 24-30, Adams' Equity, 301-2.)"

It is this passage of the opinion which has frequently been cited to sustain the proposition that the attorney-general has full common law power to prosecute all types of criminal cases. As far as the language of this opinion indicates, however, the office of attorney-general at common law was limited to participation in "certain classes" of criminal cases. This decision certainly does not justify the broad inferences of power to intervene in any criminal proceeding for which it has been cited as almost the sole authority.

Nevertheless, in spite of the fact that this decision is not sufficient authority, it is entirely possible that the later opinions may have been correct in assuming that the attorney-general at common law could participate in any criminal proceeding which he chose to enter. The primary source of the conclusions reached in *People v. Miner* is

¹⁸2 Lans. at 398.

Blackstone's *Commentaries* and perhaps reference to his discussion will show more clearly the nature of the common law office of attorney-general. He speaks at length upon the power of the attorney-general and the master of the crown office to file criminal informations in the Court of King's Bench:¹⁴

"The objects of the King's own prosecutions, filed *ex officio* by his own attorney-general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous in the punishment or prevention of which a moment's delay would be fatal, the law has given the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal;—The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind not peculiarly tending to disturb the government (for those are left with the care of the attorney-general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. . . .

There can be no doubt but that this mode of prosecution by information (or suggestion), filed on record by the king's attorney-general or by his coroner or master of the crown-office in the court of king's bench, is as ancient as the common law itself. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal-suit: so when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for, whenever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men; before the party shall be put to answer it."

This does not state definitely that the attorney-general had the power to prosecute in every type of criminal case when the indictment or information had been filed, but it certainly seems to imply that, at the time he wrote, the attorney-general's power to prosecute in criminal cases was unlimited except for the restrictions set forth in the passage quoted. Holdsworth, in his description of the development of the law officers of the crown, makes many statements which support the conclusion that the attorney-general had very full

¹⁴⁴ Blackstone's *Commentaries* 308-310.

power to conduct criminal prosecutions.¹⁵ Further, Blackstone's statement has been accepted in England as an accurate statement on the modern status of the office,¹⁶ and there is no doubt whatever that the attorney-general in England at the present time may intervene in or supervise any criminal prosecution or may enter a *nolle prosequi*.¹⁷

People v. Miner may not have been sufficient authority for the conclusions inferred from it but it seems clear that when we go back of that case the principle of common law power is sufficient, if adopted in full, to confer upon the attorney-general of the state full power to conduct or intervene in any criminal proceeding, regardless of lack of constitutional or statutory authorization. It is necessary now to determine the extent to which this principle has been applied by other courts in New York and elsewhere.

The *Miner* case was decided under the New York constitution of 1846 which provided for the election of an attorney-general and specified that "the powers and duties of the attorney-general shall be such as now are or may hereafter be prescribed by law."¹⁸ The court clearly held that any statutory enumeration of powers was not exclusive, although it agreed that the legislature, by definite statement or reasonable implication, could withdraw from the attorney-general any of his common law powers. Another constitution adopted in 1895 retained this same language, and in *People v. Kramer*¹⁹ another lower court wrote a very able and comprehensive opinion which discusses at length the common law powers of the attorney-general and the development of that office in New York. It seems to accept with entire approval the previous declarations in the *Miner* case. This opinion of the court in the *Kramer* case has been cited with approval or followed in a number of opinions by other lower courts in New York but it has not been noticed in any opinions by the appellate division of the supreme court or by the court of appeals.²⁰ The *Miner* case also seems to have received no attention whatever from these higher courts in New York.

¹⁵See 6 Holdsworth, *A History of English Law* 462.

¹⁶*Queen v. Labouchere*, 12 Q. B. D. 320 (1884); 9 Holdsworth 23; 2 Odgers, *Common Law* (3d edition, 1927) 426; Howard, *Criminal Justice in England* (1931), p. 273.

¹⁷See generally Howard, *Criminal Justice in England* (1931).

¹⁸Art. V, sec. 1.

¹⁹33 Misc. 209, 68 N. Y. S. 383 (1900).

²⁰*People v. Long Island R. R.*, 113 Misc. 700, 185 N. Y. S. 594 (1920); *People v. Brennan*, 69 Misc. 548, 127 N. Y. S. 958 (1910); *People v. Glaser*, 60 Misc. 410, 112 N. Y. S. 323 (1908); *People v. Acritelli*, 57 Misc. 474, 110 N. Y. S. 430 (1908).

This does not mean, however, that this question of the powers of the attorney-general has not been raised in the higher courts. The opinion in *Ward Baking Company v. Western Union Telegraph Company*²¹ presents a very interesting conflict with the able opinion of the court in the *Kramer* case and makes no effort to reconcile its views with those of the earlier case. The case involved an attempt by the attorney-general, on the order of the governor, to investigate and collect evidence to prosecute a man after the district attorney had entered a *nolle prosequi*. The investigation was entered upon supposedly under the authority of the following statutory provision:²²

“Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall inquire into matters concerning the public safety and public justice.”

Another provision of this same statute authorizes the governor to order the attorney-general to appear before a grand jury and conduct prosecutions. The court held, however, that this was an attempt by the attorney-general to collect evidence against a particular person against whom no indictment was pending and that such an investigation was beyond the scope of the statute. The following statement appears in the opinion:²³

“It cannot be supposed that it was intended to invest the Attorney-General with the power and duty to conduct an investigation wherever and whenever in any county of the state a crime had, in peace times, been committed by an individual. It cannot be supposed that the Legislature intended to sanction investigations which would so completely revolutionize our criminal procedure and transfer to the attorney-general of the State power now resident in the district attorneys of the counties and in the local magistrates.”

The language of this opinion indicates that the court thought that the attorney-general does not possess any powers beyond those conferred by statute, and even if he should still enjoy common law powers this statement must be taken to mean that any such common law powers are impliedly withdrawn by a statute conferring them upon district attorneys.

West Virginia and Missouri both have constitutional provisions similar to the New York provisions quoted and the courts have held

²¹205 App. Div. 723, 200 N. Y. S. 265 (1923).

²²Consolidated Laws of New York (Cahill, 1930), ch. 18, sec. 62.

²³205 App. Div. at 730.

in both states that the local prosecutor's office is carved out of the attorney-general's office and that the attorney-general possesses all common law powers except those powers which have been given by statute to the local prosecuting officials.²⁴ In view of the fact that prosecuting attorneys are given the complete power and duty to prosecute all criminal offenses, such a conclusion probably leaves the attorney-general no power to prosecute except that specifically given him by constitution or statute. The Missouri court adds the interesting requirement that any duties or powers given to the attorney-general by the legislature must be such as pertain to the office. The standard of pertinence appears to be the duties of the office at common law.

These cases seem to present no particular difficulty. They suggest a desire, on the part of the courts, to prevent any overlapping of powers in the absence of any definite legislative grant of concurrent power.²⁵ They leave the legislatures quite free to reduce the common law powers directly or by implication, and the fact that the prosecuting attorney is given such wide power in criminal prosecutions indicates that the power of the attorney-general to conduct criminal cases probably relies almost entirely upon statutory or constitutional provisions in these states.

The supreme courts of a number of other jurisdictions, however, have started with *People v. Miner, Corpus Juris*, and *Ruling Case Law*, and have arrived at some conclusions very different from those just summarized. The Minnesota constitution provides that the attorney-general shall have such duties as are "prescribed by law" and the supreme court has held that he has all common law powers as well as those enumerated by statute. In Minnesota, however, this has a meaning quite different from that given in West Virginia:²⁶

"From this it follows that as chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state"

²⁴*State v. Ehrlich*, 65 W. Va. 700, 64 S. E. 935 (1909); *Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970 (1913); *State ex rel. Barrett v. Lumber Company*, 302 Mo. 187, 257 S. W. 453 (1924).

²⁵For a contrary result see *Dupree v. State*, 14 Okla. Cr. 367, 171 Pac. 489 (1918), in which it is stated that intervention of the attorney-general, under adequate statutory authorization, does not abrogate the duty of the local county attorney to prosecute.

²⁶*State v. Robinson*, 101 Minnesota 277, 288, 112 N. W. 269, 272 (1907).

This appears to give the attorney-general of Minnesota unrestricted power to prosecute criminal cases without reference to any statutory authority. It similarly appears that attorney-generals in Massachusetts and Kansas need not find authority in the statutes to take control of criminal proceedings.²⁷ The constitutions of both these states require the election of the attorney-general but neither seems to mention his duties. There is nothing in the opinion of their courts, however, to indicate that the legislature may not take away this wide power if it wishes.²⁸

The supreme court of Illinois appears to stand entirely alone in applying a weird construction to the constitutional provision which is found in so many states providing that the attorney-general shall have "such duties as may be prescribed by law."²⁹ It has included common law power within the scope of the office in the following language:³⁰

"The Attorney-General is the chief law officer of the State, and in the creation of that office there was engrafted upon it all the powers and duties of the Attorney General as the same were known at common law."

This does not mean merely that the attorney-general may exercise common law powers in addition to his statutory powers. It is held to mean that the legislature cannot take away his common law powers and therefore cannot authorize any other state official to prosecute proceedings in which the state is interested. The legislature is free to impose other duties and take them away as long as it does not interfere with the common law duties of the office.³¹ The court does not seem to have passed upon the power of the attorney-general to conduct criminal prosecutions in the absence of specific statutory authority but there is no indication in the opinions that the common

²⁷*Commonwealth v. Kozlowsky*, 238 Mass. 279, 131 N. E. 207 (1921); *State v. Finch*, 128 Kansas 665, 280 Pac. 910 (1929).

²⁸See also: *Withee v. Fisheries Company*, 120 Me. 121, 113 Atl. 22 (1921); *State v. Young*, 54 Mont. 401, 170 Pac. 947 (1929).

²⁹Art. V. sec. 1.

³⁰*Saxby v. Sommeman*, 318 Ill. 600, 606, 149 N. E. 526, 529 (1925). The following cases cited there pertain to this question: *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130 (1915); *Hunt v. Chicago Horse & Dummy Ry. Co.*, 121 Ill. 638, 13 N. E. 176 (1887).

³¹Compare this with the statement in *State ex rel. Barrett v. Lumber Company*, *supra* note 24, in which it is said that the Missouri legislature cannot give the attorney-general any powers not belonging to the office at common law. Also compare it with *Love v. Baehr*, 47 Cal. 364 (1874). The California constitution is silent on the attorney-general's duties but there is an implied limitation that the duties must be such as are related to the office as it existed at the time the constitution was framed. The court does not mention the question of common law duties.

law powers of the attorney-general are in any way restricted by the powers of the state's attorney. It seems probable that the attorney-general in Illinois not only has full power to prosecute criminal cases but also that the legislature cannot take away that power.³²

In spite of the optimistic statements in the treatises cited, there is a large contingent of states in which the courts have decided that the attorney-general has no common law powers. For example, the statement of the Washington constitution on the duties of the attorney-general is almost identical with the Illinois provision, yet the following statement appears in a Washington case:³³

"The attorney-general of this state, although bearing the same title as the attorney-general of England, is not a common law officer. There is nothing in a mere name. Because the particular office filled by the relator is called the office of 'attorney-general,' it does not follow therefrom that he has the same powers as the attorney-general of England under the common law. Every official under our system of government from the governor down, is one of delegated powers."

To support its conclusion the Washington court quotes the following passage from an Indiana case. The Indiana constitution does not mention the office of attorney-general.

"It is a well settled doctrine that officers of the state exercise but delegated power, and this is particularly true of the attorney-general. His office is created by statute, and he as such officer can only exercise such power as is delegated to him by statute."³⁴

The constitution of Iowa creates the office of attorney-general but does not mention its duties. The supreme court there has ruled that "the attorney-general's powers in criminal cases are limited to those conferred upon him by statute."³⁵ The Wisconsin constitution contains almost the same statement as the Illinois or Minnesota constitutions on the powers of the attorney-general. Yet, while Minnesota confers the broadest possible power to prosecute under the common law powers of the office, Wisconsin holds that his powers are entirely statutory and that the office has no common law powers.³⁶

³²*Fergus v. Russel*, *supra* note 30.

³³*State v. Seattle Gas and Electric Company*, 28 Wash. 488, 495, 68 Pac. 946, 949 (1902).

³⁴*Julian v. State*, 122 Ind. 68, 72, 23 N. E. 691, 692 (1890).

³⁵*Cosson v. Bradshaw*, 160 Iowa 296, 302, 141 N. W. 1062, 1064 (1913).

³⁶*State v. Industrial Commission*, 172 Wis. 415, 179 N. W. 579 (1920).

In the following cases, also, it is either stated or assumed that the attorney-general has only those powers defined by statute or constitution: *Railroad Tax Cases*, (Ark.) 136 Fed. 233 (1905); *State v. Price*, 101 Ohio St. 50, 128 N. E. 173 (1920); *Com. v. So. Pac. Co.*, 127 Ky. 358, 105 S. W. 466 (1907).

The New Mexico supreme court has made an attempt to distinguish between the various holdings on this subject. In *State v. Davidson* it was contended that the attorney-general had common law powers of which he could not be deprived. The court made the following answer to this contention:³⁷

"It is apparent from this case [*People v. Miner*] and from the others cited that this doctrine of implied common law powers in the Attorney-General is based upon the existence of the specific fact that that office existed prior to any statutory definition of its powers and, while so existing, such officer was recognized as having all powers appertaining to that office at common law."

It went on to state that in New Mexico the statute which originally created the office defined its duties and that therefore the office possessed no common law powers.

The extent of the common law powers of the attorney-general has not been brought definitely before the supreme courts in the states which have not been mentioned in the preceding discussion, but in many jurisdictions the courts have been called upon to interpret statutory or constitutional provisions giving to the attorney-general some power in the prosecution of criminal cases. In the opinions in many cases, involving either civil or criminal activities, the doctrine of common law powers has been relied upon, sometimes specifically and sometimes only by tacit assumption, to justify a broad, generous construction of the provisions involved.³⁸ Because the application of these statutory or constitutional definitions of the attorney-general's powers is taken up in the following section, only this brief reference is necessary here.

The foregoing discussion has treated only the power of the attorney-general to initiate and conduct criminal prosecutions, and little or nothing has been said about his power to drop such proceedings by dismissal or *nolle prosequi*. In many states the power of the attorney-general to enter a *nolle prosequi* has been restricted or taken away by statute just as the similar power of the prosecuting attorney has been diminished. It is quite generally recognized, however, that this is one of the powers of the office, and in many jurisdictions the existence of this power is attributed to the common law origin of

³⁷*State v. Davidson*, 33 N. Mex. 664, 667, 275 Pac. 373, 375 (1929). Compare this position with the view in *Love v. Baehr*, *supra* note 31.

³⁸*People v. Stratton*, 25 Calif. 242 (1864); *State v. District Court*, 19 N. D. 819, 124 N. W. 421 (1910); *People v. Gibson*, 53 Colo. 231, 125 Pac. 531 (1912); *Munday v. MacDonald*, 216 Mich. 444, 185 N. W. 877 (1921); *People v. Rich*, 237 Mich. 481, 212 N. W. 105 (1927); *State v. Young*, *supra* note 28.

the office. While there seem to be no decisions to justify the conclusion, it is entirely possible that the attorney-general may retain the right to "*nolle pros*" criminal proceedings even in some states where he no longer has the power to initiate or conduct them.³⁹

The existence of the attorney-general's common law power to prosecute and the actual employment of that power to achieve a more adequate administration of criminal justice are two quite different problems. The discussion of the first has required several pages, but the second can be given sufficient attention in a very few sentences. Although it is probable that the attorney-general would be permitted to exercise a common law power to prosecute in a larger number of states than indicated by the preceding analysis of decisions, there is no indication in the judicial reports or in the reports of the incumbents of this office that the existence of this power has brought about any substantial participation by state governments in the process of prosecution.⁴⁰

The following conclusions embody the substance of the foregoing discussion:

(1) It is difficult to determine with certainty what were the powers of the attorney-general at common law but it seems probable that they included the power to conduct any criminal prosecution properly instituted by information, indictment, or otherwise, as prescribed by law.

(2) The language of constitutional provisions seems to have had little bearing on the decisions of the courts upon the common law powers of the attorney-general.

(3) There is wide disagreement among the courts as to the extent of the common law powers now possessed by the attorney-general. In many states it is held that he has none. In others he has all common law powers except such as have been granted by statute to the prosecuting attorneys. In a few it is held that under the common law, without any reference to statutory or constitutional provisions, the attorney-general has full power to prosecute any criminal proceeding. In New York where *People v. Miner*⁴¹ has become

³⁹On this question see *State ex rel. Wilson v. Young*, 44 Wyo. 6, 7 Pac. (2d) 216, 81 A. L. R. 114, 132, (1932), and the following cases cited there: *People v. McLeod*, 25 Wend. (N. Y.) 483, 37 Am. Dec. 328 (1841); *State v. Thompson*, 3 Hawks (N. C.) 613 (1825); *State v. Costen*, 141 Tenn. 539, 213 S. W. 910 (1919); *State v. Finch*, 128 Kan. 665, 280 Pac. 910, 66 A. L. R. 1369 (1929). See also the annotation at 69 A. L. R. 240.

⁴⁰In view of the fact that many state attorney-generals publish only opinions and do not publish annual or biennial reports, this conclusion is based on an examination of only about twenty reports.

⁴¹*Supra* note 11.

the leading case upon which the decisions have been based in those states which hold that the attorney-general does have a common law power to prosecute, the case of *Ward Baking Company v. Western Union Telegraph Company*⁴² seems to have excluded criminal prosecution from any common law powers which may reside in the office of attorney-general.⁴³

(4) Only in Illinois is there any indication that the legislature cannot deprive the attorney-general of common law powers.

(5) There is no indication that the existence of this power in any state has led to any substantial participation by the attorney-general in the process of criminal prosecution.

III. Special Duties of the Attorney-General in Criminal Prosecution.

(a) Criminal Appeals and Extraditions.

The power to conduct criminal prosecutions presents by its very nature a distasteful opportunity to an elected attorney-general. It is an opportunity which is full of political dynamite, and this is especially true when the power must be exercised over the heads of jealous local prosecutors. Such considerations make almost inevitable the atrophy of the common law power of the attorney-general to conduct criminal prosecutions, for it has never been more than a discretionary prerogative in the United States and certainly has not carried with it any legal obligation requiring its exercise under any particular set of circumstances. This consequent disuse in some states and the absence of such common law power in many other jurisdictions have required state governments to find some other method of providing for state control of prosecution when exclusive local administration has become inadequate. Obviously, the alternative to dependence upon common law power is the enactment of constitutional and statutory provisions conferring upon the attorney-general some specified power or responsibility in the administration of criminal justice.

The provisions which are now in effect from state to state and the numerous proposals for further laws on this subject present a

⁴²*Supra* note 21.

⁴³See the following cases for indications that the prosecuting attorney may have inherited some of the common law powers of the attorney-general: *Gibson v. Kay*, 68 Ore. 589, 137 Pac. 864 (1914); *People v. Casias*, 73 Colo. 420, 216 Pac. 513 (1923); *People ex rel. Hayne v. Newcomer*, 284 Ill. 315, 120 N. E. 244 (1918); *State v. Keena*, 64 Conn. 212 (1894). For the contrary position, see *Capitol Stages v. State*, 157 Miss. 132, 128 So. 759 (1930).

wide variety of policies. Some of them involve extensive changes in the traditional pattern of the law enforcement machinery of the American state while others require only the very slightest alterations. Some of these constitutional or statutory provisions embody policies which have been followed sufficiently long to entitle them to be part of this traditional pattern. Others represent no policy whatever but merely a surrender to the exigencies of some immediate situation. Many are recent and constitute conscious recognition of the need for radical changes in the relation of state and local authorities engaged in the enforcement of the criminal law.

In view of the attorney-general's position as the chief law officer of the state government, there is no reason to be surprised at the fact that in many states he is required to conduct all criminal proceedings before the state supreme court. In fifteen states at least there are provisions of law which direct him specifically to appear for the state in all criminal cases appealed to the highest court of the state. In the language of the Alabama statute he must "attend, on the part of the state, to all criminal cases pending in the supreme court."⁴⁴ Delaware and Rhode Island should be added to this group since their attorney-generals must conduct criminal cases in the appellate as well as in the trial courts.⁴⁵

In another group of fifteen states there are provisions like the Washington statute which declares that the attorney-general "shall have the power and it shall be his duty . . . to appear in all cases before the supreme court in which the state is interested."⁴⁶ No attempt has been made in this study to determine the construction of this provision for all of the states in which it appears, but it is clear that in many of them this language includes criminal cases although they are not clearly specified.⁴⁷

The mere fact that such a mandate exists in the statutes or the constitution is no guarantee, of course, that the attorney-general actually takes any significant part in appellate criminal proceedings. Since public officers are most reluctant to admit derelictions in the performance of duties imposed by law, either in their public reports or their private correspondence, it is hardly possible to settle this matter,

⁴⁴Alabama Political Code (1923), sec. 853.

⁴⁵*Infra* note 67

⁴⁶Washington Laws of 1929, p. 178.

⁴⁷A Minnesota statute requires the attorney-general to appear in all supreme court causes in which the state is "directly or indirectly interested." General Statutes of Minnesota (1923), sec. 109. The 1928 official report of the Minnesota attorney-general indicates clearly that this provision makes it his duty to conduct criminal proceedings in the supreme court of the state.

but one observation on the experience in Illinois will suffice to illustrate. The 1930 report of the attorney-general of Illinois presents the following description of the functioning of his office in the performance of this duty:⁴⁸

"The Attorney-General is required to appear for and represent the people of the State before the Supreme Court in all cases in which the State and the people of the State are interested.

Approximately two hundred criminal cases have been presented to the Supreme Court for decision during the past two years. In each of these cases, after having been served with copies of the statement, brief and argument of the plaintiff in error, the Attorney-General has requested the State's Attorney who had charge of the prosecution in the lower court to prepare and furnish a manuscript of the statement, brief and argument for the people. The record in the case and the abstract, statement, brief and propositions of law and fact therein presented have been investigated and considered. Upon receipt of the manuscript prepared by the State's Attorney, the statement, brief and argument for the People in each case has been prepared by the Attorney-General and printed and filed in the Supreme Court."

It appears that this statement by the attorney-general's office presents its work in this respect in a much more favorable light than the facts warrant. It has been stated by local prosecuting officers in Illinois that in almost all criminal cases appealed the brief for the state is prepared in the state's attorney's office and sent to the attorney-general who usually does nothing except have his name printed on the document before it is filed. The brief is the basis upon which cases are decided since oral argument in appealed criminal cases is very rare.

Questions involving the extradition of fugitives from justice present another phase of criminal law administration to which the attorney-general must give his attention. His duties in this respect have not arisen from the declarations of the statutes as much as from the fact that the attorney-general is the legal adviser of the governor, who requests or grants extradition and accordingly asks for assistance in reaching his decisions.⁴⁹ The following statement in the 1930 report of the attorney-general of Florida describes this duty of the office well enough to justify another extended quotation.⁵⁰

"It has now become the settled policy of the Governor to refer to the Attorney-General for examination and approval every application for ex-

⁴⁸Illinois Attorney-General's Report (1930), p. 11.

⁴⁹Statutory provisions to this effect have been found in Maine, Massachusetts, Michigan, Minnesota, and New Hampshire.

⁵⁰Biennial Report of the Attorney-General of Florida (1929-1930), p. 27.

tradition of fugitives from justice, applied for by officers of this state to secure the return of prisoners from other states, as well as applied for by officers of other states to secure return of prisoners from Florida.

In many cases hearings are requested on applications to the Governor of Florida to grant requisitions from other states for the return of prisoners from this state to a demanding state, and the invariable rule is that such hearing must be conducted by the Attorney-General or one of his Assistant Attorney-Generals.

The time required for the conduct of hearings and for submission of written recommendations to the Governor concerning the cases heard, has occupied no little time of this office during the past two years."

(b) Prosecution for Specified Offenses.

Extradition proceedings and appeals in criminal cases present the only important situations in which the attorney-general is directed to participate at some particular stage of the criminal prosecution,⁵¹ but there are scores of statutory provisions which impose upon him the special obligation to prosecute certain specified types of criminal cases. The existence of these provisions does not seem to indicate adherence by legislatures to any particular policy with respect to the proper functions of the office of attorney-general. These special requirements have merely accumulated over a long period of years. In only one instance among all of these provisions is there any indication that the grant of power to the attorney-general in any way restricts the power of the local prosecuting official to proceed against the offense in question.⁵² The duties seem to have been given to the attorney-general simply with the hope that he would act if the prosecuting attorney failed to do so. The New Hampshire statutes make it clear that the attorney-general is the paramount authority if there is any conflict between him and the prosecuting attorney and the same is true in many other jurisdictions.⁵³

⁵¹A few other duties which might be mentioned are found in the Arizona and California statutes requiring the attorney-general to advise the governor in capital cases. The attorney-general of Connecticut must prepare uniform commitment papers, and a number of state constitutions provide that he shall be a member of the board of pardons.

⁵²There is a Mississippi statute which requires that the district attorney may not start any civil suit for violation of the anti-trust statutes unless he has the written consent of the attorney-general. Mississippi Code (1930), sec. 4370. No other similar restrictions on the prosecutor's power to act have been found.

⁵³The New Hampshire statute is very explicit (Public Laws (1926), ch. 16, sec. 10):

"Nothing herein contained shall relieve any officer or person of any duty prescribed by law relative to the enforcement of any criminal law, but such officer or person, in the enforcement of such law, shall be subject to the control of the attorney-general whenever in the discretion of the latter he shall see fit to exercise the same."

A similar statement appears in the South Dakota provision quoted in note

There seems to be no correlation between grants of full power to prosecute and the enactment of laws designating particular statutes for enforcement by the attorney-general. Some states which provide that the attorney-general shall have authority concurrent with that of the prosecuting attorney also specify many statutes to which he is directed to give special attention.⁵⁴ Other states which confer the same wide power upon the attorney-general do little or no particularizing beyond the general provision.⁵⁵ There are states which seem not to give the attorney-general full power to initiate or conduct criminal prosecutions in general but which specify a long list of particular statutes which he "may" or "shall" enforce.⁵⁶ In still other states

83 *infra*. In the following section, this discussion cites a number of states, such as Michigan and Louisiana, where the attorney-general is specifically permitted by constitution or statute to intervene and take over the prosecution of any case. Even without such a statute the fact that the office of attorney-general ranks higher in the political structure of the state probably would be sufficient in most states to make his authority paramount in case of conflict with a prosecuting attorney, if the attorney-general has any power to prosecute the particular offense in question. This does not necessarily diminish the primary responsibility of the prosecuting attorney to initiate proceedings if the attorney-general does not act. For an interesting case on this matter see *Dupree v. State*, 14 Okla. Cr. 369, 171 Pac. 489 (1918), in which the county attorney's power was held to continue unabated in spite of the attorney-general's intervention.

⁵⁴See, for example, the statutes of Nebraska which give the attorney-general unrestricted power to conduct any criminal prosecutions and which also designate a number of statutes which he "may" or "shall" enforce, as the case may be. It is definitely made his duty to enforce the blue sky law (Compiled Statutes of Nebraska (1929), ch. 81, sec. 5424), to conduct civil and criminal prosecutions for unfair price discrimination (ch. 59, secs. 504-5), to prosecute restraints of trade (ch. 59, sec. 823), or to prosecute for unlawful insurance practices (ch. 44, sec. 1110). It is made his duty to inquire into liquor violations which come to his attention (ch. 53, sec. 134), to direct county attorneys to institute prosecutions for election law violations, and to prosecute such offenses himself if the county attorney fails to do so (ch. 32, sec. 2009). In addition to these the statutes declare that the attorney-general of Nebraska has the power to sue for a penalty for violation of the lobbying laws (ch. 50, sec. 304), and to bring ouster proceedings against officials who violate statutes (ch. 81, sec. 411), but these provisions seem not to require such proceedings to be instituted.

The New York statutes add to a general duty to investigate if the governor or "public interest" requires (Consolidated Laws (1930), ch. 18, sec. 62) the duty to enforce election laws (ch. 18, sec. 67), to assist in enforcing marriage records laws (ch. 14, sec. 23), and to proceed to restrain violations of the securities and monopolies laws (ch. 21, secs. 342, 353).

⁵⁵The Alabama statutes seem to give the attorney-general such full power (political Code (1923), sec. 859) and, in addition, specify only that it shall be his duty to investigate and prosecute violations of the securities act (Laws of 1931, p. 800).

⁵⁶One of these is Indiana which requires the attorney-general to enforce the blue sky law (Burns' Annotated Statutes (1926), sec. 5007), the child labor law (sec. 6474), conservation laws (sec. 4751), horse-racing laws (sec. 8718), prohibition statutes (secs. 2742, 2754), and statutes to regulate restraints of trade (sec. 4655).

At the direction of the governor, the attorney-general of Colorado may conduct any criminal prosecution in the courts of the state but the statutes

the attorney-general seems to have very few powers or duties in criminal prosecutions.⁵⁷ There are no states, however, which give him none.

Many of the prosecuting duties of the attorney-general seem to relate in some way to the regulation of business activities. One-third or more of the states make it his duty to prosecute for violation of statutes regulating or prohibiting trusts, monopolies, price discriminations, and similar offenses. There are many statutes which require the attorney-general to prosecute violations of the banking laws, and he is often directed or permitted to institute and conduct prosecutions of many other types of business offenses. Some of these involve almost any violation of the corporation laws, investigation to be started at the direction of the governor. (Arizona, California, Colorado, Montana.) In Kansas it is his duty to prosecute for fraudulent advertising. Under the statutes of Washington and Wisconsin the attorney-general may inquire generally into corporate affairs and prosecute any violation of the law. The statutes of at least a dozen states have provisions requiring the attorney-general to enforce the blue sky laws or statutes regulating the sale of securities either by injunction or criminal prosecution.⁵⁸

The attorney-general of Nebraska is given concurrent power to prosecute under any section of the criminal code but it is made his special duty to inquire into all complaints of liquor law violations which come to his attention. Other states impose a similar duty.⁵⁹

also list a number of types of prosecutions which it is his duty to institute. (Compiled Laws (1921), sec. 5968.) It is his duty to prosecute under the banking laws if a district attorney fails to do so (sec. 2722), under trust act (secs. 4038, 4040), workmen's compensation act (sec. 4494), pure food laws (sec. 3696), dairy products act (sec. 3084), common carrier act (sec. 2988), oil inspection laws, if the district attorney fails (sec. 3654), utilities act (sec. 2966), railroad act (sec. 2826), vital statistics registration act (sec. 2966), public accounting act (sec. 317), trade and commerce act (Laws of 1923, p. 665), and the securities act (Laws of 1923, p. 586). He shall enforce the irrigation act by injunction (sec. 1619), shall sue for a statutory penalty for trespass on state lands (sec. 1166), shall proceed to forfeit charter of a corporation violating the "truck system payment" act (sec. 4238), and he is given full power to conduct any prosecutions under the election laws of the state (sec. 7669).

⁵⁷Code of Tennessee (1932): Duty of attorney-general to conduct criminal prosecutions in supreme court (sec. 9956), and to sue for penalties against public utility corporations (sec. 1521).

⁵⁸For example see the Annotated Code of Maryland (1924), art. 32 A, secs. 11 ff.; Consolidated Laws of New York (Cahill, 1930) ch. 21, sec. 353.

⁵⁹Idaho, Kansas, Missouri, New Hampshire, North Dakota, South Dakota, and Washington. The New Hampshire statute concerning the enforcement of its prohibition laws is an interesting example of an attempt to provide for a higher degree of centralization in prosecutions under one statute than in criminal prosecutions in general:

"The superior authority in the enforcement of laws prohibiting the sale of intoxicating liquor and the prosecution of officers . . . shall be the

The statutes of Maine require the attorney-general to proceed against officials who fail to enforce the liquor laws. Montana, Utah, Virginia, and West Virginia have statutes which seem merely to permit him to proceed in liquor law violations.

There are other provisions which permit the attorney-general to proceed against nuisances, houses of prostitution, or gambling establishments, or which require him to sue to recover lottery prizes, to restrain or punish violations of the grain futures act, or gambling in stocks. At least twelve states require the attorney-general to help enforce the statutes concerning the registration of vital statistics and a few states require him to prosecute violations of the election laws.

The major part of the criminal prosecution duties of the attorney-general is covered by the types of statutes mentioned in the preceding paragraphs, but it may be of interest to mention a few other things which the attorney-general may be called upon to do. In Georgia, for example, if the attorney-general learns of the birth of a legitimate child having one white and one black parent, it is his duty to prosecute the parents. The Colorado statutes present an interesting array of prosecuting duties involving pure food, dairy products, and drug laws, truck system payments, oil inspection, and public accounts.⁶⁰ Other subjects found in such statutes are insurance (Florida, Kentucky, Michigan, Nebraska), medical practice (Idaho, Iowa, Texas), lynching (Kansas), illegal practice of law (Maine), fire regulations (Montana, Pennsylvania), lobbying (Nebraska, South Dakota), sterilization (Nebraska), inspection of mines (Nevada), forest protection (New Hampshire, Ohio, Oregon), fish and game laws (North Dakota), labor laws (Texas), alien land laws (Washington), regulation of the sale of milk bottles (West Virginia), contagious disease acts (Wisconsin), and egg classification act (Florida).

It is important to note that many of these provisions require the attorney-general to conduct suits or prosecutions for various state

attorney-general. It shall be his duty to have supervisory direction of all prosecutions authorized by this chapter and undertaken by the solicitors, and to take personal charge of the same when in his judgment it may be necessary or advisable. All persons engaged in the prosecution of offenses against the liquor laws shall be under his control." Public Laws of New Hampshire (1926), ch. 144, sec. 54.

Walter F. Dodd cites a North Dakota case, *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962 (1907), which held unconstitutional a statute attempting to centralize in the state the prosecution of liquor offenses. This authorized the appointment of state enforcement commissioners to have full powers to prosecute such offenses and was declared unconstitutional on the ground that such powers are reserved to officers elected by local vote. *State Government* (1928), p. 425.

⁶⁰Note 56, *supra*.

agencies such as the corporation commission, utility commission, railroad commission, state tax commission, industrial commission, workmen's compensation commission, state bank examiner, insurance commissioner, food and dairy commissioner, and various other specialized law enforcement agencies of the state government. In every state the attorney-general is the legal adviser of all the departments of the state government and it is entirely possible that this relationship would be held sufficient to give him authority to conduct any criminal prosecution involved in the duties of such state agencies if requested by them to do so. No cases have been found to sustain this suggestion.

From this summary it is clear that the duties of prosecution specifically imposed upon the attorney-general by these statutes do not attempt in any way to provide a solution for the major problems involved in the administration of criminal justice. They relate to such things as the regulation of business activity, the enforcement of liquor or vice laws, or to the registration of vital statistics. Like most of the statutes particularizing the criminal law duties of the prosecuting attorney, these provisions relating similarly to the attorney-general contain almost no mention whatever of offenses which constitute our so-called "crime waves."

Public opinion and the attorney-generals themselves all seem to feel that the local prosecutor has the primary responsibility in these as well as in the more common offenses, and observation of attorney-generals' reports available gives no indication that they regard these duties as regular or major responsibilities. It is true that there are numerous examples of prosecutions under these statutes by attorney-generals but these seem usually to be special or sensational cases. It seems to be the general view that these powers are granted for use in emergency situations and do not constitute a positive, continuing responsibility. In any event they do not bear much relation to the major factors in the problem of crime control. Even the statutes requiring the attorney-general to conduct appellate proceedings can hardly bring him into any close relationship with the breakdown of our law enforcement machinery when the Illinois supreme court hears only about one hundred criminal cases a year while Cook County alone disposes of three hundred thousand annually.⁶¹

⁶¹Illinois Attorney-General's Report (1930), p. 11; Albert Lepawsky, *The Judicial System of Metropolitan Chicago* (1932), appendix II, p. 242.

IV. General Powers of the Attorney-General in Criminal Prosecution.

The discussion of the powers and duties of the attorney-general is by no means exhausted when we conclude that common law powers and the statutes permitting him to prosecute specified types of cases have failed to make the office an important criminal law enforcing agency. There are many other efforts which point much more avowedly than these at that objective. Some of them provide that the attorney-general shall have full responsibility for the prosecution of all violators of state criminal laws while others give him only some power to supervise the work of independent local prosecutors. Some of these proposals or statutory provisions merely give the attorney-general a power concurrent with that of the local prosecutor to intervene in or initiate criminal proceedings. Under other provisions he is simply directed to assist local prosecutors when in his judgment or in theirs, or perhaps at the direction of the governor, such aid seems necessary.

(a) Provisions Tending to Centralize Control of All Prosecutions.

From time to time, in recent years, various commentators have put forward the suggestion that one of the departmental units of state government ought to be a state department of justice. Many different classes of duties have been proposed for such a department but in the more recent proposals it has usually been intended that the state department of justice should be an executive agency to enforce the criminal laws of the state in much the same way that the federal department of justice enforces the criminal laws of the national government.⁶² One of the most comprehensive of such proposals, for

⁶²It may be well to mention the various classes of duties which have been proposed for state departments or ministries of justice. The names suggested in the many proposals for the creation of such agencies are very much alike but the duties proposed differ widely. Professor John H. Wigmore, writing in 1916 (11 Illinois Law Review 45), stressed the need for a chief judicial superintendent or a superintendent of justice who would have the power and duty to investigate and take some action when the courts failed to function adequately. Mr. Justice Cardozo, writing in 1921 (35 Harvard Law Review 113), proposed the establishment of a ministry of justice which would be created to note defects and recommend changes in the law and particularly in the private law. *The Report of the Commission on the Administration of Justice in New York State*, Legislative Document (1934) No. 50, pays special attention to Mr. Justice Cardozo's suggestion (pp. 51-56) and recommends in no uncertain terms that a "law revision commission" ought to be established to meet the purposes of the Cardozo "ministry of justice." The first of these suggestions seems to be directed at the operation of the courts and the second

example, is that suggested by the Institute of Public Affairs of the University of Georgia in a constitution which it drafted and proposed for adoption in that state.⁶³ It recommends that all prosecutions for the violation of state criminal laws should be made the exclusive duty of a state department of justice consisting of the attorney-general and the local prosecuting attorneys, all of whom would be appointed by the governor with the consent of the senate. Professor Willoughby has made some similar suggestions which go even farther in that they contemplate the centralization of police as well as prosecuting officials in such a state department.⁶⁴

That this general suggestion of a state department of justice has been popular is evidenced by the fact that many states have created some such agency by constitution or statute and have given it some powers with respect to the prosecution of criminal cases.⁶⁵ Others have not actually changed the name of the attorney-general's office to department of justice but have given that officer some similar power. Legislation of this type has often been hailed as substantial progress toward the state control of law enforcement which many observers think desirable.⁶⁶ In view of this enthusiasm it is important to examine these provisions in order to determine what purposes and policies may be involved and to attempt to learn whether or not they have been more successful in making the attorney-general a significant law enforcement officer than those powers which were discussed in the previous sections.

The Georgia proposal which is mentioned above presents about the greatest possible centralization in the state government of the power to conduct criminal prosecutions. In this respect, however, it hardly exceeds if at all the machinery of prosecution which now operates in Delaware and Rhode Island. Neither of these states has dignified its attorney-general's office with the title "department of

is specially concerned with the law which the courts are established to administer. Neither of these relates specifically to the administration of criminal justice but they have sometimes been confused with more recent proposals that the state should establish a department of justice patterned after that of the federal government to enforce criminal laws. (See "A Department of Justice for North Carolina," 8 *North Carolina Law Review* at 351 (1930).)

⁶³Harmon Caldwell, "How to Make Prosecuting Effectual," 16 *Journal of the American Judicature Society* 73 (October, 1932).

⁶⁴W. F. Willoughby, *Principles of Judicial Administration* (1929), pp. 119-124. This passage quotes at length from Professor Mathews. See also the recent Brookings Institution surveys of state government in North Carolina (1930), pp. 146-151, Mississippi (1932), pp. 468-473, and Iowa (1934).

⁶⁵Louisiana, Iowa, Nebraska, New Mexico, Pennsylvania, and South Dakota provide by constitution or statute for a "department of justice."

⁶⁶See the editorial at 16 *Journal of the American Judicature Society* 71 (October, 1932).

justice" and consequently both have been overlooked in discussions of this centralization movement, but both come closer than any others to the adoption of these various proposals for concentration in the state government of this function. For many years they have given their attorney-generals the full responsibility for all criminal proceedings under state laws and the institution of the independent local prosecutor which is common to most other states is not found in Rhode Island or Delaware.⁶⁷ Both states fall somewhat short of the Georgia proposal because the attorney-general is popularly elected and therefore is not subject to any effective control by the governor. These states of course are the smallest in size and for that reason, perhaps, the difference between their conditions and those of other states may be such that centralization here does not forecast a similar trend elsewhere. Nevertheless, they are the only states in which state officials have full responsibility for the prosecution of criminal cases.

The provisions of law which have been especially hailed as steps toward this centralization, however, have been not these statutes which have accomplished it but rather the "department of justice" provisions of the Louisiana constitution of 1921 which provide a far smaller degree of state control of prosecution. The department of justice is composed of the attorney-general and necessary assistants and is given its powers in the following language:⁶⁸

" . . . They, or any one of them, shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings, civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the State. They shall exercise supervision over the several district attorneys throughout the State and perform all other duties imposed by law"

These two grants of power—supervision over district attorneys and the power to intervene in or initiate criminal proceedings—together with the fact that their exercise is purely discretionary with the attorney-general are the primary features not only of the Louisiana

⁶⁷See note 8, *supra*. The difference between the two states appears to be the fact that the Delaware statutes provide for the appointment of assistant attorney-generals for counties to conduct criminal prosecutions. The Rhode Island laws provide that all prosecutions are handled directly from the attorney-general's office without the appointment of assistants to act for subdivisions of the state.

⁶⁸Constitution of Louisiana, art. VII, sec. 56.

provisions but also of almost all the similar legislation in other states. Some states have both provisions but many have only one.

Of these two powers only that of supervision over local prosecutors can accurately be said to attempt to centralize control of prosecution in the state government, and as it appears in this section of the constitution of Louisiana it can be of very little use. Professor Willoughby has been a vigorous advocate of the expansion of the attorney-general's power to control the function of prosecution but his evaluation of this provision is hardly enthusiastic:⁶⁹

"This is a step in the right direction, but it is, at best, but a short one. In the first place, the Attorney-General is elected by the people, and thus cannot be used by the Governor as his chief officer in seeing that the laws are faithfully executed in the same way as he could if he owed his selection to the Governor. Secondly, the district attorneys, though declared to be subject to the supervision of the Attorney-General, are elected by the voters of the districts in which they perform their duties. The supervisory power declared to be vested in the Attorney-General can thus be of but the most general character."

Ten states, in addition to Louisiana, provide in similar terms that their attorney-generals shall have power to supervise the work of the local prosecuting officials and Professor Willoughby's criticism seems to apply to them as fully as to Louisiana.⁷⁰ Further, examination of the reports of the attorney-generals in most of these states indicates clearly that attorney-generals have not attempted to exercise this power of supervision in spite of the fact that most of these states have further provisions of law which might supplement and strengthen this control.⁷¹

⁶⁹Willoughby, *Principles of Judicial Administration* (1929), p. 121.

⁷⁰The eleven states granting this power are Arizona, California, Florida, Idaho, Iowa, Louisiana, Michigan, Montana, New Hampshire, South Dakota, and Utah. It is important to note that Willoughby's criticism is purely a practical one. There is evidence that the courts are entirely willing to apply such provisions to give the attorney-general very broad power. See, for example, the following statement by the Montana court: ". . . he is to exercise a supervisory power over county attorneys in all matters pertaining to the duties of their offices, and from time to time to require reports as to the condition of the public business intrusted to their charge. A duty to exercise supervisory power clearly implies the possession of supervisory power. There is therefore in the attorney-general a right to oversee for direction, to inspect with an authority all matters pertaining to the duties of the county attorneys of the state, and to direct with supervisory oversight the official conduct and acts of such officials; and it is his prescribed duty to exercise and perform these acts, and to do whatever may be necessary and proper to render his power in these respects effective." (*State ex rel. Nolan v. District Court*, 22 Mont. 25, 27, 55 Pac. 916 (1899).)

⁷¹Such reports have been examined from Florida, Idaho, Iowa, Michigan, Montana, New Hampshire, South Dakota, and Utah.

New Hampshire and South Dakota seem to be the only states which provide for general supervision of prosecutors by the attorney-general without giving him the further power to require them to submit to him reports on their work. Arizona, California, Florida, Idaho, Iowa, Louisiana, Michigan, Montana, New Mexico, and Utah provide both for supervision and for the submission of reports. The laws of Alabama, Arkansas, Maine, Minnesota, North Dakota, Ohio, Texas, and West Virginia provide for the submission of reports to the attorney-general but they do not give him any power to supervise.

In view of the generally recognized importance of adequate criminal statistics, it would seem that this power of the attorney-general to require reports from the local prosecutors might provide a means of getting valuable statistical material which might not otherwise be obtained. The fact seems to be, however, that the material collected under this authority is of little value. The report on "Criminal Statistics" of the National Commission on Law Observance and Enforcement includes a checklist of printed reports containing criminal statistics.⁷² The list indicates, largely on the basis of 1928 reports, that the attorney-generals publish reports of the work of prosecuting attorneys in eleven of these seventeen states which provide for reports to the attorney-general by prosecuting attorneys.⁷³ It is evident, however, from Professor Warner's discussion,⁷⁴ from the checklist mentioned, and from examination of these reports of attorney-generals that the reports by prosecuting attorneys are only bare tabulations of the disposition of cases in which indictments are returned. They certainly do not give information on prosecutors' activities in any detail sufficient to enable any supervising attorney-general to judge the efficiency of local prosecution and it is very doubtful that these reports are sufficiently accurate or detailed to have much value as criminal statistics.

Except for the Delaware and Rhode Island provisions which have been mentioned, these statutes involving supervision by the attorney-general or reports to him are the only legislation which purports to seek any effective centralization in the state government of all crim-

⁷²National Commission on Law Observance and Enforcement, "Report on Criminal Statistics" (1931), pp. 91 ff.

⁷³This statement refers to statistics of prosecutions in trial courts. A far larger number of attorney-general's reports publish tables of criminal cases disposed of in the appellate courts of the states.

The tables appearing in the attorney-general's reports appear to be merely reproductions or mechanical consolidations of the reports submitted by prosecuting attorneys.

⁷⁴"Survey of Criminal Statistics in the United States," comprising pp. 19-90 of the report cited.

inal prosecutions conducted in behalf of the state.⁷⁵ These are the provisions which seem to have led to the conclusion that there is a trend toward centralization of prosecution such as that proposed for Georgia. It is evident that these provisions themselves are quite inadequate to accomplish much and that in actual practice they are not used at all.

(b) Concurrent Power to Prosecute.

If this supervision feature of these various legislative provisions does not indicate an important tendency to concentrate the control of prosecution in the state, it is possible that some other provision has led to the conclusion that such a tendency exists. If so, it is necessarily those provisions like that in Louisiana which gives the attorney-general "power and authority to institute and prosecute or to intervene in any and all suits or other proceedings, civil or criminal"

It is entirely possible for an aggressive attorney-general to use some power such as this to supplement and strengthen his authority to supervise prosecuting attorneys and to that extent it might be regarded as a step toward the centralization of responsibility for prosecution. Such use, however, has not been the primary objective of such legislation. To centralize the control of criminal prosecution in the attorney-general would be a complete reversal of American political traditions which have developed for more than a century.⁷⁶ To give the attorney-general a power concurrent with that of the prosecutor embodies no such reversal but merely a traditional policy

⁷⁵There are a few statutes which may work rather incidentally toward such centralization. For example, the governor of Florida appoints and may remove the state's attorney of each district and by the exercise of these powers might really supervise prosecution. The Florida statutes provide, however, that the attorney-general, who is elected, shall supervise state attorneys. The governor of New Jersey appoints the prosecutor for each county but removal appears to be only by impeachment. (See Baker and DeLong, "The Prosecuting Attorney," 23 *Journal of Criminal Law and Criminology* 926 ff.) These provisions might appear to allow the governor to exercise some supervision over local prosecuting officials. In the practice of administration, however, continual supervision of so many officers by these means would be very cumbersome and these provisions are probably valuable only in so far as they can be invoked occasionally as examples. The same might be said of the power of removal which is given to the governor in many states to be exercised over prosecuting attorneys, sheriffs, and other officers.

It is necessary to add that several states require prosecuting attorneys to send reports to state bureaus of criminal identification, but these requirements involve statistical rather than supervisory objectives.

⁷⁶Willoughby comments: "The centralization of the function of law enforcement in the state would, of course, mean a revolution in respect to the attitude of the states toward the enforcement of the law." *Principles of Judicial Administration*, p. 120.

of giving two public officials the same powers in the hope that if one does not perform the other one will. It seems probable that such provisions have been enacted in these states not to centralize but to preclude centralization.

In view of the potentialities of provision like these, it is necessary to determine what use is made of them. It is evident from the foregoing discussion that the Louisiana provision makes it possible for the attorney-general to assume responsibility for criminal prosecution as contemplated by those who advocate a state department of criminal prosecution, but from personally communicated information it appears that the department of justice of Louisiana attempts neither to exercise an effective supervision over the district attorneys of the state nor to assume primary responsibility for criminal prosecution.

The New Orleans press indicates that the only recent example of exercise by the attorney-general of his power to intervene in a criminal case was a very serious abuse of this power. The district attorney of the Parish of Orleans, in November, 1932, initiated an investigation upon complaints of widespread fraud in a referendum on several constitutional amendments. The attorney-general used his constitutional power to supersede the district attorney in criminal proceedings as a means of preventing this investigation. It is probable that the grand jury could have inquired into the situation and returned indictments but the attorney-general would have the power to enter a *nolle prosequi* over the objections of the grand jury or the district attorney. The reasons which Attorney-General Porterie gave to justify his intervention were very flimsy, and it seems quite evident that he was determined to halt an investigation which might affect adversely his own political interests. The bar associations of New Orleans and Louisiana strongly supported District Attorney Stanley in his attempt to investigate and sharply criticized the action of the attorney-general.⁷⁷

The laws of Nebraska present a typical example of legislation conferring upon the attorney-general concurrent power to institute and conduct criminal prosecutions. These statutes establish a "department of justice" but do not confer upon the attorney-general the power to "exercise supervision" over county attorneys or to require them to submit reports to him. To quote the provisions:⁷⁸

⁷⁷See the Times-Picayune, issues from November 23, 1932 to January 8, 1933, particularly the issues of November 26 and January 7.

⁷⁸Revised Statutes of Nebraska (1929), ch. 84, secs. 203-4. See *Munday v. MacDonald*, 216 Mich. 444, 185 N. W. 877 (1921) which holds that such language leaves entirely to the discretion of the attorney-general the question

"The attorney-general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest"

"The attorney-general and the department of justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties."

It is important to note that the language of these provisions definitely makes the exercise of this power discretionary with the attorney-general. The Nebraska laws, however, do impose the following duties, among others:⁷⁹

"To consult and advise the county attorneys, when requested by them, in all criminal matters and in matters relating to the public revenue. He shall have authority to require their aid and assistance in all matters pertaining to his duties in their respective counties and may in any case brought to the supreme court from their respective counties demand and receive the assistance of the county attorney from whose county such case is brought.

"To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court in which the state is interested or a party and when requested by the governor or either branch of the legislature to appear for the state and prosecute or defend any action or conduct any investigation in which the state is interested or a party before any court, officer, board or tribunal or commission."

It seems clear from the language of these provisions that the legislature was not attempting to require the attorney-general to exercise a continual close supervision over the routine activities of county attorneys, although an aggressive attorney-general conceivably might stretch the first of these statements of duty into the authority for such supervision. The intention of the legislature, in enacting these statutes, seems rather to make it possible for the attorney-general to intervene occasionally when local machinery breaks down. This intervention is mandatory only if the governor or legislature shall order it.

Some indication of the manner in which these statutes have been applied may be found in the official report of the attorney-general of Nebraska for the two years ending December 15, 1930. The author knew how to emphasize the work of his office and present it in a most favorable light. The statements consist of generalizations

of when to enter a case; also, *State v. District Court*, 19 N. D. 819, 124 N. W. 421 (1910).

⁷⁹*Ibid.*, sec. 205.

rather than statistics but they appear to report every phase of criminal law enforcement which was undertaken by the department.

During the two years covered by the report the attorney-general appeared in the district courts of the state as counsel in fifty-nine criminal prosecutions. It is clear, however, that in a large number of these cases—the number is not given—the attorney-general rendered assistance at the request of the county attorney in charge of the case. "This has been particularly true in prosecutions for violation of the banking laws, and other cases where special skill and experience were required to try the case."⁸⁰ The report indicates that the attorney-general centered his law enforcement activities upon the liquor, gambling, price discrimination, and banking laws.⁸¹ In addition to the general powers and duties mentioned, Nebraska has statutes definitely making it the duty of the attorney-general to investigate and prosecute complaints of violations of the liquor and price discrimination laws. Prosecutions under the gambling and banking laws appear to have been undertaken under the discretionary power of the attorney-general to prosecute any type of criminal offense.

The attorney-general appears to exercise his powers far more diligently in Nebraska than in Louisiana but even in Nebraska he seems to participate in criminal prosecution only in extraordinary or emergency matters.⁸²

The statutes contain many variations of this type of provision conferring concurrent prosecuting power on the attorney-general. Eleven states at least, including Louisiana and Nebraska, confer such complete authority to institute and conduct criminal proceedings.⁸³

⁸⁰Report of the Attorney-General of the State of Nebraska for the Biennium ending December 15, 1930, p. 22.

⁸¹See *ibid.*, pp. 23-24, 30.

⁸²These conclusions concerning the extent and nature of participation in law enforcement by the attorney-general of Nebraska agree with those presented by M. H. Satterfield, "Law Enforcement in Nebraska," 12 Nebraska Law Bulletin 318-332 (February, 1934).

⁸³It is held in some states that the attorney-general possesses this wide power under the common law whether or not there is such a statute. See section II. The eleven states mentioned are the following: Alabama, Florida, Louisiana, Massachusetts, Nebraska, New Hampshire, New Mexico, North Dakota, Pennsylvania, South Dakota, and Vermont. Of the states in this group, attorney-general's reports from Florida, Massachusetts and Vermont do not indicate that the attorney-general made use of this power in the years 1929 and 1930, although the Vermont report does indicate that every assistance was given to state's attorneys who requested help from the office of the attorney-general. The Nebraska and New Hampshire reports indicated that the power was exercised.

Some of the provisions of the various states on this matter are as follows:
Alabama: "The attorney-general, either in person or by one of his

It may be of interest to quote the broad language in which the Pennsylvania law is phrased.⁸⁴

"The Department of Justice shall have power, and its duty shall be, with the approval of the Governor:

- (1) To investigate any violation or alleged violation of the laws of the commonwealth which may come to its notice;
- (2) To take such steps and adopt such means as may be reasonably necessary to enforce the laws of the commonwealth."

This statute goes beyond the Nebraska provision and similar provisions in other states, except possibly New Hampshire, in that it imposes a "duty" and does not merely confer "authority."

From these grants of full concurrent power to prosecute, the attorney-general's powers in general criminal prosecution dwindle away through a number of similar but less generous provisions. For example, there seems to be no Michigan statute giving the attorney-general independent power to initiate prosecutions but he is given the power "to intervene" in any criminal case in any court of the state—a power which probably amounts to the same thing.⁸⁵

Another variation of this type of legislation is the New York law which provides as follows:⁸⁶

"Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by

assistants, maysuperintend and direct the prosecution of any criminal cause in any of the courts of the state, and the solicitor prosecuting in such court shall assist and act in connection with the attorney-general" (Political Code (1923), sec. 859.)

New Hampshire: "He shall have and exercise general supervision of the criminal causes pending before the supreme and superior courts of the state, and with the aid of the solicitors of the several counties he shall enforce the criminal laws of the state." (Public Laws (1926), ch. 16, sec. 5.)

South Dakota: "In any and all criminal proceedings in any and all courts of this state and in any county or part of the state, the Attorney-General shall have concurrent jurisdiction with the State's Attorney or State's Attorneys of the several counties of the state. He shall have authority to sign, file, and present any and all complaints, informations, presentments, indictments, subpoenas, affidavits, motions, process, and papers of any kind which the State's Attorney might do in any criminal proceeding and to appear before all magistrates, grand juries, courts, commissions, or tribunals in any criminal proceeding in the state, the same as the State's Attorney might do, or in conjunction with said State's Attorney. Nothing herein contained, however, shall relieve the State's Attorneys from any duty now enjoined upon them by law nor relieve them from the duty of assisting state officials in conduct of criminal proceedings in their respective counties. (Sessions Laws of 1931, p. 102.)

⁸⁴Pennsylvania Laws of 1929, p. 238.

⁸⁵Compiled Laws of Michigan (1929), sec. 179.

⁸⁶Consolidated Laws of New York (1930), ch. 18, sec. 62.

the governor, shall inquire into matters concerning the public safety and public justice.”

The 1931 report of the attorney-general of New York describes three cases arising during the year in which the governor directed the attorney-general to supersede the local district attorney.⁸⁷ Statutes providing for a similar procedure are found in at least fourteen other states. Kansas, North Carolina, Oklahoma, South Dakota, and Wisconsin are in this group but provide, in addition, that the legislature, or either House, may direct the attorney-general to undertake the prosecution of a criminal case. The laws of a half-dozen other states provide that the governor may direct the attorney-general to aid a local prosecuting attorney in a criminal proceeding. It is probable that these provisions are broad enough to allow the governor to direct that “assistance” be given even if the prosecuting attorney does not want it.

(c) Assistance to Local Prosecutors.

Similarly, there are other statutes such as the Illinois provision which requires the attorney-general “to consult with and advise the several state’s attorneys . . . and when, in his judgment, the interest of the people of the state requires it . . . attend the trial of the party accused of crime, and assist in the prosecution.”⁸⁸ The primary utility of such a provision probably lies in the fact that it enables the local prosecutor to call for assistance but it is sufficiently broad to allow the attorney-general, in most states, to “assist” upon his own initiative even against the wishes of the prosecuting attorney.⁸⁹

Three-fourths of the states have one or more of these provisions which have been described in this section. The statutes of at least

⁸⁷Report of the Attorney-General of New York (1931), pp. 17-19.

⁸⁸Illinois Revised Statutes (Cahill, 1933), ch. 14, sec. 4.

⁸⁹Another quotation from *State ex rel. v. District Court* (22 Mont. 25, 28, 55 Pac. 916, 917 (1899)) indicates how much this power to “assist” may really include:

“He is to assist the county attorney in the discharge of his duties when the public service requires it, or when the governor directs him to give such assistance. . . . Nor is there any limit to the assistance to be given—no point where it is to begin or end except the bound of the official duty of the county attorney. Just as long as the county attorney has the duty to discharge, and just so far as he may go in discharging it, so long is it the right of the attorney-general to actually assist him in the discharge of such a duty; and equally far in executing the duties shall he go when the public service requires or when the public service requires or when directed to assist by the governor.”

twenty appear to be broad enough to allow the attorney-general to assume control of practically any criminal case upon his own initiative. In fifteen others, he may exercise such wide power if directed to do so by some other state official, usually the governor.

The laws of about twenty states contain provisions making it the duty of the attorney-general to aid any prosecuting attorney who requests help. Most of these sections seem to imply that the initiative is to come from the local official and not from the attorney-general,⁹⁰ and the official reports of a number of attorney-generals indicate that the local prosecuting attorneys really do receive assistance from the state officers. The report of the Nebraska attorney-general makes the following statement:⁹¹

"While the law contemplates in most cases that the county attorneys shall assist the attorney-general when requested to do so rather than the reverse, the department of justice has attempted to cooperate as fully as possible with the county attorneys of the state and, in addition to giving legal advice and written opinions whenever requested, it has also on many occasions assisted in the prosecution or defense of cases in the district and inferior courts when asked to do so by the county attorney. This has been particularly true in prosecutions for violation of the banking laws, and other cases where special skill and experience were required to try the case. In many of these cases the county would have been required to spend large sums for special counsel had it not been for the assistance given by this department."

Similar reports from Minnesota, Montana, and Vermont, among others, indicate that there is genuine cooperation between these officials.

Although the Michigan statutes provide for such assistance to prosecuting attorneys by the attorney-general, his report for 1929-30 does not state that such assistance was given but many of the opinions of the attorney-general were written to answer questions submitted by prosecuting attorneys. A summary compiled by the Wisconsin Legislative Reference Library shows that at least thirty-one states have laws providing that the attorney-general shall give opinions to local prosecuting attorneys,⁹² and a casual glance through a number of attorney-general's reports indicates that such provisions are quite often utilized.

⁹⁰As an example see Revised Statutes of Kansas (1923), ch. 75, sec. 704

⁹¹Report of the Attorney-General of Nebraska (1929-30), p. 22.

⁹²Provisions in the Laws of the States of the United States Providing for Free Legal Advice to State and Local Public Officials by Prosecuting Attorneys or Attorney-General and the Relation of the Attorney-General to the Prosecuting Attorneys. (Unpublished.) Compiled by Martha Block, Wisconsin Legislative Reference Library, Madison. September, 1924.

The attorney-generals of the states often refer to themselves in their official reports as chief law enforcement officers of the state. The conclusion that this is the nature of the office probably relies both upon the statutes which have been the subject of the foregoing discussion and upon the fact that under the common law and in the colonial and early national period of the United States the attorney-general was the only public prosecuting official.⁹³ While it is true that courts have said that the attorney-general retains his common law powers,⁹⁴ this study indicates that, with the few exceptions which have been noted, he is not a chief law enforcement officer. If he were actually such an officer, it would be his duty to maintain a constant vigilant supervision of all the agencies in the state involved in the process of criminal law administration.

Reports of attorney-generals from nearly half the states have been examined but that from Nebraska is the only one which indicates that the office adopts an aggressive policy of independent law enforcement. Even in that state there is no indication that the attorney-general assumes the primary responsibility for the enforcement of the laws.

The illustrations which have been presented in this section do not signify that it is unwise or ineffective to grant the attorney-general concurrent power to prosecute. They show that this type of statute does not operate to subordinate the local authorities to any state agency but that it merely creates a parallel agency to step in where the local agency flagrantly neglects to perform its duty. The statutes alone show that it has not been intended that the attorney-general should exercise constant thorough supervision of law enforcement for in most states he has not been given the facilities to do so. In those states which most nearly provide adequate facilities nearly all of these laws merely permit an aggressive attorney-general, in his discretion, to intervene in a criminal case.⁹⁵

⁹³See Moley, *Politics and Criminal Prosecution* (1929), pp. 57-58; Goodnow, *Principles of the Administrative Law of the United States* (1905), p. 412 (cited by Moley); also, *People v. Kramer*, 33 Misc. 209, 68 N. Y. S. 383 (1900); *State v. Keena*, 64 Conn. 212 (1894); *Commonwealth v. Kozlowsky*, 238 Mass. 279, 131 N. E. 207 (1921).

⁹⁴See section II.

⁹⁵About one-tenth of the work of the attorney-general of California involves criminal prosecution. (See note 109, *infra*.)

Walter F. Dodd comments as follows (*State Government* (1928), p. 425):

"In the prosecution of violations of state law, the attorney-general has in most cases some broad general authority to intervene in cases and to aid in their prosecution. Sometimes his authority extends to the point of completely superseding the locally elected prosecuting attorney. Yet the attorney-general, even though he possesses such powers, will be able to

There is a wide difference between giving the attorney-general power to prosecute in emergencies and giving him full responsibility for all prosecution throughout the state. The provisions now in the statute books indicate that the people of the states do not fear the first but the second represents such a tremendous invasion of the present prerogatives of local government that it would arouse powerful opposition in almost every state.

V. The Attorney-General's Control Over Police.

The objective of most of the proposals for the creation of state departments of justice and of the constitutional provisions, the statutes, and the court decisions which move in that direction is the centralization only of the one function of prosecution, with no reference to or consideration of the parallel necessity for the centralization of police control in the state government. There have been a few instances, however, in which legislatures, sometimes intentionally, sometimes inadvertently, have combined the state control of the two functions in one state officer. These are comparatively unimportant at the present time but they cannot be permitted to pass altogether unnoticed for some of their features may be worthy of emulation or adaptation.

The state office to which this combined responsibility is given is usually that of attorney-general, although in some instances it may be given the additional dignity of the title "department of justice." In Kansas the attorney-general has been said by the courts to have the common law power to conduct criminal prosecutions.⁹⁶ To this the statutes add the power to maintain a state clearing house for information relating to crime.⁹⁷ In Rhode Island the attorney-general is the chief prosecuting official for the entire state; there are no local prosecutors.⁹⁸ This officer also supervises the state bureau of criminal identification.⁹⁹ These are rather rudimentary examples of some combination of the supervision of prosecution and police and perhaps do not even deserve mention. They represent a beginning, however, and a little farther down the path toward this merger are Minnesota and Iowa.

intervene only in occasional cases of great importance; he must necessarily leave to the local prosecuting officers the general task of law enforcement within their respective territories."

⁹⁶*State v. Finch*, 128 Kan. 665, 280 Pac. 910 (1929).

⁹⁷Kansas Laws of 1931, ch. 178.

⁹⁸General Laws of Rhode Island (1923), sec. 295.

⁹⁹Rhode Island Laws of 1927, p. 100.

The attorney-general of Minnesota, according to the supreme court of that state, has the common law power to take all measures necessary to insure that the criminal laws are enforced.¹⁰⁰ In addition to this very general grant, the statutes provide that upon the request of the county attorney or upon the direction of the governor, he shall undertake the prosecution of any "indictable offense" and his powers are equal to those of the county attorney.¹⁰¹ To these powers and duties in criminal prosecution, which have existed in the law for many decades, the legislature within the last ten years has added the duty to direct the activities of the Minnesota state bureau of criminal apprehension, which is both a clearing house for the collection and distribution of crime information and a staff of state peace officers who enforce the laws throughout the state either independently or in aid of local officials.¹⁰²

In much the same way the attorney-general of Iowa is charged with responsibilities in both prosecution and criminal investigation. He has no common law power to prosecute but under the statutes may intervene whenever, in his judgment, "the interest of the state requires such action", or when the governor requests it.¹⁰³ The Minnesota bureau of criminal apprehension has a counterpart in the Iowa bureau of investigation which performs almost exactly the same duties and, like the Minnesota agency, operates under the direction of the attorney-general.¹⁰⁴ In addition to these powers which are almost identical in both states, the attorney-general of Iowa is given the authority to supervise the work of the county attorneys and to require reports from them. Here, as in Minnesota, the powers in criminal prosecution are of long standing, while those relating to police administration are recent additions.

In neither state, however, is there any indication in the laws themselves or in their administration that the legislatures have consciously intended any correlation of these two functions in placing them in the one state officer. The powers in criminal prosecution are used very rarely, if at all, and the police duties are administered exactly as they would be if the officer supervising their execution had no power whatever to participate in prosecution.

The recent South Dakota act creating a department of justice seems to present a somewhat different situation, for here the legis-

¹⁰⁰*State v. Robinson*, 101 Minn. 277, 131 N. W. 269 (1907).

¹⁰¹Minnesota General Statutes (1923), sec. 109.

¹⁰²Minnesota Laws of 1927, p. 318.

¹⁰³Code of Iowa (1931), sec. 149.

¹⁰⁴*Ibid.*, sec. 13416.

lature in the same statute has created a state department of justice with wide powers to supervise both police work and prosecution. Its provisions are worthy of notice.¹⁰⁵

The department of justice consists of the attorney-general, who is designated as the executive officer, the state superintendent of criminal identification—filled by the warden of the state penitentiary acting *ex officio*—and their respective staffs. The attorney-general is given very complete power “to conduct and assist in the prosecution of any person charged with felony”, to employ and direct a staff of state peace officers, and to control and direct the activities of the superintendent of criminal identification. The superintendent, in turn, is given the usual duties relating to the collection and distribution of crime information, and he is authorized to require the assistance of local peace officers in enforcing the criminal laws. It is his further duty to advise and instruct local officers upon their duties.

While the administrative organization of this department of justice is defective in that the governor appoints the superintendent whom the independently elected attorney-general is to supervise, it is clear that this statute is an effort to make the attorney-general actually the chief law enforcement officer of the state. It is the only statute which has been found which seems to aim directly at this objective and while its administration may utterly nullify the intention of the legislature in enacting it, it appears to be the first feeble attempt to correlate the work of the prosecuting and police agencies of the local subdivisions of the state by merging the control of these functions in one state officer. The significance of the experiment depends upon the imagination and the personal force of those who hold the office of attorney-general in South Dakota.¹⁰⁶

VI. Conclusion.

Although the attorney-generals of most of the forty-eight states are authorized to conduct criminal prosecutions, either by the common law or specific statutory provisions, it is quite clear that the extent of state participation in this phase of criminal law enforcement is negligible. Several different elements contribute to explain why this is true.

¹⁰⁵South Dakota Session Laws of 1933, ch. 85.

¹⁰⁶In Pennsylvania and Indiana the state police department is controlled by a superintendent appointed by the governor and the attorney-general is also appointed by the governor. Consequently, this arrangement effects a large amount of centralization of control over these two related functions of police and prosecution.

The extension of the activities of the state government into the field of police administration has necessitated the establishment of entirely new agencies and in creating these agencies the legislatures have uniformly made their police functions *duties* rather than *powers*. The provisions of law relating to the attorney-general and the process of criminal prosecution merely confer upon him the *power* to participate in the prosecution of crimes in general. Whether to do so or not rests entirely within his discretion except in respect to those specified criminal statutes which it is sometimes made his *duty* to enforce.¹⁰⁷

Contrasted with this discretionary power of the attorney-general to participate in criminal prosecutions or not as he may wish are the statutes which set forth the responsibilities of the local prosecuting attorneys throughout the state. The theory of the law gives them no such discretion. It is clearly their *duty* and official responsibility to see that all violations of the criminal laws within their jurisdictions are prosecuted.¹⁰⁸ Any attorney-general, who depends for election upon the votes of the people of the many local communities, will be extremely hesitant to interfere with the administration of prosecuting offices throughout the state when the prosecutor is often the most powerful political figure in the community. Except for the few anaemic provisions, cited in the preceding sections, directing him to exercise general supervision over the prosecuting attorneys, the attorney-general is given no affirmative responsibility for the general condition of criminal prosecution throughout the state. While the state governments have given the office broad powers in criminal prosecution, there is little indication of any effective trend toward the establishment of any centralized state organization to control and direct the administration of this function for the entire state. The

¹⁰⁷In the actual administration of these two offices the difference between *duty* and *power* is probably far less than the language of the statutes has intended: The fact that the statute makes it the duty of the prosecuting attorney to enforce some particular law does not prevent him from deciding not to prosecute under that statute, and if he determines not to prosecute it is almost impossible to force him to do so. Perhaps the primary difference in the administration of these two offices is not the language of the statutes but the fact that public officials and citizens alike regard the prosecuting attorney as the official who is given the duty to prosecute any violation of the criminal statutes while they regard the powers of the attorney-general in this respect as weapons to be used if, *in his discretion*, some emergency situation requires extraordinary measures. For a most interesting analysis of the function of criminal statutes in law enforcement see Arnold, "Law Enforcement—An Attempt at Social Dissection," 42 Yale Law Journal 1 (November, 1932).

¹⁰⁸Baker and DeLong, "The Prosecuting Attorney: Powers and Duties in Criminal Prosecution," 24 Journal of Criminal Law and Criminology, 1025-1065 (March-April, 1934).

powers which have been conferred are concurrent, emergency powers which could but do not operate to check and supervise the work of local authorities.

Another factor which contributes to the inactivity of the attorney-general in criminal prosecution is the fact that his criminal law powers and duties are entirely incidental to the non-criminal activities which constitute the bulk of the responsibilities of the office. Because he happened to be the only public official who was required to be an attorney, the attorney-general, like the prosecuting attorney, has been burdened with a variety of unrelated duties having in common only the fact that they require the services of an attorney. Some reallocation of the functions of the office is probably necessary if both the civil and the criminal responsibilities are to be discharged satisfactorily.¹⁰⁹

Effective supervision of the work of local prosecuting attorneys could contribute greatly to the improvement of the administration of criminal justice, and it is a field which has hardly been touched. Before anything will be accomplished in this direction, however, it will probably be necessary to give the state officer in charge of prosecution far more than the present broad grants of discretionary power. It must be emphasized clearly in the statutes that the office is intended to assume general responsibility for the quality of prosecution throughout the state and above all, it must be given power to enforce its authority over local prosecuting agencies. That power is non-existent at the present time.

Because the attorney-general is usually an elective officer not subject to the effective supervision and control of the governor,¹¹⁰ it is extremely doubtful that that office should be expanded to become the state agency to supervise prosecution, particularly since its duties are now primarily civil in nature. Most state police agencies are now set up under the control of the governor himself, and the centralization of state control of prosecution in an independently elected official must necessarily result in the same lack of coordination of

¹⁰⁹The attorney-general of California estimates that one-tenth of the activity of his office relates to the enforcement of the criminal law. The annual cost of the office is about \$160,000, making the total amount spent by the state on prosecutions about \$16,000. Report of the Crime Problem Advisory Committee (December, 1932), p. 45.

¹¹⁰The governor's effective control over the attorney-general is far less if he must resort to the courts to compel obedience to his orders than if he needs only to threaten to remove the attorney-general from office. *State ex rel. Haskell, Governor v. Husten*, 21 Okla. 782 (1908); *State ex rel. Stubbs, Governor v. Dawson*, 86 Kansas 180 (1911).

these two functions which now results from similar division of police and prosecution in local government.

Since the election of the attorney-general is required by most state constitutions, it will be some time before these provisions are amended to allow the governor to appoint him. A more practicable method of centralizing under the governor the control of the state agency which supervises prosecution might be to create a state "department of criminal justice," with a director appointed by the governor, to which would be given all powers and duties relating to prosecution which it might be deemed wise to give to any state officers. Under this arrangement the attorney-general would remain elective but would have only the duty to act as the legal adviser of state officers and to conduct civil proceedings affecting the state. In most states there are no constitutional obstacles to such a plan.¹¹¹

It is not intended in this proposal to imply that an attorney-general with only civil duties should not be appointed by the governor. All of the officers of the executive department of the state should be so chosen. It is more important, however, to bring the function of law enforcement under the control of the governor than the administration of the civil functions of the attorney-general's office, and if the first can be accomplished more easily than the second or both, it seems wise to take that step first. In any event the functions are sufficiently different to justify assignment to different officials even if both are to be appointed by the governor.

The extent of the powers and duties of such a department is a matter for each legislature to decide for itself. There are many alternatives:

(1) The suggestions of Professor Willoughby might be the pattern for such a department which would then be responsible for all criminal prosecutions in the state and which would control either completely or largely the police agencies of the entire state as well.

(2) Such a department might be made entirely responsible for criminal prosecution for the state but in police work it might be given only power to supervise in a general way and to give expert assistance to locally controlled police agencies.

¹¹¹In a few, there are other provisions of the constitutions which stand in the way. The New York constitution, for example, establishes certain administrative departments and prohibits the legislature from creating any others. (V, 2-3.) The Louisiana Department of Justice is created and its powers are specified by the constitution, and in a few other states the constitution specifies that the attorney-general shall have some particular criminal law duty, particularly the duty to conduct criminal proceedings in the supreme court. In Illinois the legislature cannot take away the common law powers of the attorney-general, and the creation of such a new agency might be construed to do that.

(3) The department might follow somewhat the suggestion of the proposed Georgia constitution, making it a department of criminal prosecution but without any civil or police duties.

(4) The department might be made a state prosecuting agency with power concurrent with local prosecuting attorneys in the same manner as such power is now given to the attorney-general of Nebraska, and such an arrangement might involve any degree of state participation in police work which might seem desirable or expedient.

The alternatives are statements of a few of the things which might be done. The declaration is not a prophecy. It is quite clear from this study of the present powers of the attorney-general that the locally chosen prosecuting attorney is not on the way to immediate extinction. Neither the legislation which has been examined nor the manner in which it has been applied evinces any tendency to transfer primary responsibility for even the prosecution aspects of law enforcement from the prosecuting attorney to the attorney-general. The attorney-general has been regarded as an agency for use in emergency prosecutions only.

In view of the character of some of the governors who have held office in the last decade, it would not be surprising if voters should hesitate to turn over the whole machinery of prosecution to the state government. Add to this the general desire for local control and the result is sufficient to justify the conclusion that it is unlikely that the administration of prosecution will soon be centralized generally in the state. It seems probable that further legislation, even if it involves the creation of a new agency as suggested here, will merely define as *duties* those things which attorney-generals in two-thirds or more of the states have power to do now. In any case, however, to such provisions should be added restrictions to make it impossible for the state officer to supersede a local prosecutor and then drop the proceedings to prevent prosecution as happened in Louisiana. The power to exercise general supervision over local officials must be strengthened by providing devices to make effective control possible.

Perhaps the most important change which might be made in the laws on the subject would be the transfer of state participation in criminal prosecution to some official appointed by the governor. The necessity for this change has been recognized in many of the proposals for administrative reorganization in state governments. These proposals, however, have failed to realize that it is not sufficient merely to let the governor appoint an attorney-general who has power

to prosecute. If any change is to be effective, criminal law administration must be the exclusive, or at least the primary, responsibility of the state official who is expected to act. Criminal prosecution is hardly important enough now, as the attorney-general's duties and powers are defined, to be even a secondary responsibility. Nevertheless, important as statutory and constitutional changes are, it does no harm to call to the attention of our attorney-generals that most of them now have all the power which is necessary to raise the quality of criminal prosecution.

NOTE: Since this discussion was written the American Bar Association has recommended that our state governments establish departments of justice to improve the enforcement of the criminal law. The recommendation is so broad, however, that it is impossible to evaluate it. It does not specify the position of the agency in the structure of government nor does it define its powers or its relation to local law enforcement agencies. All of these factors must be determined before any statute can be drafted. For further information on this proposal see the "Current Notes" in this issue.