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Legal Methods for the Suppression of Organized Crime II--The Investigative Function of the Prosecuting Attorney

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ment and population. The first-order partial correlation obtained was .70 between unemployment and prison admissions holding the effects of population growth constant. The original coefficient of .78 between unemployment and prison admissions was thus reduced only slightly by holding state population constant. When population and unemployment were optimally weighted and combined to predict prison admissions, a multiple correlation of .86 was found between admissions and the combined predictors, suggesting that both population and unemployment data are useful in the forecasting of penitentiary admissions. The multiple R accounts for 74 percent of the variance in prison admissions, more than either of the variables considered alone. If white admissions are considered separately, the above relationships increase slightly; if Negro admissions are considered alone, the relationships are reduced drastically.

CONCLUSIONS

Three factors may be considered in accounting for the differential effects of unemployment on Negro and white prison commitments. These emphasize both cultural and psychological as well as the economic aspects of unemployment:

1. One reason for the lower association found between unemployment and Negro prison admissions may be the tendency of Negroes to commit relatively more crimes against the person than whites (7). Over the 14-year period, 5 to 16 percent more Negroes were committed for crimes against the person than whites, while whites were committed from 9 to 10 percent more for property crimes than Negroes. Direct economic gain played a relatively smaller role in the crimes committed by Negroes.

2. The median income for Louisiana white males in 1949 was \$2,228 and \$997 for colored males (10). The state unemployment compensation rates ranged from \$100 to \$500 yearly. It is apparent that compensation received from the state employment security program more nearly approximates the wage the Negro would normally receive from productive labor. This is not the case for the white who, upon losing a job, suffers relatively more economic deprivation than the chronically low income Negro. The white, therefore, might be more likely to resort to criminal means in order to reestablish his income.

3. Considered from a psychological viewpoint,

unemployment may be more critical for the white than the Negro in that it is more damaging to the white male's self-esteem. For the Negro, much more frequently a "marginal" worker, unemployment is more expected and probably does not have the degrading status it has among whites. (Surveys indicate that the unemployed have the lowest status among all occupational groups rated (2, 4). A variety of raters, including both graduate students and laborers, ranked the unemployed beneath 26 occupations in relative prestige. The unemployed were ranked below such low-level occupations as janitors, farm laborers, and coal miners.) The differential effects of unemployment on Negro and white criminal behavior may be psychological manifestations of differing cultural values placed on holding a "steady job."

The results of the many studies which have investigated the relationship between crime and the various social accompaniments of economic distress have well illustrated that one can look for no single source of motivation in criminal behavior. These studies point to an entire complex of potentially contributing conditions which comprise the environment of people in need. Certainly, the great number of violators for crimes such as narcotics offenses, rape, murder, and assault stands as testimony to the fact that criminals are not motivated solely by economic need.

Unemployment may both directly and indirectly lead to crime. However, crime must be viewed as an individual phenomenon. The majority of unemployed people do not commit crimes. Probably, no economic event can properly be considered a cause of crime; more likely, it is the particular individual's ability to adjust psychologically to a frustrating economic situation which ultimately determines whether he will violate the legal code. This study reinforces the need for considering unemployment as a relevant variable in crime etiology. However, it should be considered as only one variable which must be related to many others in the framework of a single theory of criminal behavior.

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CRIMINAL LAW CASE NOTES AND COMMENTS

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LEGAL METHODS FOR THE SUPPRESSION OF ORGANIZED CRIME

II. *The Investigative Function of the Prosecuting Attorney*

MARVIN E. ASPEN

Television and radio have stereotyped the prosecutor as a "combination of Sherlock Holmes, Dick Tracy, J. Edgar Hoover, and Sir Galahad. He solves the cases himself, assisted only by a beautiful secretary. Together they break down doors, track the culprits to their lair, solve the murder that has been committed and prevent three or four more additional homicides. All the defendants are then brought to an untimely death by the deadly workmanship of the District Attorney, who thus obviates the necessity for evidence, makes a trial unnecessary and permits the entire case to be solved in exactly 28 minutes, thus leaving time for the commercial on the merits of a deodorant."¹ In reality, however, the prosecutor is primarily a lawyer who ordinarily enters into the case only after the culprit has been apprehended. The primary obligation to detect and suppress crime rests with the police authorities of the community.²

¹ McDonald, *Problems of a Prosecutor*, 24 N.Y.S.B. BULL. 221 (1952).

² See e.g., ILL. REV. STAT. c 125, §§17, 18 (1953) (Sheriff's duty) Cook County, Illinois serves as an example of a community of many police authorities; MUNICIPAL CODE OF CHICAGO, §§11-24 to 33 (1939) (Powers and Duties of Municipal Police Force). In addition, Chicago police have the duty to prevent, as well as to detect, violations of the gambling law. *Id.* at S 191-6 (1939). It appears that members of the Chicago Park District police force have even wider powers to apprehend violators. Park District Police are authorized to enforce both the Park District Code and the city code. CHICAGO PARK DISTRICT CODE 8-55 (1940). For a more extensive treatment of police

However, when these authorities fail to perform their duties, the obligation must be assumed by other public officials. As a practical matter, this duty often devolves upon the local prosecutor.³ The failure of the prosecuting attorney to assume this duty may result in continued corrupt and unlawful conditions in the community.⁴

The power to investigate is the prosecuting attorney's chief weapon against that crime which is tolerated by the police.⁵ However, state officials, lawyers, and laymen as well, often misunderstand the scope of the prosecutor's authority and the extent of his duty to conduct investigations.⁶

powers and duties, see, SMITH, *POLICE SYSTEMS IN THE UNITED STATES* 109 (2d. ed. 1949); WILSON, *POLICE ADMINISTRATION* 115 (1950). See also, Petersen, *Issues and Problems in Metropolitan Area Police Services*, 48 J. CRIM. L., C. & P.S. 127 (1957); I ORGANIZED CRIME AND LAW ENFORCEMENT 190 (1952).

³ Although throughout this paper the state prosecutor will be referred to as the prosecuting attorney or prosecutor, a variety of titles are used for his office in the various states, i.e., district attorney (New York), commonwealth's attorney (Kentucky), circuit attorney (Missouri), states attorney (Illinois), county prosecutor (New Jersey), county attorney (Mississippi), solicitor (Alabama), prosecutor (Montana), and prosecuting attorney (Michigan).

⁴ See 76 A. B. A. REP. 385, 401 (1951).

⁵ The American Bar Association's 1951 report maintained that the prosecuting attorney has wide powers to combat crime and that equipped with an adequate investigative staff and the technical ability, as well as the will to enforce the laws, he can do much to control crime in his community. *Id.* at 401.

⁶ See note 1, *supra*.

There are three principal types of investigations which the prosecutor might employ. First, he might initiate investigations prior to the arrest of an accused, although, as previously stated, this function is usually that of the local police. Second, he might investigate after arrest and indictment in order to gather additional evidence necessary for the prosecution of the case. Third, the prosecutor might investigate solely to determine whether the police are conscientiously performing their duties.

As to the second type there is apparently little question but that a prosecutor may investigate to secure evidence for the prosecution of an accused under indictment.⁷ This type of investigation is regarded as corollary to his duty to prosecute. However, there is disagreement among authorities as to whether the prosecuting attorney possesses general police powers allowing him to investigate for the purpose of prosecuting law violations, and as to the right of a prosecutor to investigate the police.⁸ To determine these issues respecting the investigative powers of the prosecutor requires an examination of the duties imposed upon him by his state constitution or legislature.

THE PROSECUTOR'S STATUTORY DUTY TO INVESTIGATE

Constitutional or statutory provisions in every state enumerate the duties of the prosecuting attorney. Although the language of these statutes require him to prosecute all defendants indicted of crime, they are silent as to his duty to investigate.⁹ However, even though the statutory language which creates the office and duties of the prosecuting attorney does not assign him any precise investigative duty, certain other statutes charge him with the investigation of particular

classes of law violations.¹⁰ For example, in some states the prosecutor is required to investigate such acts as arson,¹¹ racial discrimination,¹² or gambling.¹³ However, the prosecuting attorney frequently is not exclusively responsible for the enforcement of these provisions. Legislatures, in an effort to insure effective law enforcement have often made several public officials expressly responsible for the same law.¹⁴

Since the language of state constitutions and statutes generally neither prohibit nor require investigation, it is important to analyze judicial interpretations of these provisions in order to ascertain what, if any, investigatory duty the courts have imposed upon the prosecutor. Some courts have interpreted statutes which require the prosecuting attorney to prosecute as obliging him to investigate all criminal acts even prior to the ascertainment of a suspect.¹⁵ Other courts have refused to require the prosecutor to investigate where the local police are charged with that duty.¹⁶ These latter courts have reasoned that the prosecuting attorney is a lawyer, not a detective, and cannot be required to investigate generally unless expressly advised to do so by statute. There is,

¹⁰ Some of the statutory provisions are collected in DeLong & Baker, *The Prosecuting Attorney*, 24 J. CRIM. L. & C. 1025, 1050-55 (1935).

¹¹ N.D. REV. CODE 18-0109 (1943).

¹² ILL. REV. STAT. c. 38, 128 E (1951).

¹³ ALA. CODE tit. 14, 274 (1940).

¹⁴ For example, in Alabama the sheriff, constable, and prosecutor among other local officers are charged with the enforcement of state gambling provisions. ALA. CODE tit. 14 274 (1940).

¹⁵ In New Jersey, the prosecuting attorney is under a "statutory duty to investigate suspicious situations" and gather evidence especially when he receives information of a possible violation of the law. See *State v. Winne*, 12 N.J. 152, 174, 96 A.2d 63, 74 (1933); N.J. REV. STAT. c. 12A, 158-4-5 (1952). In New York, the prosecutor is "wholly responsible" for investigation and prosecution of all crimes and offenses, if occurring in his county. See *People v. Dorsey*, 29 N.Y.S. 2d 637, 644 (1941). In Kentucky, it is the duty of the prosecuting attorney "to institute investigations, make inquiry of his aids and assistants and make use of his detective and investigator." See *Wilbur v. Howard*, 70 F. Supp. 930, 935 (E.D. Ky. 1947); KY. REV. STAT. 69.110 (1953).

¹⁶ In Mississippi, although the prosecuting attorney is required to exercise diligence in prosecuting criminal offenses, he need not undertake personally to discover the circumstances of each offense. See *Adams v. State*, 202 Miss. 68, 74, 30 So.2d 593, 596 (1947); MISS. CODE ANN. c. 6, tit. 17 (1942).

In Illinois, the prosecuting attorney "is not liable for failures to perform any duty not expressly enjoined upon him by statute", and the statutes do not require him to investigate generally. See *Schreiner v. Courtney*, 380 Ill. 171, 175, 43 N.E.2d 982, 986 (1942); ILL. REV. STAT. c. 14, §5 (1955).

⁷ See, e.g., DeLong & Baker, *The Prosecuting Attorney*, 24 J. CRIM. L. & C. 1025, 1046 (1934); I ORGANIZED CRIME AND LAW ENFORCEMENT 246 (1952).

⁸ In regard to the scope of the police investigatory duty, see note 2, *supra*. Some authorities want the prosecuting attorney's office completely divorced from criminal investigation. See, e.g., HARRISON, POLICE ADMINISTRATION IN BOSTON 132 (1934). Other experts feel that the prosecutor should be the primary investigatory officer in the community. See e.g., WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 139 (1929). Professor Ploscowe asserts that the prosecuting attorney's function is to investigate as well as to prosecute. I ORGANIZED CRIME AND LAW ENFORCEMENT 262 (1952).

⁹ See, e.g., ILL. REV. STAT. c. 14, 5 (1951); MASS. ANN. LAWS. c. 12, 27 (1952); N.Y. CONST. art. 9 § 5 (1954); CAL. GOV. CODE 26500; OKLA. STAT. ANN. tit. 19, 183 (1956). See, also, notes 14, 15, and 16 *infra*.

therefore, considerable conflict in the judicial interpretations of these statutory provisions. At the same time, however, it is clear that although some courts indicate that the prosecutor cannot be *required* to investigate generally, there has been no judicial suggestion that he does not have the *authority* to do so.

THE JUDICIAL-EXECUTIVE DISTINCTION

In addition to the language and judicial interpretations of state statutes, the prosecutor's duty or power to investigate may depend upon whether he is regarded as an officer of either the executive or of the judicial branch of government. Some states, by judicial interpretation of constitutions or statutes, have classified the prosecutor as an officer of the court.¹⁷ As such, his primary duty is to see that justice is rendered.¹⁸ It has been argued that if the prosecutor were to take a biased position toward an individual prior to arrest or indictment, his action would be inconsistent with his role of an impartial judicial officer at the trial; and that the prosecutor's investigative work will personally involve him so deeply in the case that his prosecution might become vindictive in nature. However, states which view the prosecuting attorney as an executive officer regard him as obliged to take a more active role in upholding the laws of the state.¹⁹ Viewed thusly as an executive officer he may be said to possess broader investigative power than he would as a judicial officer. However, it is unlikely that even those courts which classify the prosecutor as a judicial officer would argue that he should not vigorously prosecute at the trial. Moreover, it is not likely that in cases where the

prosecutor does not investigate he will less vigorously advocate the state's case.

Even if the judicial-executive distinction were sound, there is evidence that this classification has little practical effect upon the investigative activities actually engaged in by the prosecutors. A recent survey revealed that those prosecuting attorneys who consider their office to be of a judicial character nevertheless may engage in considerable investigative work, while, conversely, those who view their office as a branch of the executive department may engage in little investigation.²⁰ Thus, there is apparently little correlation between the prosecutors' classification of their office as executive or judicial and the investigative procedure followed by various prosecuting attorneys.

THE PROSECUTOR AS A WITNESS

Apart from the judicial-executive distinction, some courts have discouraged investigation by the

²⁰ The Honorable John Gutknecht, former states attorney of Cook County, Illinois, recently mailed a questionnaire to one prosecutor's office in each of the states; he received replies from thirty-six. Two of the queries were: (1) Under which branch of government is your office classified? (2) To what extent does your office engage in investigatory work? The replies were both interesting and surprising. Of fifteen prosecuting attorneys who consider themselves to be judicial officers, three do general police investigative work, one does police work only in particular cases, eight investigate solely to keep a check on local law police and one failed to indicate their investigative practice. Seven of the prosecutors regard themselves as either independent of both branches of government, or a member of both. Two of these officers do general investigative work in all cases and two others make police-type investigations of particular types of crime. Three others investigate only as a means of policing local law enforcers. It is interesting to note that at least one prosecuting attorney who considers himself to be a member of the executive branch of government is classified as a quasi-judicial officer by the state court. The District Attorney of King's County, New York, feels that N.Y. CONST. art. 9 § 5 (1954), places him under the executive branch of government. However, in McDonald v. Goldstein, 79 N.Y.S.2d 690, 693 (1948), the court held the prosecuting attorney to be a quasi-judicial officer of the court. In King's County, a special Investigating Bureau, which functions on a twenty-four hour basis, every day of the year, is attached to the prosecutor's office. In addition to handling cases originating with the police, the investigation Bureau is called upon to investigate cases originating in the office or complaints of citizens and confidential investigations assigned by the district attorney. Statistics indicate the success this bureau has enjoyed in the King's County area. See DIST. ATTY. OF KING'S COUNTY ANN. REP., at 94-97 (1955). For other instances in which the prosecutor has employed his investigative powers to combat organized crime, see II ORGANIZED CRIME AND LAW ENFORCEMENT 10-12, 230-41 (1952).

¹⁷ See, e.g., State v. Martin County, 214 Ind. 152, 14 N.E.2d 910 (1938) (Prosecutor was charged with the administration of justice); State v. Wharfield, 41 Idaho, 14, 236 Pac. 862 (1925) (Prosecutor cannot perform executive functions). In cases the prosecutor was considered a judicial officer of the government.

See, also, Snyder's case, 301 Pa. 276, 152 Atl. 33 (1930) (Prosecutor subject to supervision of judiciary); People v. Davis, 52 Mich. 569, 18 N.W. 362 (1884) (Prosecutor cannot investigate prior to arrest). In these cases he was viewed as quasi-judicial by the state courts.

¹⁸ The American Bar Association Committee on Ethics appears to follow this view. Canon 5 declares that the "primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." See, also, Daru, *Code of Ethics and Principles for the Prosecution and Defense of Criminal Cases*, 6 ALA. LAW. 39 (1945).

¹⁹ See, e.g., State v. Winne, 12 N.J. 152, 96 A. 2d. 63 (1953), Wilbur v. Howard, 70 F. Supp. 930 (E.D.Ky. 1947). In these cases the prosecutor was viewed as an executive officer and given broader investigative authority.