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## Legal Methods for the Suppression of Organized Crime III--Circumventing the Corrupt Prosecutor

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prosecutor by attaching limitations upon the use of evidence which he might acquire. It has been suggested that active participation by the prosecutor in the apprehension of the accused may have an adverse effect upon both the weight and admissibility of evidence gathered during his investigations, regarding which the prosecutor is required to be a witness.<sup>21</sup> This is particularly true when the use of materials gathered by investigation require that he be a witness at the trial itself. The policy of some courts in refusing to permit the prosecuting attorney to prosecute and testify at the same trial is based upon a fear that the self interest of the prosecutor, as a witness, will unduly prejudice the jury against the accused.<sup>22</sup> It is considered probable that the prosecutor's testimony against the accused would be stronger and more effective than that of any defense witness in the eyes of the jury. By actively participating, therefore, in pre-indictment investigations, the prosecutor may risk his eligibility to try the case. However, if the circumstances of the case make his testimony essential, he can withdraw and allow other counsel to prosecute, since in many communities there is more than one attorney in the prosecutor's office.<sup>23</sup> Therefore, the risk of disqualification may not in certain cases deter the prosecuting attorney from investigating. In addition, in many metropolitan areas detectives and police officers attached to the prosecutor's office render it unnecessary for him to conduct investigations personally.<sup>24</sup>

Despite the absence of legislation or judicial authority requiring him to investigate, the prosecutor nevertheless probably has power to undertake any of the three possible types of investigation,<sup>25</sup> as an implied corollary to his duty to

prosecute. Since in most instances there is no legal prohibition against the prosecutor's authority to investigate, it is important to ascertain how the prosecuting attorney should investigate in order to effectively combat organized crime.

#### THE PROPER METHOD OF INVESTIGATION

The needs and duties of the rural prosecutor differ from those of the metropolitan official. For this reason a uniform investigative procedure would not be sufficiently flexible to satisfy the requisites of both.

*The Rural Prosecutor.* In the less populous county, the sheriff or the constable is supposed to be the chief law enforcement officer.<sup>26</sup> However, in some rural areas, where these officers are not trained in the technique of modern police investigation, the prosecutor may be the only public official qualified to conduct important investigations.<sup>27</sup> In such communities, therefore, the prosecutor, as a practical matter, must take a more active role in criminal investigation than the prosecutor in a larger community.<sup>28</sup> Although in rural counties organized crime is of lesser proportions than in metropolitan areas, criminal elements are quick to take advantage of lax or corruptible local officials.<sup>29</sup> Thus, it becomes the responsibility of the rural county prosecuting attorney to exercise vigilance both in insuring that the local sheriff or constable performs his job efficiently and in personally undertaking criminal investigations for which those officials are not qualified.

*The Urban Prosecutor.* In the more populous counties where police, sheriff, and coroner have adequate investigatory staffs, the prosecuting attorney should investigate only to insure that these officials act honestly. There are several considerations which render it inadvisable for the metropolitan prosecutor to engage in unlimited

<sup>21</sup> In *Adams v. State*, 202 Miss. 68, 30 So. 2d 593 (1947), the Mississippi Supreme Court held that, although it was lawful for the prosecuting attorney to accompany the sheriff during a raid on the premises of an alleged liquor license violator, if he chose to prosecute the case, he should not be allowed to testify over objection by the accused.

<sup>22</sup> In *May v. Commonwealth*, 285 S. W. 2d 160 (Ky. 1955), where the defendant was indicted for assaulting the prosecuting attorney, the latter was both prosecutor and the chief witness for the state at the defendant's trial. The court held that in order to remove the element of self-interest another attorney should have tried the action.

<sup>23</sup> In *Bennett v. Commonwealth*, 234 Ky. 333, 28 S.W. 2d 24 (1930), where the prosecuting attorney was held incompetent to testify as to violations he had observed during a police investigation, the court suggested that his testimony could be heard if he withdrew from prosecuting the case.

<sup>24</sup> See note 2, *supra*, and note 30, *infra*.

<sup>25</sup> See text at note 7, *supra*.

<sup>26</sup> See, e.g., SMITH, *POLICE SYSTEMS IN THE UNITED STATES*, 83-106 (2d. ed. 1949).

<sup>27</sup> See, e.g., I ORGANIZED CRIME AND LAW ENFORCEMENT 252 (1952).

<sup>28</sup> However, one might question whether the scientific methods which must be mastered for an effective homicide investigation, are equally as essential to detect such obvious violations as gambling and prostitution. If not, there seemingly would be no basis for concluding that the rural county prosecutor should have more investigative powers than the urban prosecuting attorney.

<sup>29</sup> See, e.g., Senate Special Committee To Investigate Organized Crime In Interstate Commerce, *Third Interim Report*, S. REP. No. 307 82d Cong., 1st Sess. 61-63 (1951), where there is a discussion of the problems of organized crime in a few of the smaller counties of Illinois.

investigation. First, the prosecuting attorney usually does not have an investigative staff of sufficient size to police the entire community.<sup>30</sup> Second, there is unnecessary expense and duplication of effort when three or four investigative agencies exercise overlapping jurisdictions.<sup>31</sup> Third, the lack of primary and centralized responsibility for criminal investigation may tend to promote a division of responsibility among the various law enforcement agencies, with a consequent avoidance of responsibility by all.<sup>32</sup> This situation often results in the investigative function not being adequately performed by any department. Therefore, the investigatory function of the urban prosecutor should be limited to surveillance of other law enforcement agencies.

When the metropolitan prosecutor receives information of the existence of criminal operations, such as gambling, he should inform police authorities, who have the primary responsibility to enforce the law.<sup>33</sup> If the police, after receiving such infor-

<sup>30</sup> In Cook County, Illinois, for instance, the investigative staff of the prosecuting attorney numbers well under one hundred; whereas, the combined staffs of the Chicago police department and Cook County Sheriff's and Coroner's offices total close to ten thousand trained men and women. THE CHICAGO MUNICIPAL YEAR BOOK OF THE INTERNATIONAL CITY MANAGERS' ASSOCIATION 408 (1956). See also, *State v. Winne*, 12 N.J. 152, 190, 96 A. 2d 63, 83 (1953) (Dissenting Opinion), where this problem was recognized by the court.

<sup>31</sup> See Petersen, *Issues and Problems in Metropolitan Area Police Services*, 48 J. CRIM. L., C. & P.S., 127 (1957); SMITH, *op. cit. supra*, note 25, at 332.

<sup>32</sup> "In metropolitan communities like Cook County, Illinois, Los Angeles County, California, or Bergen County, New Jersey, there is a congeries of independent local police forces covering the county. . . . There is no centralized direction or control and no centralized responsibility that a single uniform law-enforcement policy is applied over the entire geographic area of a county. The situation lends itself to 'buck passing' and evasion of responsibility which can only inure to the benefit of gangsters and racketeers." Senate Special Committee To Investigate Organized Crime in Interstate Commerce, *Third Interim Report*, S. REP. NO. 307, 82d Cong., 1st Sess. 183 (1951). The situation Senator Kefauver found in Reading, Pennsylvania, is an example of "buck passing" by the local authorities. In Reading, Pa., the prosecuting attorney told the Kefauver Committee that he thought gambling was the responsibility of the chief of police, who said he only acted on order from the mayor. Whereas, the Mayor said it was up to the clergy to rid the people of the urge to gamble. "Therefore, in Reading, with a \$5,000,000.00 annual take from gambling, the enforcement of the law is in the hands of God." Patterson, *The Scandal of our District Attorneys*, *This Week Magazine*, Jan. 23, 1952, p. 5.

<sup>33</sup> It is not suggested that the prosecuting attorney should personally seek out dishonest public officials until he has received information indicating a need for investigation.

mation, refuse to investigate or repeatedly make unlawful raids, thus indicating collusion with the gambling operators, the prosecutor may be able to use this misconduct as evidence to convict the responsible police officials.<sup>34</sup> However, if there is reason to suspect that the police make a lawful raid but only after warning the criminals that a raid is imminent, the prosecutor should investigate in order to establish proof of this misconduct.<sup>35</sup> In order to procure evidence for prosecution in this type of case, the prosecuting attorney must resort to effective investigative techniques, such as stationing an undercover agent in the gambling establishment which the police, through sham raids made after a prior warning, have permitted to remain in operation.<sup>36</sup> Although this evidence could be used against the operators of the unlawful enterprise, the prosecutor's investigation should have as its primary goal the conviction of the responsible local official who has failed to perform his job properly. The conviction of but one police official would perhaps serve as an effective deterrent to further laxity or corruptness on the part of other law enforcers. Such a result would be more effective in combatting organized crime than any attempted duplication of local police work.<sup>37</sup>

<sup>34</sup> In order for a raid to be lawful it must be conducted with a valid search warrant so that any materials gathered during such raid may be used as evidence against the offenders. See, e.g., Comment, *Admissibility of Illegally Seized Evidence*, 7 SYRACUSE L. REV. 319 (1956).

<sup>35</sup> The problem of convicting the local police officer for wilful neglect of duty and incompetence is dealt with in a succeeding section of this symposium.

<sup>36</sup> In order to trap the police officer who is warning the gambling house before the raid, the prosecutor should once again inform the officer of the gambling operation. The prosecutor should then record the precise time at which he informed the police agency of the violation. At the same time the undercover agent stationed in the gambling house could note the exact time when the proprietor orders it cleared and the gambling equipment removed. Evidence obtained by these means would enable the prosecutor to prove the existence of a conspiracy between the particular police officer and the criminal offenders.

<sup>37</sup> A related problem concerns the role which the civic crime commissions, that is, private groups organized to check the police, should play in aiding the prosecutor to convict law enforcement officers linked with organized crime. Most crime commissions refuse to investigate to gather evidence for prosecution. These organizations keep the activities of syndicate crime on file and make regular reports on instances of criminal violations to the prosecutor and police authorities. However, the commissions insist that it is the function of the police to gather evidence. Also, by revealing the identity of their undercover agents in order to aid in the prosecution of criminal offenders, these agents would lose all future value as investigators for the commission—thus, entailing a great loss of man power and money

## THE GRAND JURY AS AN INVESTIGATIVE BODY

The policy of limited investigation should not prohibit the prosecuting attorney from investigating in a general manner when directed to do so by the grand jury. The grand jury, through its common law and statutory powers, has broad powers to investigate criminal activities.<sup>38</sup> State courts generally have held that the prosecutor must co-operate with the grand jury in its investigations.<sup>39</sup> For this reason it has been argued that perhaps the prosecutor should only investigate in conjunction with the grand jury. However, it is usually difficult to convene the grand jury, and once convened it is limited in tenure.<sup>40</sup> As a result, grand jury investigations of organized crime have been rare.<sup>41</sup> Thus, the prosecutor, acting solely as an investigator under the auspices of the grand jury, cannot be expected to contribute a great deal to the suppression of organized crime. For this reason, the prosecutor should not rely upon an order from the grand jury before commencing investigation, but rather should take immediate action against those officials responsible for the unlawful situation.

## CONCLUSION

The prosecutor, through exercise of the investigative powers of his office, should effectively check

which go into training of a competent agent. For a thorough discussion of the operations of a civic crime commission, see Petersen, *How To Form A Citizens Crime Commission*, 17 FED. PROB. 9 (1953).

<sup>38</sup> For a discussion of the grand jury's investigatory powers, see Comments, 8 BAYLOR L. REV. 194 (1956); 37 MINN. L. REV. 586 (1953).

<sup>39</sup> See, e.g., *State v. Platt*, 193 La. 928, 192 So. 659 (1940) where the prosecutor was obliged by the court to co-operate with the grand jury.

<sup>40</sup> See note 38, *supra*. Perhaps, this infrequent use may be attributed to the prosecutor's failure to request that it be convened.

<sup>41</sup> See note 38, *supra*.

the growth and continuance of organized criminal activities. However, to make the most advantageous use of his office, the prosecuting attorney should investigate organized crime only to supplement or keep check on those agencies which are primarily responsible for law enforcement and should not duplicate efforts of local police authorities, or work in competition with them.

In metropolitan areas, there are strong pressures which may motivate the prosecuting attorney to pursue a policy of promiscuous investigation. These pressures may take the form of a crusading, circulation-conscious press, which has taken a vehement stand against unchecked organized crime. Since the prosecutor's office by tradition serves as an initial step toward more ambitious political undertakings, it is understandable that the prosecuting attorney should desire to maintain the best possible relations with the metropolitan newspapers and the public. The characteristic publicity of the office may assure the prosecutor of a bright political future. Thus, for some prosecuting attorneys the desire for the publicity of sensational investigation may overshadow any inclination to pursue a wiser policy of limited and more fruitful investigation.

Perhaps the solution to the urban prosecutor's dilemma lies in the enactment of a statute requiring him to investigate, but limiting his duties to the procurement of evidence for prosecution of corrupt or lax law enforcers, and to the gathering of evidence after indictment for the purpose of prosecuting accused criminals. This statute should also provide for the prosecutor to investigate if ordered to do so by the grand jury or the attorney general.<sup>42</sup>

<sup>42</sup> The problem of the local prosecuting attorney's relationship with the state attorney general is examined in a succeeding section of this symposium. In certain situations the attorney general should have the authority to avail himself of the investigative facilities and services of the local prosecutor.

## LEGAL METHODS FOR THE SUPPRESSION OF ORGANIZED CRIME

### III. Circumventing the Corrupt Prosecutor

LOUIS SUNDERLAND

The elimination of organized crime is basically a problem of the enforcement of state laws. While the governor is charged with executing the law and the attorney general is the state's chief legal officer,

the prosecution of state law violations is primarily conducted by local prosecuting attorneys. When the local prosecutor fails to perform his duty other methods of law enforcement must be found. Two

of the more frequently suggested methods are prosecution by the state attorney general or by a special prosecutor appointed by a court.

#### THE ATTORNEY GENERALS' POWER TO PROSECUTE

The attorney generals' authority to conduct criminal prosecutions varies among the states. In two states he is the sole prosecutor.<sup>1</sup> In contrast, the attorney general of Texas appears to have no criminal jurisdiction other than to represent the state on appeal.<sup>2</sup> Between these two extremes fall many degrees of power to prosecute.<sup>3</sup> However, the infrequent exercise of the attorney generals' power to participate in criminal actions has created some doubt as to the existence or adequacy of that power.

A determination of the existence and extent of the attorney generals' power to prosecute requires an examination of the sources of that power. These sources vary among the states. For instance, one state will find such authority in the common law, another will establish it by statute and a third by a constitutional provision.

#### Common Law Powers

The office of attorney general evolved in England during the sixteenth and seventeenth centuries.<sup>4</sup> Prior to this time the Crown was represented by a number of attorneys with limited authority as to the actions which they could initiate and the

courts in which they could appear. The attorney general gradually supplanted these attorneys until he became the chief legal officer of the Crown. Although the exact extent of his criminal jurisdiction is somewhat obscure, he undoubtedly had broad power to initiate criminal prosecutions.<sup>5</sup>

An early American case assumed that the state attorney general possessed the broad powers of the English attorney general at common law.<sup>6</sup> Subsequently, a New York court listed the powers and duties of the state attorney general, basing its conclusions primarily upon the description in Blackstone's Commentaries of the powers of the English attorney general.<sup>7</sup> This list has been accepted as authoritative by most of those courts which have held that the common law powers of the English attorney general exist in their state attorney general.<sup>8</sup> Although this list has been relied upon as authority for the position that the attorney general has the power to prosecute *all* criminal cases, the language used by the New York court suggested that the common law power had some undefined limitations.<sup>9</sup>

Of all the states, Pennsylvania has recognized the most extensive common law powers in the attorney general to conduct criminal prosecutions. That official, who is appointed by the governor, has been held to have the discretionary power to supersede the prosecuting attorney, who is an elected official. The power to supersede enables the attorney general to replace the local prosecutor and conduct the proceedings from the investigation stage through the trial. However, it has been held that the Pennsylvania attorney general may not act arbitrarily, since the exercise of his discretion is subject to judicial review.<sup>10</sup>

<sup>1</sup> Only in Delaware and Rhode Island are prosecutions carried on by someone other than locally elected prosecuting attorneys. In these two states the attorney general conducts all prosecutions through his appointed deputies. DEL. CODE ANN. tit. 29, §2501-08 (1953); R.I. GEN. LAWS c. 10, §2 (1938).

<sup>2</sup> See TEX. CONST. art. V, §21; TEX. CODE CRIM. PROC. ANN. arts. 25, 26 (1954); TEX. REV. CIV. STAT. ANN. art. 1811 (1949). These provisions authorize the district attorneys, county attorneys, and state prosecuting attorneys to represent the state in all criminal cases before the lower courts. See also *State ex rel. Downs v. Harney*, 164 S.W.2d 55 (Tex. Civ. App. 1942), which denies all common law powers to the attorney general. In Sheppard, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1, 14 (1955), the attorney general of Texas said "... that the common law authority of the Attorney General if such exists, has been severely restricted by statute."

<sup>3</sup> These variations will be considered in detail later. See note 24 *infra* for states granting authority to supervise the local prosecutor; note 27 *infra* for states authorizing supersession; note 30 *infra* for states granting concurrent power; note 34 *infra* for states allowing the attorney general to advise and assist the local prosecutor.

<sup>4</sup> 6 HOLDSWORTH, HISTORY OF ENGLISH LAW 458-81 (1924); Bellot, *The Origin of the Attorney General*, 25 L.Q. REV. 400 (1909); HOLDSWORTH, *The Early History of the Solicitor General*, 13 ILL. L. REV. 602 (1919).

<sup>5</sup> See, e.g., 4 BLACKSTONE, COMMENTARIES 308-10, where the attorney general was said to possess the authority to prosecute upon the complaint of a citizen for "gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind..." See also DeLong, *Powers and Duties of the State Attorney General in Criminal Prosecutions*, 25 J. CRIM. L. & CRIMINOLOGY, 358, 364 (1934).

<sup>6</sup> *Parker v. May*, 59 Mass. (5 Cush.) 336 (1850), where it was assumed without citation that the attorney general could exercise the common law powers of his English predecessor.

<sup>7</sup> *People v. Miner*, 2 Lans. 396 (N.Y. Sup. Ct. Gen. T. 1868). This was a civil action attempted under the authority of statute but since the court found the statutes did not apply they looked to the attorney general's common law powers.

<sup>8</sup> See note 11 *infra*.

<sup>9</sup> The criminal power was said to be, "by information, to bring certain classes of persons accused of crimes and misdemeanors to trial." *Id.* at 398. (Emphasis added.)

<sup>10</sup> *Appeal of Margiotti*, 365 Pa. 330, 75 A.2d 465

Attorney generals in several states have been held to have nearly as broad common law powers to conduct criminal prosecutions.<sup>11</sup> In addition, a majority of states have held that some common law powers and duties have accrued to the present office.<sup>12</sup> While these decisions have involved powers of a civil rather than of a criminal nature, they do not preclude the power to conduct criminal prose-

cutions. Usually, they have indicated that the attorney general possesses all common law powers except those removed by statute.

When the attorney general's powers and duties are defined as "those prescribed by law," the courts have construed the word "law" to include the common law. By adopting this construction, courts incorporate the common law powers and duties of the attorney general into the general statutory or constitutional provision establishing the modern office.<sup>13</sup>

With the exception of Illinois, those states which recognize the common law powers indicate that these powers can be limited by statute.<sup>14</sup> The Illinois Supreme Court, however, has held that, while the legislature may charge the attorney general with new powers and duties, it cannot strip him of any of the common law powers and duties incident to the office.<sup>15</sup> The court reasoned that since the common law powers and duties of the attorney general were, by implication, incorporated into that office through a provision of the state constitution, such powers and duties can be divested only by constitutional amendment. The Illinois attorney general, therefore, appears to have broad power to prosecute criminal cases. However, such power has been used sparingly.<sup>16</sup> Furthermore, the language of a recent case has cast some doubt upon the existence of the attorney general's criminal jurisdiction.<sup>17</sup> In an attempt to

(1950). The attorney general superseded the prosecutor in an investigation of alleged criminal acts of public officials in Pittsburg. He was allowed to exercise complete control of the case in the investigation stage, in proceedings before the grand jury, and the trials. See Sheppard, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1, 16 (1955), where the attorney general of Texas said the above case "... extended the common law authority of the Attorney General as far as has been done to date." See also *Commonwealth ex rel. Miner v. Margiotti*, 325 Pa. 17, 188 Atl. 524 (1936), for a discussion of the historic powers of the attorney general. The listing of common law powers found in *People v. Miner*, 2 Lans. 396 (N.Y. Sup. Ct. Gen. T. 1868) is cited in this case as authority for the Pennsylvania attorney general's criminal jurisdiction.

<sup>11</sup> See, e.g., *State ex rel. Williams v. Karston*, 208 Ark. 703, 187 S.W.2d 327 (1945) (injunction to restrain criminal nuisance); *State v. Finch*, 128 Kan. 665, 280 Pac. 910 (1929) (full charge of prosecution when present); *Commonwealth v. Kozlowsky*, 238 Mass. 279, 131 N.E. 207 (1921) (conduct and manage criminal prosecutions); *People v. Rich*, 237 Mich. 481, 212 N.W. 105 (1927) (power equivalent to prosecutor); *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907) (maintain all proceedings necessary to enforce laws); *Dunn Construction Co. v. Craig*, 191 Miss. 682, 2 So. 2d 166 (1941) (common law power not confined to enforcement of criminal laws); *State v. McFeeley*, 136 N.J.L. 102, 54 A.2d 797 (1947) (representative of the state in prosecutions, as in England); *State v. White*, 21 N.D. 444, 131 N.W. 261 (1911) (file criminal information).

<sup>12</sup> See, e.g., *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So. 2d 280 (1950) (all common law powers except as modified by statute); *Pierce v. Superior Court*, 1 Cal. 2d 759, 37 P.2d 460 (1934) (equitable action to cancel fraudulent registrations); *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941) (all common law powers unless restricted by statute); *State ex rel. Landis v. S.H. Kress & Co.*, 115 Fla. 189, 155 So. 823 (1934) (file quo warranto information); *Howard v. Cook*, 59 Idaho 391, 83 P.2d 208 (1938) (action to quiet title); *Hunt v. Chicago Horse and Dummy Ry. Co.*, 121 Ill. 638, 13 N.E. 176 (1887) (enjoin railroad's use of street); *Repass v. Commonwealth ex rel. Attorney General*, 131 Ky. 807, 115 S.W. 1131 (1909) (enjoin public nuisance); *In re Maine Central R.R.*, 134 Me. 217, 183 Atl. 844 (1936) (protect interests of public); *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877 (1921) (defend judge in libel action); *State ex rel. McKittrick v. Missouri Public Service Comm'n*, 352 Mo. 29, 175 S.W.2d 857 (1943) (represent interest of state); *State ex rel. Ford v. Young*, 54 Mont. 401, 170 Pac. 947 (1918) (enjoin public nuisance); *In re Equalization of Assessment of Natural Gas Pipe Lines*, 123 Neb. 259, 242 N.W. 609 (1932) (to invoke jurisdiction of court to review board's order); *State ex rel. Fowler v. Moore*, 46 Nev. 65, 207 Pac. 75 (1922)

(all powers at common law); *Fletcher v. Merrimack County*, 71 N.H. 96, 51 Atl. 271 (1901) (power to draw complaint not limited to statute); *Gibson v. Kay*, 68 Ore. 589, 137 Pac. 864 (1914) (common law powers exist in either office of attorney general or prosecutor); *State v. Ehrlich*, 65 W. Va. 700, 64 S.E. 935 (1909) (control of civil litigation).

<sup>13</sup> See, e.g., *Fergus v. Russell*, 270 Ill. 304, 110 N.E.2d 130 (1915); *State ex rel. Ford v. Young*, 54 Mont. 410, 170 Pac. 947 (1918).

<sup>14</sup> See note 12 *supra*.

<sup>15</sup> *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915). This was a civil action in which the court held the legislature could take away statutory powers previously granted the attorney general but could not remove any of the powers and duties he possessed by virtue of the common law. See also *People ex rel. Board of Trustees of University of Illinois v. Barrett*, 382 Ill. 321, 46 N.E.2d 951 (1943); *People ex rel. Barrett v. Finnegan*, 378 Ill. 387 38 N.E.2d 715 (1941); *Saxby v. Sonnemann*, 318 Ill. 600, 149 N.E. 526 (1925).

<sup>16</sup> See, e.g., *People ex rel. Elliott v. Covelli*, 415 Ill. 79 112 N.E.2d 156 (1953) (common law right to *nolle prosequi*); *People v. Flynn*, 375 Ill. 366, 31 N.E.2d 591 (1941) (indictment obtained by attorney general against mayor for not curbing vice quashed for lack of specific designation of offenses); *People v. Looney*, 314 Ill. 150, 145 N.E. 365 (1924) (appear before grand jury); Note, 1949 U. ILL. L. FORUM 507.

<sup>17</sup> *People v. Flynn*, 375 Ill. 366, 31 N.E.2d 591

clarify this matter, the state legislature recently considered and rejected a bill authorizing the attorney general, at the request of the governor, to conduct criminal prosecutions in any county.<sup>18</sup>

Despite the many cases and treatises recognizing some common law powers in the modern attorney general, a substantial minority of states deny their attorney general all common law powers.<sup>19</sup> These powers are usually rejected on the grounds that the state official possesses only delegated rather than implied powers. Thus, the official holds only those powers specifically granted to him by the state constitution or by statutes. In addition, Indiana has held that since the office was created by statute, its powers can only be granted by statute.<sup>20</sup> The New Mexico Supreme Court, adopting a different approach, has rejected the common law powers on the grounds that the office of attorney general of New Mexico was created prior to that state's adoption of the common law.<sup>21</sup> Since the common law was not in effect when the office was established, the court reasoned that its creators could not have intended that the common law powers and duties be implied as an incident to that office.

It has been argued in some states that common law powers do not reside in the attorney general at the present time because they are the product of a different political system.<sup>22</sup> Under the English system the attorney general appointed the local prosecutors, while, in contrast, the present day local prosecutor is generally an elected official. Since the methods of selecting these officials differ, it has been argued that their powers and duties should also differ.

All states, whether rejecting or recognizing the existence of common law powers, have adopted statutes granting certain specific powers and duties to the attorney general. In some states the statutory powers have been interpreted as supplanting common law powers, while in others they have been held to supplement the existing common law powers.<sup>23</sup>

### Statutory Provisions

*Supervision statutes.* One of the powers assigned to the attorney general by statute is that of supervising local prosecutors.<sup>24</sup> Such statutes usually contain general language authorizing the attorney general to direct and control the prosecutor in all matters pertaining to his office. In addition to this general supervision, the attorney general is often specifically authorized by these statutes to intervene and direct the prosecutor's actions in a criminal proceeding. Attorney generals have conducted criminal prosecutions under the authority of such statutes;<sup>25</sup> however, the powers to intervene

(1941). In this case, an indictment obtained by the attorney general was quashed. Although quashed upon other grounds, the court said that the statutes did not authorize the attorney general to take exclusive charge of prosecution. The court thus implied that the attorney general's authority was based upon statute rather than the common law.

<sup>18</sup> ILL. REV. STAT. c. 14, §4(4) (1955) authorizes the attorney general to attend any criminal trial "and assist in the prosecution" when the interest of the state so requires. Senate Bill #108, 69th G.A. (1955) would have replaced the above quoted words with, "and if the Governor requests the attorney general in writing the attorney general shall, in his discretion, have the right to conduct the prosecution including, but not limited to, any preliminary proceedings such as the presentation of evidence to or examination of witnesses before any Grand Jury, regular or special, of any county, with or without the acquiescence, assistance or presence of the state's attorney."

<sup>19</sup> See, e.g., *Shute v. Frohmler*, 53 Ariz. 483, 90 P.2d 998 (1939); *Atchison, T. & S.F.R.R. v. People ex rel. Attorney General*, 5 Colo. 60 (1879); *Walker v. Georgia Ry. & Power Co.*, 146 Ga. 655, 92 S.E. 57 (1917); *Julian v. State*, 122 Ind. 68, 23 N.E. 690 (1890); *Cosson v. Bradshaw*, 160 Iowa 296, 141 N.W. 1062 (1913); *State v. Davidson*, 33 N.M. 664, 275 Pac. 373 (1929); *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (County Ct. 1941); *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982 (1908), *cert. denied*, 215 U.S. 592 (1909); *State ex rel. Downs v. Harney*, 164 S.W.2d 55 (Tex. Civ. App. 1942); *State ex rel. Winston v. Seattle Gas and Electric Co.*, 28 Wash. 488, 68 P. 946 (1902); *State v. Snyder*, 172 Wis. 415, 179 N.W. 579 (1920).

<sup>20</sup> *Julian v. State*, 122 Ind. 68, 23 N.E. 691 (1890).

<sup>21</sup> *State v. Davidson*, 33 N.M. 664, 275 Pac. 373 (1929).

<sup>22</sup> See, e.g., *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915) (dissenting opinion); *Appeal of Margiotti*, 365 Pa. 330, 75 A.2d 465 (1950) (dissenting opinion).

<sup>23</sup> See note 19 *supra* for states that have supplanted the common law powers by statute. See notes 11 and 12 *supra* for states that consider the statutory provisions as supplemental to the common law powers.

<sup>24</sup> See ARIZ. REV. STAT. §41-193(4) (West 1956), which is a typical supervising provision. The attorney general shall "exercise supervisory powers over county attorneys of the several counties in matters pertaining to that office and require reports relating to the public business thereof." See, e.g., ALA. CODE tit. 55, §236 (1940); CAL. ANN. CODES (GOVERNMENT) §12550 (West 1954); COLO. STAT. ANN. c. 3, §49 (1935); FLA. STAT. ANN. §16.01, 16.09 (1941); IDAHO CODE ANN. §67-1401 (5) (1948); IOWA CODE ANN. §13.2 (7) (1949); LA. REV. STAT. §15.23 (1950); ME. REV. STAT. c. 20, §1 (1954); MD. ANN. CODE GEN. LAWS art. 32A, §2 (1951); MICH. STAT. ANN. §3.183 (1952); MISS. CODE ANN. §3845 (1942); MONT. REV. CODE ANN. §82-401 (5) (1947); NEB. REV. STAT. §84-205 (9) (1943); NEV. COMP. LAWS §7316 (b) (1929); N.H. STAT. ANN. §7:34 (1955); N.D. REV. CODE §54-1203 (1943); S.C. CODE §1-237 (1952); S.D. CODE §55.1501 (1939); UTAH CODE ANN. §67-5-1 (5) (1953); VA. CODE §2-90 (1950); VT. REV. STAT. §455 (1947); WASH. REV. CODE §43.10.090 (1951);

<sup>25</sup> See, e.g., *Mundy v. McDonald*, 216 Mich. 444,

or initiate actions are exercisable at the discretion of the attorney general.

The majority of "supervising" statutes thus appear to afford the attorney general adequate powers to direct or conduct prosecutions if the prosecutor should be reluctant to act. However, some statutes which authorize the attorney general to supervise the state's general legal affairs specifically exempt the prosecutor from such supervision.<sup>26</sup> Such a statute is valueless as a basis for the attorney general's circumvention of a corrupt prosecutor.

*Supersession statutes.* Another frequently delegated statutory power is that of supersession of the prosecutor by the attorney general upon the request of the governor or the legislature.<sup>27</sup> Under the language of some statutes, even though requested, he can not be required to supersede. Moreover, he is sometimes authorized to exercise this supersession power at his discretion in the absence of any request. The language of these statutes indicates that the attorney general has the authority to replace the prosecutor in any

action, whether at the investigatory or at the trial stage.<sup>28</sup> This power of supersession is combined with the supervising power in a number of states.<sup>29</sup> However, the supersession power alone apparently affords the attorney general sufficient authority to prosecute if the local prosecutor refuses. Perhaps the essential difference between the "supervisory" and "supersession" statutes is that the former are primarily concerned with the prevention of misconduct by the prosecutor while the latter are concerned with correcting the results of such misconduct. However, the threat of supersession, as well as the supervisory power, may serve to prevent misconduct.

*Concurrent jurisdiction.* While under the common law and under some of the "supervising" statutes the attorney general apparently has concurrent jurisdiction—that is, the same powers as the local prosecutor—a few states expressly grant him concurrent jurisdiction by statute.<sup>30</sup> In contrast to most supervision and supersession statutes, the attorney general, under this type of statute apparently can not replace the prosecutor. However, he can initiate an action independently of the local prosecutor or appear jointly in the same proceeding with the local prosecutor.

A basic fault of concurrent jurisdiction is that it divides the responsibility for enforcing the law.<sup>31</sup> For example, when both the attorney general and the prosecutor are actively participating in a case and both possess equal authority, there is a question as to which one is in charge of the prosecution.<sup>32</sup> An even more unfortunate situation is

185 N.W. 877 (1921); *State ex rel. Nolan v. District Court*, 22 Mont. 25, 55 Pac. 916 (1899); *State ex rel. Miller v. District Court*, 19 N.D. 819, 124 N.W. 417 (1910).

<sup>26</sup> See, e.g., CONN. GEN. STAT., §212 (1949) which provides, "the attorney general shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction."

<sup>27</sup> See MICH. STAT. ANN. §3.181 (1952), which is a typical supersession provision. "The attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." See, e.g., ALA. CODE tit. 55, §235 (1940) (discretion); GA. CONST. §2-4502 (governor); IOWA CODE ANN. §13.2(2) (1949) (governor, legislature, discretion); KAN. GEN. STAT. §75-702 (1949) (governor or legislature); MINN. STAT. §8:01 (1949) (governor); NEB. REV. STAT. §84-205(9) (1943) (governor or legislature); NEV. COMP. LAWS §7316(c) (1929) (governor or discretion); N.H. REV. STAT. ANN. §7:9 (1955) (governor); N.J. REV. STAT. §52:17A-5 (1955) (governor); N.M. STAT. ANN. §4-3-3 (1953) (governor or discretion); N.Y. EXECUTIVE LAW §63(2) (governor); N.C. GEN. STAT. §114-2(1) (1952) (governor or legislature); OHIO REV. CODE §109.02 (1953) (governor); OKLA. STAT. ANN. tit. 74, §18b(c) (1956) (governor or legislature); ORE. REV. STAT. §§180.070, 180.080 (1955) (governor); S.D. CODE §55.1501 (1939) (governor or legislature); WASH. REV. CODE §43.10.090 (1951) (governor); W. VA. CODE ANN. §260 (1955) (governor); WYO. COMP. STAT. ANN. §18-910 (1945) (governor); *But see* *Kemp v. Stanley*, 204 La. 110, 15 So. 2d 1 (1943), where a statute authorizing supersession was held unconstitutional because it prohibited judicial review of the attorney general's discretion.

<sup>28</sup> The attorney general is sometimes given the power to supersede for the purpose of enforcing a particular statute. See, e.g., MO. ANN. STAT. §311.770 (Vernon 1949), *State v. Kennedy*, 343 Mo. 789, 123 S.W.2d 118 (1938); WIS. STAT. §176.90(2) (1955). These statutes authorize the attorney general to supersede the prosecutor to enforce certain provisions of the statutes pertaining to liquor control.

<sup>29</sup> Alabama, Iowa, Kansas, Michigan, Nebraska, New Hampshire, South Dakota, Washington.

<sup>30</sup> See NEB. REV. STAT. §84-204 (1943) which is a typical concurrent jurisdiction provision. "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." See, e.g., ME. REV. STAT. c. 20, §9 (1954); N.D. REV. CODE §§54-1203, 1204 (1943); ORE. REV. STAT. §180.240 (1955); S.D. CODE §34.0403 (1939); VT. REV. STAT. §463 (1947).

<sup>31</sup> See *State v. Ehrlick*, 65 W. Va. 700, 64 S.W. 935 (1909), where the doctrine of concurrent powers was rejected because "no one would be more responsible than the other for the nonenforcement of the laws."

<sup>32</sup> See *People ex rel. Castle v. Daniels*, 8 Ill. 2d 43, 132 N.E.2d 507 (1956), where there appeared to be some disagreement between the attorney general and the prosecutor over the entry of a *nolle prosequi*.



created when both officers initiate and prosecute the same offense simultaneously in different courts.<sup>33</sup> Any such division of responsibility allows both officers to excuse their failure by blaming the other.

*Assist and advise statutes.* Perhaps the least significant of all statutory powers granted to the attorney general are those requiring or allowing him to assist, consult or advise the local prosecutor.<sup>34</sup> This assistance may take the form of actual attendance at the trial or the preparation of an advisory opinion. Usually these statutes provide for this assistance at the request of the prosecuting attorney. However, some of these statutes also authorize the attorney general to request the assistance of the prosecutor. They appear to have been designed to encourage co-operation and mutual assistance between the two officers. Since these statutes fail to give the attorney general much actual authority over the prosecutor, they are of little value when the prosecutor fails to perform.

*Department of Justice.* A recent trend in legislation pertaining to the powers and duties of the attorney general has been the creation of "Departments of Justice" or "Departments of Law."<sup>35</sup>

<sup>33</sup> See *Dupree v. State*, 14 Okla. Crim. 369, 171 Pac. 489 (1918), where the prosecutor conducted an action in the superior court and the attorney general in the district court. The case held that since the prosecutor's proceedings had resulted in a verdict of not guilty a plea of former jeopardy was a valid defense against the attorney general's action.

<sup>34</sup> See ILL. REV. STAT. c. 14, §4(4) (1955), which is a typical assist and advise statute. "The duties of the attorney general shall be . . . to consult with and advise the several state's attorneys in matters relating to the duties of their office; and when, in his judgement, the interest of the people of the state required it, he shall attend the trial of any party accused of crime, and assist in the prosecution." See, e.g., ARK. STAT. ANN. §12-702 (1947); KAN. GEN. STAT. §75-704 (1949); ME. REV. STAT. c. 20, §9 (1954); MASS. ANN. LAWS. c. 12, §6, 6A (1952); MICH. STAT. ANN. §3.183 (1952); MO. ANN. STAT. §27-060 (Vernon 1949); NEB. REV. STAT. §84-205 (2) (1943); N.M. STAT. ANN. §4-3-2 (i) (1953); N.C. GEN. STAT. §114-2 (1952); N.D. REV. CODE §54-1201 (4) (1943); OHIO REV. CODE §109.14 (1953); OKLA. STAT. ANN. tit. 74, §18b (d) (1956); ORE. REV. STAT. §180.060 (4) (1955); S.D. CODE §5364 (1939); UTAH CODE ANN. §67-5-1 (7) (1953); VT. REV. STAT. §455 (1947); WASH. REV. CODE §43.10.030 (1951); W. VA. CODE ANN. §259 (1955); WIS. STAT. §14.53 (3) (1955); WYO. COMP. STAT. ANN. §18-905 (1945).

<sup>35</sup> See, e.g., ARIZ. REV. STAT. §§41-193-195 (West 1956); CAL. ANN. CODES (GOVERNMENT) §15000-15250 (1954); GA. CODE ANN. §40-1612 to -1628 (Supp. 1955); IOWA CODE ANN. §§13.1-9 (1949); MD. ANN. CODE GEN. LAWS art. 32A (1951); NEB. REV. STAT. §§84-201 to -210 (1943); N.J. REV. STAT.

The purpose of such reorganizations of the attorney generals' offices is to centralize to some extent the law enforcement machinery of the state. Legislation to this effect usually does nothing more than change the name of the department without altering the duties and powers of the attorney general. Under this system the attorney general usually has the same authority as that granted by the "supervision" and "supersession" statutes.

This department concept stems from either the United States Department of Justice or the English system of prosecution.<sup>36</sup> However, under the departmental system, in contrast to the federal or English systems, the local prosecutors remain elected officials.<sup>37</sup> The attorney general's control over a locally elected prosecutor will be substantially less than that over a prosecutor appointed by him. For this reason, statutes creating departments of justice or departments of law have generally resulted in little significant improvement in state law enforcement. But there is evidence that attorneys general operating under such statutes have been able to increase coordination among local law enforcement officials.<sup>38</sup>

#### *Failure of Existing Powers*

The local prosecutor has the primary duty to prosecute all violations of the law within his jurisdiction, even when the laws are looked upon with disfavor by local citizens.<sup>39</sup> Since he some-

§§52.17A-1 to -20 (1937); N.C. GEN. STAT. §§114.1-18 (1952); ORE. REV. STAT. §§180.210-240 (1955); PA. STAT. ANN. tit. 71, §§291-300 (1942); R.I. GEN. LAWS c. 5 §§26, 27 (1938).

<sup>36</sup> See, e.g., EASBY-SMITH, *THE DEPARTMENT OF JUSTICE* (1904); HOWARD, *CRIMINAL JUSTICE IN ENGLAND* (1931); Brownell, *As a Newcomer Sees The Department of Justice*, 8 RECORD 219 (1953); Burger, *The Office of the United States Attorney General*, 2 LA. B. J. 124 (1954).

<sup>37</sup> Rhode Island is an exception, see note 1 *supra*.

<sup>38</sup> See 1949 *Proceedings of the Conference of The National Association of Attorneys General* 25-31, where the limits and benefits of the California Department of Justice are reported by their attorney general. The main benefit of the departmental system is here described as the mutual understanding of their problems obtained by local officials who attend meetings called by the attorney general. See also WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 121 (1929), where such departments are criticized as having only the most general supervisory powers. Stark, *Politics and the State Department of Justice* 30 J. CRIM. L. & CRIMINOLOGY 182 (1939), describing the short lived South Dakota Department and discussing some of the reasons that led to its disbandment.

<sup>39</sup> See, *State ex rel. Johnston v. Foster*, 32 Kan. 14, 43 Pac. 534, 538, *aff'd*, 112 U.S. 201 (1884): "If a law

times shrinks from this primary duty, it is not surprising to find the attorney general avoiding what are at most vague secondary responsibilities in regard to criminal prosecution. Moreover, the attorney general is subject to pressures in addition to those which may make the prosecutor reluctant to act. These pressures are particularly effective since the attorney general's powers are exercisable at his discretion. Of course, if he exercises his discretion by participating in a criminal prosecution, his actions are subject to court review. On the other hand, the permissive language of the statutes may prevent the courts from reviewing the attorney general's failure to exercise his powers. Therefore, even when he has adequate power to circumvent the local prosecutor, he can not be required to exercise this power.

Perhaps the foremost reason for the attorney general's reluctance to prosecute is that he is unaware of conditions in the local prosecutor's office. In order to effectively exercise his supervision and supersession powers he must know something about the particular activities of the prosecutor. A number of states have adopted a reporting system in an effort to keep the attorney general informed of the prosecutor's actions.<sup>40</sup> However, these reports only inform the attorney general of completed actions, such as the number of arrests, indictments and convictions. They do not inform the attorney general of conditions in the community caused by the prosecutor's inaction. In addition, such reports probably come too late to enable the attorney general to prevent inadequate prosecution or to intervene before a case is terminated. Another method of appraising the local situation would require the attorney

general to periodically inspect the operation of the prosecutor's office. Such inspection would be aimed at evaluating the effect of the prosecutor's activities upon local law enforcement. However, the attorneys general frequently lack sufficient personnel and funds to effectively make such investigations.<sup>41</sup>

The fact that both the attorney general and the prosecutor are elected officials may be an additional reason for the reluctance of the attorney general to exercise his authority. The attorney general could control a prosecutor whom he appointed much more effectively than one who has been elected by the local community. Furthermore, the attorney general's control over the local prosecutor may be hampered by political considerations. Frequently the prosecutor is a powerful political figure in his local community and the state administration is hesitant to embarrass him or to incur his wrath. On the other hand, if the prosecutor is of a different political party, there are some indications that the attorney general may use his powers as a political weapon.<sup>42</sup>

There may also be personal motives and ambitions which influence the attorney general's exercise of his powers. While one can imagine instances where the publicity attendant upon intervention in a highly publicized criminal case would benefit an official's career, an attorney general's political future is probably better served by confining his activities to civil law. Certainly, a politically conscious attorney general might be reluctant to become involved in an investigation of the relationship between organized crime and local political officials. Furthermore, as long as his office remains civil in nature he can avoid responsibility for the performance of law enforcement officers.<sup>43</sup> It is probably factors such as these which have caused at least one attorney general to deny the existence of any criminal authority in his office.<sup>44</sup>

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enacted by the legislature has not the support of public sentiment, this may be, under some circumstances, a reason for its amendment or repeal, but it is not a good defense for a county attorney, upon whose lips is fresh the oath of office, for refusing to attempt its enforcement."

<sup>40</sup> See, e.g., ARIZ. REV. STAT. §41-193 (4) (West 1956) (on demand); ARK. STAT. ANN. §12-705 (1947) (biennial); CAL. CONST. art. 5, §21, CAL. ANN. CODES (GOVERNMENT) §12550 (1954) (on demand); FLA. STAT. ANN. §16.09 (1941) (quarterly); IDAHO CODE ANN. §67-1401 (5) (1948) (on demand); IOWA CODE ANN. §13.2 (7) (1949) (on demand); LA. REV. STAT. §§15:24, 15:576 (1950) (annual and monthly); MICH. STAT. ANN. §3.184 (1952) (probably annual); MINN. STAT. §388.07 (1949) (annual); MONT. REV. CODE ANN. §82-401 (5) (1947) (on demand); NEV. COMP. LAWS §7316 (b) (1929) (on demand); N.H. STAT. ANN. §7:38 (1955) (annual); TEX. CODE CRIM. PROC. art. 47 (1954) (on demand); UTAH CODE ANN. §67-5-1 (5) (1953) (on demand); W. VA. CODE ANN. §260 (1955) (on demand).

<sup>41</sup> See, e.g., 1949 *Proceedings of the Conference of the National Association of Attorney General* 28; DeLong, *Powers and Duties of the State Attorney General in Criminal Prosecutions*, 25 J. CRIM. L. & CRIMINOLOGY 358, 397 (1934).

<sup>42</sup> See, e.g., Appeal of Margiotti, 365 Pa. 330, 75 A.2d 465 (1950) (dissenting opinion), 99 U. PA. L. REV. 826; DeLong, *supra* note 41, at 386.

<sup>43</sup> See 1949 *Proceedings of the Conference of the National Association of Attorneys General* 25, for a discussion of the increased responsibilities under a department of justice system.

<sup>44</sup> 2 AMERICAN BAR ASSOCIATION, ORGANIZED CRIME AND LAW ENFORCEMENT 105 (1953), where the attorney general of Connecticut is quoted.

In addition to the various reasons why the attorney general is reluctant to exercise his powers of criminal prosecution, there may often be considerable resistance to such action by local citizens as well as local officials. A strong tradition of home rule exists in most communities. Such communities may view with suspicion any attempt by the state government to increase its powers at the expense of local officials. Furthermore, in many states the larger metropolitan areas by tradition and custom have become areas of local law enforcement exclusively. These factors, coupled with the hostility of citizens to the policy and purpose of certain laws designed to control gambling and the sale of liquor, make it difficult for the attorney general to effectively enforce the law at the local level.

### Summary

There has been a trend in recent years towards greater centralization of the machinery of law enforcement and prosecution.<sup>45</sup> Suggestions for centralization often include abolishing the elective office of prosecutor and authorizing the attorney general to appoint the local prosecutors. Although there are advantages to centralized responsibility, such a system would not necessarily insure honest prosecution. State law enforcement officials have shown themselves to be no more immune to corruption than local officials.<sup>46</sup> Furthermore, the appointed prosecutor would very likely lack the initiative and responsibility of the locally elected official.<sup>47</sup> The most recent plan for centralization has come from the Commission on Organized Crime of the American Bar Association. After a detailed study of the problems involved, a model act was formulated which was designed to place supervision by the state of local law enforcement and prosecution on a sound statutory basis.<sup>48</sup> This model act would give the attorney general adequate power to supervise and supersede the prose-

cuting attorney. The adoption of such an act would be appropriate in those states which have failed, as yet, to grant their attorneys general adequate authority. However, such legislation alone is not a satisfactory solution to the problem of the prosecuting attorney's failure to perform. The attorney general must have not only the power to conduct criminal prosecutions but must be required to exercise this power in appropriate instances. He should be *required* to exercise his authority whenever misconduct in a particular prosecutor's office becomes evident. When charged with a specific duty the attorney general would be more likely to act than when merely possessing a discretionary power. Furthermore, in some situations a writ of mandamus might be obtained to compel action.<sup>49</sup>

### APPOINTMENT OF A SPECIAL PROSECUTOR

An alternative to prosecution by the attorney general when the local prosecutor refuses to act, is the appointment of a special prosecutor. It is generally recognized that courts possess an inherent power to appoint a special prosecutor from the attorneys who appear before the court.<sup>50</sup> This power is based upon the rationale that it is necessary to prevent a failure to prosecute in those cases where the regular prosecutor fails to appear in court for that purpose. However, such power appears to have been exercised only in those instances where the prosecutor is merely absent, or when the office is vacant, rather than when the prosecutor fails or refuses to perform. However, since the effect of a prosecutor's failure or refusal to

<sup>45</sup> See, e.g., WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 119-24 (1929); NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON PROSECUTION*, No. 4, at 13 (1931); Warren, *A State Department of Justice*, 21 A.B.A.J. 495 (1935); *American Bar Association Recommendations* 25 J. CRIM. L. & CRIMINOLOGY 465 (1934).

<sup>46</sup> See, e.g., DeLong, *supra* note 41, at 399; Senate Special Committee To Investigate Organized Crime In Interstate Commerce, *Third Interim Report*, S. REP. NO. 307, 82d Cong., 1st Sess. 40, 84-90, 106-08 (1951).

<sup>47</sup> See AMERICAN LAW STUDENT ASSOCIATION, *LAWYERS' PROBLEMS OF CONSCIENCE* 66, 70 (1953).

<sup>48</sup> 2 AMERICAN BAR ASSOCIATION, *ORGANIZED CRIME AND LAW ENFORCEMENT* 93-133 (1953).

<sup>49</sup> The courts have indicated a reluctance to issue a mandamus compelling the prosecutor to perform his duties. No doubt this reluctance is caused by the difficulties in effectively enforcing such an order. The same problem would be found when a mandamus was issued to the attorney general. However, such writs have been issued to compel the prosecutor to act. See, e.g., *Board of Supervisors v. Simpson*, 36 Cal. 671, 227 P.2d 14 (1951) (to compel the prosecutor to abate a nuisance); *Commonwealth ex rel. Attorney General v. Hipple*, 69 Pa.9 (1881) (to compel the prosecutor to conduct criminal prosecutions); *State ex rel. Brown v. Warnock*, 12 Wash. 2d 478, 122 P.2d 472 (1942) (to compel the prosecutor to conduct quo warranto proceedings).

<sup>50</sup> See e.g., *Taylor v. State*, 49 Fla. 69, 38 So. 380 (1905); *Wilson v. County of Marshall*, 257 Ill. App. 220 (1930); *Dukes v. State*, 11 Ind. 556 (1858); *Tesh v. Commonwealth*, 34 Ky. (4 Dana) 522 (1836); *State v. Jones*, 306 Mo. 437, 268 S.W. 83 (1924); *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750 (1887); *State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 175 N.E. 865 (1931); *Nance v. State*, 41 Okla. Crim. 379, 273 Pac. 369 (1929); *State v. Ganthier*, 113 Ore. 297, 231 Pac. 141 (1924).