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THE PROSECUTING ATTORNEY

PROVISIONS OF LAW ORGANIZING THE OFFICE

EARL H. DE LONG and NEWMAN F. BAKER*

I.

A comparative analysis of the enactments of forty-eight legislatures on any one subject is quite certain to be difficult both to write and to read. It is true that the general functions of the prosecutor are much the same from one state to another and to that extent the provisions of law affecting the prosecuting attorney lend themselves to generalization. However, the adaptations and variants which each legislature injects into its own handiwork sometimes make it hazardous to generalize and more difficult to present the material in readable form.

To the problem of presentation it is necessary to add some statement concerning the material upon which this study is based. It relies exclusively upon statutory and constitutional provisions relating to the prosecutor—a fact which will indicate to most readers why the writers do not guarantee the absolute accuracy of every statement made. The compiled statutes and the session laws of all the states have been searched diligently and thoroughly, but indices to such volumes often are most inadequate. Statements of fact concerning any particular state rely, in every case, upon the positive pronouncement or the clear implication of the statutory provisions which have been found. Most of these statements will be true, but some may be out-of-date because such provisions may easily be amended or repealed by some indirect reference, by implication, or by a rider in a statute on a wholly different subject. Occasionally, the modification may have been effected by the courts.

On considering statutory material of this type, it is probable that a detailed study of interpretation by the courts would yield little of value, for statements involving age, amount of salary, and number of assistants can be positively stated by even the most inept draftsman. Where some particular item has been the subject of a note in the usual unannotated codes, the writers have taken cognizance of that

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note, but aside from that, this survey involves no case study except as plainly indicated by the context.

After offering such discouragement to the reader, it is expedient, and possibly even obligatory, for the writers to justify this discussion. In spite of the tremendous importance of the prosecutor in our governmental structure, comparatively little has been written about him. In a few states, particularly those in which crime surveys have been made, studies of the office have been published. The few publications dealing generally with the office in the United States have merely summarized the facts of the crime surveys for states in which they have been made and, for the majority of states remaining, have generalized from those facts or from the general impressions of the authors. As subsequent discussion of the fee system will show, generalization from such impressions is not always accurate. The statutory picture which will develop from this study should be a dependable summary for the whole nation of legislation concerning the prosecutor. If any mistakes appear, and that is probably inevitable, they will occur in reference to specific states and, by the same laws which rule the field of statistics, they cannot occur often enough to disturb the descriptions of policies generally adopted throughout the country. Observations arising from personal impressions and investigations tend to depict the prosecuting attorney as he actually functions and not as legislatures and constitutional conventions contemplated. This practical portrait is important and will not, by any means, be neglected in subsequent studies but in addition to seeing the office as it is, we must also view it as it was intended by its creators.

The writers believe that this is a reliable presentation of the provisions of law generally in force and of the important modifications and exceptions. Where some statement includes an enumeration of states, it is not claimed that there may not be one or two others which could be noted. Such a declaration means that definite provisions of the kind involved have been found in the states listed and that every reasonable effort has been put forth to make it exhaustive. The writers have not, at any time, intended that this shall be a table of all the legislation on the prosecutor in every state.

II.

If this or any other discussion of the office of prosecuting attorney should demonstrate the need for change in the present characteristics of the office, it would be a long and tedious process to accomplish that change. The permanence of the prosecutor, as he exists

at present, is substantially buttressed by constitutional provisions in most of the forty-eight states, and revision of such constitutional provisions comes slowly. It is usually a county office and this fact explains, perhaps, why the prosecutor is so often a constitutional officer. The county is the antique among our local governments, and constitutions tend to establish its officers more rigidly than those of any other local unit. It is also true that constitutions quite often set up the judicial system of the state, and possibly the constitutional dignity of the prosecuting attorney is attributable to the relation of his office to the courts. Again, it may be both reasons, for the county is often the unit of government upon which the machinery of justice is erected. In any case, the prosecuting attorney in many states, even in several where he is not a county officer, is so embalmed in the fundamental law that his office cannot be shaken sufficiently free to meet modern demands upon government.

The constitutions of thirty-eight of these commonwealths definitely provide for a prosecuting attorney. The name given to the office varies, of course, from one state to another, as we shall see subsequently, but the duties are similar whatever the name may be. All but three of these thirty-eight constitutions rigidly require that such an official be chosen, some creating the office directly, others containing only a mandate to the legislature to take any action necessary to bring the prosecuting attorney into being. Of the three remaining states in which the office is so created, Oklahoma seems to leave its legislature entirely free to alter it as it wishes.¹ In Nevada the legislature is left free to "diminish, consolidate, or abolish" the office of district attorney, but if the district attorney is not abolished, the constitution provides that he be elected.² The constitution of Arizona creates a county attorney, requires that he be elected, and sets the term of office, but the requirements of this section are "subject to change by law."³ The Kentucky constitution is one of the thirty-five which require that the office of prosecuting attorney be established but the requirement applies to the county attorney. It creates in addition the office of commonwealth's attorney, fixes the term and requires the election of both officials, but also provides that the legislature may abolish the commonwealth's attorney.⁴

Of the thirty-five states the constitutions of thirty-one require, in addition, that the office be filled by popular election, and of this num-

¹Constitution of Oklahoma, art. XVII, sec. 2.

²Constitution of Nevada, art. IV, sec. 32.

³Constitution of Arizona, art. XII, sec. 3.

⁴Constitution of Kentucky, secs. 97, 108.

ber twenty-six set the term and five do not. In Florida it is provided that the state attorney be appointed by the governor, with the advice and consent of the senate, and his term is set at four years.⁵ In New Jersey it is similarly provided that the prosecutor be appointed, but his term is five years.⁶ California and Mississippi leave the method of choice to be determined by the legislature; in California the constitution does not fix the term of the office,⁷ and in Mississippi it is set at four years.⁸

In Connecticut, Delaware, Kansas, Maine, Minnesota, Missouri, Nebraska, Ohio, Rhode Island, and Wyoming, the constitutions do not create an office of prosecuting attorney. In Maine there is an incidental reference to the county attorney in a list of incompatible offices,⁹ and in Wyoming the county attorney is mentioned only incidentally in a section which limits the salaries of the office according to the assessed valuation in the respective counties.¹⁰ In five of the remaining states of this group, the constitutions do not contain any provision which can be considered to be a direct or indirect reference to a prosecuting officer. In Kansas, however, it is provided that all county and township officers shall be elected for a two year period but the county attorney is not specifically mentioned,¹¹ and in Nebraska and Minnesota the constitution also fails to mention the county attorney but requires the legislature to "provide for the election of all necessary county officers."¹² If the legislatures of these three states should decree that a prosecutor be chosen for some governmental unit other than the county, these sections could not be invoked.

Thirty of the forty-eight constitutions definitely establish the governmental unit for which the prosecutor must be chosen, usually the county, but in some states it is the judicial circuit or district. Twelve constitutions have no provision which even remotely affects this question, and several others touch it only indirectly. The incidental references in the constitutions of Maine and Wyoming have been sufficiently mentioned. In Oregon the legislature is required to provide for the election of a district attorney in districts composed of "one or more counties."¹³ The Arizona provision for a county attorney has

⁵Constitution of Florida, art. V, sec. 15.

⁶Constitution of New Jersey, art. VII, sec. II, par. 3.

⁷Constitution of California, art. XI, sec. 5.

⁸Constitution of Mississippi, art. VI, sec. 174.

⁹Constitution of Maine, art. IX, sec. 2.

¹⁰Constitution of Wyoming, art. XIV, sec. 3.

¹¹Constitution of Kansas, art. IV, sec. 1.

¹²Constitution of Minnesota, art. XI, sec. 4; Constitution of Nebraska, art. IX, sec. 4.

¹³Constitution of Oregon, art. VII, sec. 17.

already been cited but the section seems to allow the legislature to make any change it wishes. The Nebraska and Minnesota provisions previously referred to do not seem to require that the prosecutor be a county officer.

Although only the Kentucky constitution establishes two prosecutors for the same territory, several other states have considered that constitutional creation of one does not prevent the legislature from establishing an additional office with similar duties. The Utah constitution, for example, requires the election of a county attorney,¹⁴ but the legislature has also provided for the election of a district attorney in each judicial district.¹⁵ In Florida, where the constitution creates a state attorney for each judicial circuit,¹⁶ the statutes require, in addition, both a county solicitor and a prosecuting attorney in many counties.¹⁷ A similar situation exists in Texas, Mississippi, and Georgia, where the constitutions establish one level of prosecution and the legislatures an additional one.

This sketch is sufficient to indicate that the office of prosecuting attorney is a constitutional office in most states and, moreover, that many constitutions fix the term of the office, require it to be filled by election, and define the governmental unit for which the prosecutor must be chosen. A few specify, in addition, the qualifications of the office. The constitution of Maryland even prescribes the salaries of deputies and assistants of the state's attorney in Baltimore but this is only a temporary provision subject to change by the legislature.¹⁸ Constitutional provisions such as those which have been mentioned are unnecessarily detailed and restrictive. There is probably no situation which requires that the prosecuting attorney be made a constitutional officer yet, as we have seen, only a handful of states have recognized this fact in drafting their constitutions.

III.

It does not necessarily follow that the industry of past constitutional conventions has left nothing for legislatures to consider in respect to the prosecuting attorney. In fact, the statutory material relating to that officer is most voluminous and utterly unorganized. The legislative process has functioned no differently with respect to him than upon all other subjects. Fragmentary statutes have been

¹⁴Constitution of Utah, art. VIII, sec. 10.

¹⁵Compiled Laws of Utah (1917), sec. 5758.

¹⁶Constitution of Florida, art. V, sec. 15.

¹⁷Compiled General Laws of Florida (1927), secs. 8279, 8247.

¹⁸Constitution of Maryland, art. V, sec. 9.

enacted from time to time in response to specific needs, and these bits of the law must be gathered together from all the out-of-the-way corners of the statute books. By no stretch of the imagination can it be said that the statutes of any particular state give a complete picture of the prosecuting attorney in that state. Needs which have been met by statute in one state have been covered by court decisions in another, and matters covered by statute in the second have been filled in by the courts in the first. It is not the purpose of this discussion to present an exhaustive summary of the statutes relating to the prosecuting attorney in each of the forty-eight states. It is intended, rather, to note and discuss statutory and constitutional provisions which are in force quite generally throughout the country and to call attention to interesting or important exceptions to general practice. The duties of the office will be treated in subsequent articles of this series, and for the present the analysis will be restricted to those provisions of law which, in the absence of a more accurate term, may be called administrative: that is, statutes which name the office, define the governmental unit of which it is a part, fix the method of selection, the term, or the compensation of the prosecutor, which specify the qualifications for the office, the subordinates and assistants allowed, or the restrictions with which it is surrounded.

In twenty-seven states prosecution of offenses against the laws of the state is placed in the hands of one prosecuting attorney chosen for each county in the state. This official is known variously as county attorney (Arizona, Iowa, Kansas, Maine, Minnesota, Montana, Nebraska, and Oklahoma), as district attorney (California, Nevada, New York, Oregon, Pennsylvania, and Wisconsin), as state's attorney (Illinois, North Dakota, South Dakota, and Vermont), as prosecuting attorney (Idaho, Michigan, Ohio, Washington, and West Virginia), as county and prosecuting attorney (Wyoming), as county solicitor (New Hampshire), as prosecutor (New Jersey), and as deputy attorney-general (Delaware). Maryland, Missouri, and Virginia probably should be included in this list for in all three the county is really the primary area for prosecution. In Maryland each county and the city of Baltimore, which alone constitutes a county, elects a state's attorney.¹⁹ In Missouri each county elects a prosecuting attorney and St. Louis constitutes a county, but in St. Louis, the prosecuting attorney prosecutes misdemeanors only, and the legislature has created a circuit attorney for St. Louis to prosecute felon-

¹⁹*Ibid.*

ies.²⁰ A commonwealth's attorney is elected for each county in Virginia and for each city having a separate corporation or circuit court.²¹

Seven states choose their prosecuting attorney by judicial circuits or districts and provide for only the one official. He is called the circuit solicitor in Alabama, the prosecuting attorney in Arkansas and Indiana, and the district attorney in Colorado, Louisiana, and New Mexico. In Tennessee the constitution and statutes refer to the office of district attorney but the state appropriation acts seem to call it district attorney-general.

In another group of seven states, one prosecuting attorney is selected for the county and another for each judicial district or circuit. Texas and Utah each elect a county attorney and a district attorney; South Carolina elects a county solicitor and a solicitor; Mississippi, a county prosecuting attorney and a district attorney; Kentucky, a county attorney and a commonwealth's attorney. In Georgia a solicitor is appointed for those counties in which the grand jury so requests, and a solicitor-general is elected in each circuit. In Florida a state attorney is appointed by the governor for each judicial circuit, but a prosecuting attorney is elected in each county to prosecute misdemeanor cases in the county courts.²² However, this limited criminal jurisdiction is given to the county court only in those counties which do not have a criminal court of record.²³ Such courts, in counties in which they have been established, have criminal jurisdiction in all but capital cases, and prosecutions before them are conducted by the county solicitor who is appointed by the court.²⁴ The Florida statutes seem to provide for the election but leave no duties for the prosecuting attorney in counties where such courts have been created.

If any general distinction may be drawn between the functions of these different levels of prosecuting officials, it is that the district or circuit prosecutor acts in the district or circuit court, which in most states is the court of general criminal jurisdiction, while the county prosecutors prosecute in the county or municipal courts which usually have only a limited criminal jurisdiction.

The Texas constitution definitely requires the election of a county attorney "for counties in which there is not a resident crim-

²⁰Revised Statutes of Missouri (1929), secs. 11309, 11281-2.

²¹Constitution of Virginia, secs. 112-119.

²²Compiled General Laws of Florida (1927), sec. 8279.

²³*Ibid.*, sec. 8278.

²⁴*Ibid.*, secs. 8226, 8247.

inal district attorney," and refers only incidentally to district attorneys, seeming to assume rather than require their existence.²⁵ It appears from the statutes that some counties may constitute a criminal district, and in such counties a criminal district attorney, and not a county attorney, is elected.²⁶ In other counties, there may be several judicial districts and it appears that in the past it has been the practice to elect a county attorney for such a county and also a district attorney for each judicial district, but in 1927 the legislature provided that in such counties the county attorney should be the only prosecuting official chosen.²⁷ In the more sparsely settled parts of the state, one judicial district may embrace several counties, in which event both county and district attorneys seem to be elected. When such a conflict of jurisdiction occurs, it is made the duty of the district attorney to handle all criminal cases in the district courts and of the county attorney to prosecute all criminal cases in courts of his county below the grade of district court.²⁸

Connecticut provides for a prosecutor for each court in the lower levels of its judicial structure. Thus, the judges of the superior court appoint a state's attorney,²⁹ the court of common pleas appoints a prosecuting attorney,³⁰ and the city, town, and borough courts each seem to appoint their own prosecuting attorneys.³¹

In Massachusetts the district attorney and in North Carolina the solicitor are each elected by districts specially established by the legislature for the election of the prosecutor.³²

The attorney-general of Rhode Island is the officer charged with responsibility for prosecutions throughout the entire state and there is no local prosecutor.³³ It is possible that Delaware should have been classed with Rhode Island rather than with the twenty-seven states having only a county prosecuting attorney. This question arises because in that state the attorney-general appoints a deputy in each county and that deputy is the prosecuting attorney for his

²⁵Constitution of Texas, art. V, sec. 21.

²⁶Revised Civil Statutes of Texas (1925), art. 329.

²⁷Laws of Texas (1927), ch. 151, pp. 222-3.

²⁸Texas Code of Criminal Procedure (1925), arts. 25-6.

²⁹General Statutes of Connecticut (1930), sec. 5365.

³⁰*Ibid.*, sec. 6413.

³¹At least this is the implication of section 5366. See also Walter M. Pickett, "The Office of Prosecutor in Connecticut," 17 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 348 (November, 1926).

³²Massachusetts Acts and Resolves of 1922, ch. 459; North Carolina Constitution, art. IV, sec. 23, as amended in 1931 (subject to ratification by the people).

³³General Laws of Rhode Island (1923), sec. 295.

county.³⁴ However, the county is the geographical unit which defines his jurisdiction and perhaps the first classification was the better.

The people of the United States have traditionally feared concentration of great power in the hands of any one person, and it is surprising that the power of the prosecuting attorney has been left as intact as it is today. Any diffusion must necessarily have been accomplished by a functional decentralization. For that reason, it is interesting to observe that only in two states do the writers find statutes showing any disposition toward "special-purpose" prosecutors. In Oklahoma game wardens have full power to prosecute violations of fish and game laws if the county attorney neglects or refuses to do so,³⁵ and in Connecticut the state board of education may employ "prosecuting agents" to inquire into and prosecute for violations of the law relating to the attendance of children at school or to the employment of children in "mechanical, mercantile, or manufacturing establishments." In the lower courts of Connecticut these agents appear to have full power, but in prosecutions in the superior court they appear to be somewhat under the direction of the state's attorney.³⁶

It may be that this consideration of the name of the office and of the governmental unit which it serves has yielded little of interest or value. It has, however, showed somewhat statistically that the county is the most common unit for the selection of the prosecuting attorney although it is probable that this is neither greatly significant nor a revelation. The fact is important in that the county is not a flexible unit of government; its boundaries are not changed as population shifts. Therefore the selection of a prosecutor for each county without regard to differences in population seems to have little logical basis. The amount of work for a prosecuting attorney certainly varies roughly in proportion to the population of his jurisdiction. Should not population, then, rather than area define that jurisdiction?

³⁴Revised Statutes of Delaware (1915), ch. 17, sec. 539.

³⁵Compiled Statutes of Oklahoma (1921), sec. 6539.

³⁶General Statutes of Connecticut (1930), sec. 828. A provision somewhat related to these Oklahoma and Connecticut statutes appears in Oregon where the governor may appoint special prosecuting attorneys to enforce the prohibition laws if the regularly elected official fails. (Oregon Laws, 1920, sec. 2224.) "In North Dakota an act authorizing the appointment of enforcement commissioners, who should have all the powers of state's attorneys in the enforcement of a prohibition law, was held unconstitutional (*Ex parte Corliss*, 16 N. D. 470, 1907), on the ground that such powers are reserved to officers elected by local vote." (Quoted from W. F. Dodd, *State Government*, p. 425.)

IV.

It is almost the universal practice throughout the country to elect the prosecutor and in at least thirty-one states election is definitely required by the constitution. In all but five states every prosecuting official is elected. One of the exceptions is Connecticut where state's attorneys and prosecuting attorneys are appointed by the courts in which they prosecute,³⁷ and in Delaware the attorney-general appoints the county attorney for each county.³⁸ The state attorney in Florida is appointed by the governor with the advice and consent of the senate,³⁹ the prosecuting attorney is elected by the people of the counties,⁴⁰ and the county solicitor, where he exists, is appointed by the criminal court of record.⁴¹ In accordance with the constitutional requirement, the governor of New Jersey, with the advice and consent of the senate, appoints a prosecutor of the pleas in each county of the state for a term of five years.⁴²

In twenty of the states the prosecuting attorney is chosen for a term of only two years and in twenty others for four years. New York is the only one which provides for a three year term. New Jersey presents the only five year term, Louisiana, the only one of six years, and Tennessee, the only eight year tenure. In Georgia the county solicitor, where he exists, is appointed by the governor, with the advice and consent for the senate, for two years, while the solicitor of each circuit is elected for four years. In Kentucky the county attorney is elected for four years and the commonwealth's attorney for six. Rhode Island, in which the attorney-general is the prosecutor, has been included in the number of states providing for two year terms, and in Delaware the term of the attorney-general is four years but the term of the county attorneys whom he appoints is determined by the attorney-general himself.

In Connecticut, where the courts appoint the prosecutor, the state's attorney is chosen for two years but the prosecuting attorney holds office from appointment to the expiration of the term of the common pleas judge who appoints him, which means a maximum term of four years.⁴³

South Dakota is one of those states in which the prosecutor is elected for two years, as required by its constitution, but that docu-

³⁷See references in notes 29-31.

³⁸Revised Statutes of Delaware (1915), ch. 17, sec. 539.

³⁹Constitution of Florida, art. V, sec. 15.

⁴⁰Compiled General Laws of Florida (1927), sec. 8279.

⁴¹*Ibid.*, sec. 8217.

⁴²Constitution of New Jersey, art. VII, sec. II, par. 3.

⁴³General Statutes of Connecticut (1930), secs. 5365, 6413.

ment also contains the additional provision that no person shall hold the office more than four years in succession.⁴⁴ In the state of Washington the constitution leaves the term to be established by statute⁴⁵ but provides that no person shall hold the office for more than two successive terms.⁴⁶

The qualifications for the office of prosecuting attorney actually prescribed in the constitutions or statutes differ greatly from one state to another, but in twenty-four it is definitely specified that the prosecutor must be licensed to practice law in the state in which he holds office. In five others—Colorado, Illinois, Michigan, North Dakota, and Wisconsin—the word *attorney* in constitutional provisions and the nature of the duties of the office have been construed to include the requirement that the incumbent be a licensed attorney.⁴⁷ It has been held in California and Kansas that, in the absence of statutory provision so requiring, membership in the bar is not a qualification for the office of prosecutor, but since those decisions the legislatures in both states have embodied the requirement in statutes, and both are among the twenty-four states mentioned. In Minnesota the court has reached a similar conclusion,⁴⁸ but the legislature does not seem to have acted on the matter. In Alabama and New Mexico it is not specifically required that the prosecutor be a member of the bar but he must be "learned in the law."⁴⁹

In the sixteen states which remain to be accounted for, both the statutes and the courts seem to be silent on the matter, but if the question should be raised, the statement of the supreme court of Illinois in *People v. Munson*⁵⁰ probably forecasts the conclusion in any such case. It was said in that opinion that the duties of the state's attorney are such that he must be an attorney to perform them and that election to the office does not automatically grant him the privileges of an attorney at law.

In only four states have provisions been found making a minimum number of years of practice a prerequisite for the office of prosecutor. In Georgia the solicitor-general is required by statute to have three years of practice behind him before he can qualify

⁴⁴Constitution of South Dakota, art. IX, sec. 5.

⁴⁵Constitution of Washington, art. XI, sec. 5.

⁴⁶*Ibid.*, art. XI, sec. 7.

⁴⁷See cases cited at 18 *Corpus Juris* 1299; Harno. "State's Attorney not Licensed to Practice Law," 21 *Illinois Law Review* 273-9 (1926); "Admission to Practice Law as a Prerequisite," 10 *Minnesota Law Review* 620-1 (1926).

⁴⁸*Ibid.*

⁴⁹Constitution of Alabama, sec. 167; Constitution of New Mexico, art. VI, sec. 24.

⁵⁰*People v. Munson*, 319 Ill. 596, 150 N. E. 280 (1926).

for the office.⁵¹ The constitution of Louisiana provides that the district attorney shall have practiced law in the state for at least three years before election to the office.⁵² In Kentucky a person must have four years experience as a licensed attorney to be eligible for the office of commonwealth's attorney and two years if he seeks the office of county attorney.⁵³ The requirement in Pennsylvania is one year and six months.⁵⁴ The *Missouri Crime Survey* directed much criticism at the inexperience of prosecuting attorneys in that state.⁵⁵ The study of the constitutions and statutes does not indicate, of course, whether the possibility is actually the fact but it does show that in practically all the states there is nothing in the law to prevent the office of prosecutor from being only a first step for a newly admitted attorney.

The laws of many states require no qualifications beyond that of the license to practice law but, of course, that requirement in itself usually includes items which may be specifically mentioned in statutes of other states, i. e., state and federal citizenship, residence in the state, and a minimum age of twenty-one years. In Alabama, Colorado, Georgia, and South Dakota, the candidate must be at least twenty-five years of age, and in Kentucky twenty-four years. In a few states it is also required that the prosecutor shall have been a resident of the state for a certain number of years. In Georgia and New Mexico this period is three years, in Kentucky two, and in Tennessee five.

Inasmuch as the prosecutor is always a state, district, or county officer, the general provisions governing election to public office almost always apply to him. The most common of these makes it necessary for him to be a qualified elector or at least a resident of the electoral area for which he is chosen. The laws of Virginia permit an exception to this restriction by allowing election as commonwealth attorney of a non-resident or of a person who has resided in the county less than the required year if no lawyer meeting the requirements offers himself for the position.⁵⁶ It is also generally provided throughout the country that no person who has been convicted of a felony is eligible to hold such an office.

Several of the states have statutory or constitutional provisions to prevent the prosecuting attorney from holding other offices at the

⁵¹Park's Annotated Code of Georgia (1914), sec. 4924.

⁵²Constitution of Louisiana, art. VII, sec. 59.

⁵³Constitution of Kentucky, sec. 100.

⁵⁴Pennsylvania Laws of 1929, p. 1313.

⁵⁵Missouri Crime Survey, pp. 131-2.

⁵⁶Code of Virginia (1919), sec. 2703.

same time. To illustrate, in Idaho, the prosecuting attorney may not hold any other state or county office during his term,⁵⁷ and the constitution of Louisiana provides that "two offices of trust or profit" are not to be held at the same time.⁵⁸ The laws of Michigan specifically make the prosecuting attorney ineligible to be county treasurer.⁵⁹ It is not necessary to dwell further on provisions of this nature for it is probable that in most states the prosecuting attorney would be held ineligible to hold other elective offices even if there were no such constitutional or statutory provisions. It is a general rule that no person shall hold two incompatible offices at the same time.⁶⁰

One other restriction upon the election of the prosecutor should be mentioned at this time although it is not strictly a qualification of the office. Fourteen states have attempted by some device to limit the amount of money which may be spent by a candidate for the office of prosecuting attorney. These limitations, of course, usually are not directed specifically at this office but affect it along with all of the other county offices. They may take the form of a specific maximum fixed in the statute as in Texas where the district attorney may not spend more than six hundred dollars, and the county attorney not more than from three hundred to seven hundred fifty dollars, according to the size of the county.⁶¹ In Arkansas a candidate may spend up to the amount of the first year's salary or three thousand dollars, whichever is lower. His own personal travelling expenses are not counted in this amount.⁶² The commonwealth's attorney in Kentucky is limited to twenty-five hundred dollars for the primary and the same amount for the election.⁶³ In New Mexico the candidate is permitted to spend ten per cent of the first year's salary and in addition the amount of his own personal traveling expenses.⁶⁴ Practically all of these states and the others which have attempted to limit campaign expenditures also require that each candidate must file a statement of expenditures made by himself or in his behalf, and nine states which do not attempt to limit expenses do require that each candidate file such a statement at the close of his campaign. Such provisions are easily evaded and difficult to enforce.

⁵⁷Compiled Statutes of Idaho (1919), sec. 3653.

⁵⁸Constitution of Louisiana, art. 170.

⁵⁹Compiled laws of Michigan (1929), ch. 38, sec. 1265.

⁶⁰See the treatment of this question in 46 *Corpus Juris* 941-948, secs. 45-46.

⁶¹Revised Civil Statutes of Texas (1925), arts. 3170 ff.

⁶²Arkansas Digest of Statutes (1921), sec. 3897.

⁶³Carroll's Kentucky Statutes (1922), sec. 1565 b 16.

⁶⁴New Mexico Laws of 1927, ch. 41.

In most places they probably are not effective but their existence indicates that there is a problem there which nearly half of the legislatures have attempted to meet in some manner.

Before the prosecuting attorney assumes the duties of his office it is generally required that he qualify by taking the oath of office, which is prescribed by statute in most states, and it is also necessary for him to give a bond to the state or county to insure the faithful performance of his duties and the proper handling of any funds which come into his possession. In about half of the states, the amount of this bond is fixed by the statute or constitution and may be one thousand dollars as in Minnesota,⁶⁵ or ten thousand as in Maryland.⁶⁶ In a few states the county board is given power to fix the amount of the bond to be required from county officers, and in the statutes of several others, there seems to be no specific provision concerning the bond of the prosecutor or of county officers, but only more or less of an assumption that a bond is required of all elective officials.

This summary indicates that in practically the entire country any attorney who is practicing or attempting to practice, however inexperienced or incompetent he may be, is eligible to hold the office of prosecuting attorney for his locality. Almost the only obstacle would be the necessity for finding someone to underwrite his bond. In fact, it appears that in a few states it is not even necessary that a man be an attorney to be eligible for the office. It is highly improbable that electorates often elect to this office a man who is not an attorney but, nevertheless, the fact that the standards fixed in the statutes are so low is sufficient to show that the quality of service from this office might be improved by raising its qualifications.

V.

It happens occasionally that the office of prosecuting attorney is temporarily vacant, and the laws of nearly all the states have anticipated this exigency. This situation may arise because of the unavoidable or perhaps even the willful absence of the prosecutor or possibly it may exist because of his sickness or other disability. In urban areas, of course, he has a staff of assistants who can be called upon at any such time, but the personnel of hundreds of offices throughout the United States consists of the prosecuting attorney himself and at most one stenographer.

Again, the need for a substitute may occur because of the dis-

⁶⁵Minnesota General Statutes (1923), sec. 924.

⁶⁶Constitution of Maryland, art. V, sec. 12.

qualification of the prosecuting attorney himself. In Idaho, for example, he is disqualified to prosecute in any case in which he has previously acted as defense attorney.⁶⁷ In Oregon he may not prosecute if he is related to the defendant or associated with him in business, if he is financially interested in the case, or if he is a stockholder in a corporation which is being prosecuted.⁶⁸ A prosecuting attorney in West Virginia may not act in any case in which the court concludes that it is improper for him to do so.⁶⁹

It is almost universally provided that in case of any such absence or disqualification, the court hearing the case shall appoint a prosecuting attorney *pro tempore* to act for the period of the absence or for the case. In Illinois the court must first request the attorney-general of the state to act in place of the state's attorney and, if he fails or refuses to do so, then the court is empowered to make a special temporary appointment.⁷⁰ The Utah statute requires the district attorney to ask some other district attorney to substitute for him if he knows that he will be unable to prosecute the case but if no such arrangement is completed, the court makes a temporary appointment.⁷¹ Whenever a district attorney in California is disqualified, the attorney-general may employ special counsel to substitute for him but, in the absence of a prosecutor, the court appoints an attorney to act.⁷²

Many of the statutes set forth judicial procedures for the removal of elective officers not subject to impeachment.⁷³ These procedures usually provide that the court shall appoint a special prosecutor to undertake the case when such removal action is directed at the prosecuting attorney of the jurisdiction.

There is no general rule prescribed for the filling of permanent vacancies in the office of prosecuting attorney. In seventeen states, this task is given to the governor, and of this group, only in New Jersey and Florida does he make the original appointment. In some the appointment to fill the vacancy must be approved by the senate or, as in Massachusetts, by the council, and in others the responsibility rests on the governor alone. In Louisiana the governor fills the

⁶⁷Compiled Statutes of Idaho (1919) sec. 3654.

⁶⁸Oregon Laws (Olson, 1920), sec. 1067.

⁶⁹Official Code of West Virginia (1931), p. 119.

⁷⁰Illinois Revised Statutes (Cahill, 1931), ch. 14, sec. 6.

⁷¹Utah Compiled Laws (1917), sec. 5770; Constitution of Utah, art. VIII, sec. 10.

⁷²California Political Code (1931), sec. 472; Penal Code, sec. 1130. See also "Employment by Court of Special Prosecutor when Prosecuting Attorney is Disqualified," 10 Virginia Law Review 239-40 (1929).

⁷³See the detailed discussion on this question in section VIII, *infra*.

vacancy if the unexpired portion of the term is less than one year but if it is more, a special election is held.⁷⁴ In Texas the governor fills vacant district attorneyships and the county board appoints when the office of county attorney is vacant,⁷⁵ and in twelve other states the statutes provide that vacancies are filled by the county board. County boards in Illinois fill vacancies in the office of state's attorney if the unexpired remainder of the term is less than one year. If it is more, a special election is held for that purpose.⁷⁶ In thirteen states the vacancies are filled by some court, usually the court having general criminal jurisdiction in the locality. In Delaware, since the attorney-general makes the original appointment of the county attorney, he also makes any necessary replacements,⁷⁷ and in Rhode Island, where the attorney-general is responsible for prosecutions, the General Assembly fills vacancies in that office.⁷⁸ A diligent search of the statutes of South Carolina and Mississippi has not yielded much in answer to this question except that in South Carolina, when a solicitor is removed for intoxication, a special election is held to fill his place,⁷⁹ and the Mississippi constitution provides that the governor may make emergency appointments.⁸⁰ It is not altogether clear whether or not this Mississippi provision applies to district offices.

No one general policy is followed in fixing the tenure of appointments to such vacancies. The states fall generally into two large groups of about the same number. In one group it is the general practice to appoint to such a vacancy for the remainder of the full term. The majority of the states in this group provide two year terms for their prosecutors, and therefore in no case can the unexpired portion of the term be very long. In the other group it is the usual policy to provide for appointment of a substitute who holds office until the "next general election" or "until his successor can be elected and qualified." In every case where such a vacancy is filled by election, the person elected holds office only for the unexpired part of the term.

In the twelve states where the prosecuting attorney may be recalled by the electorate, it is generally the policy to vote at the same

⁷⁴Constitution of Louisiana, art. VII, sec. 69.

⁷⁵Texas Code of Criminal Procedure (1925), art. 31; Texas Revised Civil Statutes (1925), art. 2355.

⁷⁶Illinois Revised Statutes (Cahill, 1931), ch. 46, sec. 147.

⁷⁷Revised Statutes of Delaware (1915), ch. 17, sec. 539.

⁷⁸General Laws of Rhode Island (1923), sec. 212.

⁷⁹South Carolina Criminal Laws (1922), sec. 476.

⁸⁰Constitution of Mississippi, sec. 103.

election on candidates for the vacancy. If the incumbent is recalled, the person so chosen holds office for the balance of the unexpired term.

The laws providing for the appointment of a prosecuting attorney *pro tempore* usually state in addition that for the period for which he so acts he shall have the same powers and duties and shall be subject to the same penalties and restrictions as the man whose place he fills, and most of such statutes provide for his payment. His compensation may come from the treasury of the governmental unit which pays the prosecutor in amount fixed by the court, by the county board, or by statute, or it may be provided that his compensation shall be deducted from the salary of the regular prosecuting attorney who is absent. However, it is usually provided that any such deduction shall be made only if the absence of the prosecuting attorney is negligent or willful. These provisions prescribing payment to the prosecutor *pro tempore* contain many vestiges of the old fee system and in the past, when that basis of compensation was more prevalent than now, payment to a temporary substitute was accomplished by the simple expedient of giving him the fees to which the prosecuting attorney would have been entitled by law had he handled the case.

When a person has been appointed or elected to fill a permanent vacancy, he is, obviously, the prosecuting attorney in every way the same as if he had been elected to office at the beginning of the term.

VI.

Some slight reference to the fee system of compensating the prosecutor has already appeared in the preceding paragraphs, and it is necessary now to discuss the whole matter of the expense of the office. In general, in so far as the prosecuting attorney is concerned, the fee basis of payment is a matter more of historic than of contemporary interest for it is now the general policy to pay him a fixed salary. However, dozens of statutory remnants lie unrepealed among the state laws of the country and they indicate that not so long ago the prosecutor received his remuneration in the form of fees paid either by the state or by the defendant upon conviction—where there was no conviction, there was no fee, no matter how ably the state was represented.

The following constitutional provisions from Alabama and Louisiana indicate a trend which is borne out by examination of the laws of most of the states:

Sec. 167 (Alabama) "A solicitor for each judicial circuit . . . shall be elected . . . and such solicitor shall be learned in the law, and shall . . . reside in a county (in the circuit) . . . and his term of office shall be for four years, and *he shall receive no other compensation than a salary, to be prescribed by law, which shall not be increased during the term for which he was elected; . . .*"

Art. 7, sec. 59 (Louisiana) "He shall receive from the state a salary of \$2500 per annum. . . . He shall also receive such additional salary as may be prescribed by the legislature, payable by the parish or parishes situated within the judicial district in which he is elected. . . . *He shall receive no fees of any kind.* It shall be the duty of the legislature at its next session, regular or special, to fix the salaries . . ."

While few of the constitutions deal with the matter as positively as this, the statutes of most of the states provide that the prosecuting attorney shall be paid a salary and nothing more and the salary is definitely fixed by the statute for each county or class of counties in the state. In defining the prosecutor's salary, some legislatures have stretched the device of classification to its utmost limit. For example, in California the statutes have established fifty-eight classes of counties—one class for each county in the state—and for each county the statute specifically sets the salary of the district attorney and the number and salaries of deputies and assistants.⁸¹ There would be little of value in tabulating here the salary provisions of all the states. Let it suffice to say that they range from a minimum of \$400 a year in certain counties in Nebraska to an annual stipend of \$15,000 in Cook County, Illinois. In Pennsylvania and New Jersey the maximum appears to be \$12,000, in Georgia \$10,250, \$10,000 in Indiana and \$9,000 in Massachusetts. It is important to remember that these are the highest salaries paid to the prosecutor in each of these states and, therefore, are paid only in one or two counties in each. From this top prosecuting attorneys' salaries grade down until in Vermont we find that the statutes provide a salary range of \$450 to \$1,700 per year. In Wyoming the range is \$1,200 to \$2,000; in Nebraska, \$400 to \$4,000. In Michigan, New York, and Wisconsin the statutes provide that the salary of the prosecuting attorney is to be fixed by the county board of his county. In Connecticut the salaries of the state's and prosecuting attorneys are fixed by the state board of finance and control.

It is important to give some attention to the treasury from which these various salaries are paid. In the majority of those states which elect a prosecutor for each judicial district or circuit, his salary is

⁸¹California Political Code (1931), secs. 4230-4287.

paid directly from the treasury of the state. In Alabama it is provided that \$3,600 of his salary comes from the state treasury and the salary range is \$3,600 to \$6,000. In Louisiana the state pays \$2,500 and the parishes from \$1,400 to \$2,500 more. The state of New Mexico pays \$1,000 of the salaries of its district attorneys and the remainder is spread over the counties. The commonwealth's attorney in Kentucky receives \$500 per year from the state and \$3,500 from the fines, forfeitures, etc., collected as a result of the activities of his office. In Colorado, Indiana, and Georgia the total amount of the salary in each district or circuit is apportioned among the counties of the area.

In almost all of the states where the prosecuting attorney is a county officer, his entire salary comes from the county treasury. In Illinois the state pays \$400 toward the salary of every state's attorney, and in Montana the burden is equally divided between the state and the county. In Delaware where the county prosecutor is a deputy attorney-general, and in Oregon and Maine the salaries are paid entirely from the treasury of the state.

In a large number of the states which now pay the prosecuting attorney a salary, the statutes still provide for the collection of the fees which formerly constituted his compensation but it is usually provided that such fees shall be paid into some public treasury. For example, the Illinois statute provides:⁸²

" . . . The fees that are now or may hereafter be provided by law to be paid by the defendant as state's attorney's fees, shall be taxed as costs, and all fees, fines, forfeitures, and penalties shall be collected by the state's attorney and paid by him direct into the county treasury."

The fund which results is to be used to pay salaries of state's attorneys and their deputies and assistants. Anything remaining is turned over to the county school fund.

In a few of the states in which the prosecutor is actually paid on a salary basis, the laws provide for one fee in addition to that salary. The laws of Florida give the state attorney, in addition to his salary, ten per cent of all moneys collected "by him or paid into the state treasury on account of any claim prosecuted or compromised by him."⁸³ In California the district attorney is entitled to a \$15 fee for suits against delinquent purchasers of county lands.⁸⁴ In New Hampshire the prosecutor is given \$10 a day when engaged in the enforcement of the liquor law at any time not in term time of

⁸²Illinois Revised Statutes (Cahill, 1931), ch. 53, sec. 83.

⁸³Compiled General Laws of Florida (1927), sec. 4767.

⁸⁴California Political Code (1931), sec. 3553.

the supreme court of the state.⁸⁵ The Oklahoma statutes contain the following provision:⁸⁶

"In addition to his annual salary, which shall be the same as that of the county judge, he shall receive 25 per cent of all forfeited bonds and recognizances by him collected. . . ."

It appears from the statutes that in Arkansas, Nevada, Texas, and Virginia the prosecuting attorney's income depends largely upon the amount of the fees which he collects. When the prosecuting attorney in Arkansas is present and prosecuting, he is entitled to the following fees, which are in addition to a salary of \$200 a year:⁸⁷

Each judgment obtained on complaint, information or otherwise in the name of the state or county.....	\$ 5.00
Each conviction for misdemeanor or breach of the peace.....	10.00
Conviction in cases of gambling.....	25.00
Conviction in all but capital felonies.....	25.00
Conviction of homicide where death penalty is not imposed.....	35.00
Conviction of homicide where punishment is death.....	75.00
Ten per cent of the amount on forfeited bail bonds and recognizances.	

The legislature of Nevada, by a number of special acts from 1919 to 1931, has fixed the compensation of the district attorney for each county but no one general policy underlies these various acts. In Elba County the district attorney is given a salary of \$4,500 but from this amount he must pay a deputy.⁸⁸ In Eureka County he is given \$2,100 a year and in addition all fees allowed by law.⁸⁹ The district attorney of Lander County receives \$1,800 and fees⁹⁰ and in Ormsby County \$1,500 and all fees go to the county treasury.⁹¹ The fees allowed are as follows: Capital case conviction, \$100; conviction in any other felony case, \$50; misdemeanor in the district court, \$25; misdemeanor in justice court, \$15; 10 per cent on collections.⁹²

The actual amount of his fees which any district or criminal district attorney in Texas is permitted to retain varies from one class of district to another and it is not necessary nor worth while to summarize the whole fee system in that state at this time. An act adopted in 1931 which seems to illustrate the policy of the state provides for

⁸⁵Public Laws of New Hampshire (1926), ch. 144, sec. 62.

⁸⁶Oklahoma Compiled Statutes (1926 Supplement), sec. 5744.

⁸⁷Arkansas Digest of Statutes (Crawford and Moses, 1921), ch. 63, sec. 4571.

⁸⁸Nevada Acts of 1931, p. 284.

⁸⁹*Ibid.*, p. 278.

⁹⁰*Ibid.*, p. 195.

⁹¹*Ibid.*, p. 146.

⁹²Nevada Revised Laws (1912), sec. 1603.

election of a district attorney in certain counties for a two-year term and fixes a schedule of fees to be paid by the state, but he may retain from those fee collections only \$5,500 as his salary and any surplus is used to pay the salaries of his assistants.⁹³ In some other districts, and for some counties, a similar maximum is fixed for the district or county attorney but he is allowed to retain one-fourth of any excess up to a varying limit.⁹⁴ In counties of 150,000 or more, the district attorney receives \$500 from the state and fees up to \$6,000 but any assistants must be paid from the fees of the office and in no case is the county liable.⁹⁵

In Virginia the laws fix a range within which the annual allowance to be paid to the commonwealth's attorney from the county treasury must fall. Within the range fixed by statute, the county board determines this allowance which may be as low as three hundred dollars or as high as \$2,500. A schedule of fees is fixed by statute and also a maximum which each prosecutor may retain from his fee collections. This maximum ranges from \$250 to \$2,750 a year and is in addition to the allowance mentioned.⁹⁶ All fees to which a prosecutor is entitled in any case are paid by the state if they are not collected from the defendant.

In almost every state the same treasury which pays the salary of the prosecutor is also required to furnish funds to pay office and travelling expenses. In some this amount is left to the discretion of the county board, and in others the statute fixes a contingent fund to cover such expenses. In Oregon the state pays the salary but the county supplies the funds for office and travelling expenses.⁹⁷ Several of the statutes are not entirely clear on this point and it is possible that in a very few states the prosecuting attorney must pay any office expenses from his own pocket. Because the prosecuting attorney in Arkansas receives his compensation in the form of fees,

⁹³Texas General Laws of 1931, pp. 844 ff. The following quotation from this act indicates that Texas legislates on this problem for particular areas and not for the whole state:

"In those counties in this State having a population of not less than Thirty-Three Thousand Five Hundred (33,500) and not more than Seventy-Five Thousand (75,000) inhabitants and not containing a city of more than Fifty Thousand (50,000) inhabitants . . . and in which counties there are one or more Judicial Districts, and in which the County Attorney performs the duties of County Attorney and District Attorney, and in which there is not now a District Attorney, the office of District Attorney is hereby created . . ."

⁹⁴Texas Revised Civil Statutes (1925), arts. 3887-90.

⁹⁵*Ibid.*, art. 3886.

⁹⁶Virginia Laws of 1924, ch. 458.

⁹⁷Oregon Laws (Olson, 1920), sec. 937; Laws of 1929, ch. 382.

it would be reasonable to expect that he should pay his own expenses but in 1931 the legislature provided that the counties in each circuit should create a \$10,000 contingent fund to cover the expenses of the office.⁹⁸ The Texas statutes provide that such expenses may be deducted from the total fee collections of the office before any surplus is turned over to the county treasury.⁹⁹ Some of the provisions on this question specifically state that the prosecuting attorney shall be supplied with an office and the necessary supplies and traveling expenses. Others merely give the county board the power or duty to make such provision for all county officers. In Iowa the statute requires the county board to furnish an office, light, and stationery, but it is specifically stated that it is not under any obligation to supply the county attorney with a library.¹⁰⁰ The laws of the other states, except in Pennsylvania, do not mention the prosecutor's library and for that reason it is not possible to determine from the statutes the extent to which he must furnish his own library.

Whenever it becomes necessary for the court to appoint a special temporary prosecutor to act in the absence of the regularly chosen official, it is usually required by the statutes that the compensation of this temporary substitute be deducted from the salary of the regular prosecuting attorney. This requirement is usually accompanied, however, by the qualification that the court may excuse the absence of the prosecutor and, if it does so, no such deduction is made. A provision like this presents a loophole so wide that the prosecutor is probably seldom called upon to accept this deduction but its presence in the statutes can do no damage. Under such circumstances the substitute receives his pay from the same agency which pays the prosecutor, if it is not deducted from that officer's salary. When the fee system was more widely existent than at present, the payment of this temporary appointee was more simple for it was usually provided that he should receive the same fees which would accrue to the prosecutor if he had participated in the case.

Only in a few states do the statutes definitely provide that the prosecuting attorney must pay his permanent assistants from his own pocket. Under the laws of Nevada the district attorney of Elba County receives an annual salary of \$4,500 a year from which he must pay a deputy,¹⁰¹ and in Texas it is provided that the assistants and deputies must be paid from the fee collections of the office and that the

⁹⁸Arkansas Acts of 1931, p. 1101.

⁹⁹Texas Revised Civil Statutes (1925), art. 3899.

¹⁰⁰Code of Iowa (1927), ch. 254, sec. 5134.

¹⁰¹Nevada Acts of 1931, p. 284.

county or state are not liable for their salaries.¹⁰² In most states the legislature has specifically prescribed the number of deputies and assistants and their salaries for the prosecutor's office in each class of district or county in the state. It is almost always provided in addition that the salaries of such assistants are to be paid from some public treasury and not by the prosecutor. In any case, however, in which the prosecutor must have more assistance than the statutes authorize him to employ, it would be necessary for him to pay any unauthorized assistants from his own private means.

Kentucky, Mississippi, North Carolina, and Tennessee seem to offer the only variation from the general tendency of the statutes to grade salaries according to population. The explanation may be that the judicial districts for which the prosecutor is chosen in those states have nearly equal population because in each of these states the same salary is paid to prosecuting attorneys in all circuits or districts. In all the other states which pay by salary the prosecutor in the most populous county or district receives the highest salary. Undoubtedly the responsibilities and duties of the office increase in rough proportion to the population of the district served, but the sparsely settled community does deserve the ability which a more sufficient salary would attract to the office. Perhaps the policy in these four states may be interpreted as an effort to insure that the office of prosecuting attorney in the rural areas of the state will attract a man comparable in ability and experience to his metropolitan colleague. It is possible that the payment in a few states of all or part of the local prosecutor's salary from the state treasury is another attempt to give the rural districts better prosecution than they can afford if the financial burden rests entirely upon them.

It is evident from this analysis of the statutes that the fee system of compensating the prosecuting attorney is nearly gone and, if the rate of departure from it is as rapid in the next five years as in the past fifteen, it will disappear in that time. The numerous schedules of fees which appear in the statutes, even in those states which now pay salaries, give evidence of the fact that prosecutors have been reluctant to enforce gambling and liquor laws. In most fee schedules the amount given the prosecutor for convictions under those laws is greatly out of proportion to the gravity of the offense, and in this manner this basis of remunerating the prosecutor has tended to emphasize certain laws disproportionately.¹⁰³ Moreover, since in most

¹⁰²See Texas Revised Civil Statutes (1925), arts. 3887-90.

¹⁰³On this question of the fee system see Moley, *Politics and Criminal Prosecution* (1929), pp. 64-67. See also Davidson, "The Prosecuting Attor-

jurisdictions the collection of the fee depended upon conviction, it has certainly contributed to the unfortunate tendency of prosecutors to seek convictions rather than effective administration of the criminal law.

The justification of this present study is the fact that detailed analysis of the statutes of all the states affords the safest basis for generalizations regarding the prosecutor. As a result of this statutory survey, it is necessary to modify previous impressions regarding the prevalence of the fee system. Professor Moley in his essay, as he terms it, on *Politics and Criminal Prosecution* has contributed a very considerable part of the scant literature on the prosecutor. There is certainly no intention whatever here to impugn the excellence of that book but in it appears the following statement:¹⁰⁴

"In some of the states it is provided by law that the prosecuting attorneys be paid salaries, usually varying with the population of the county. More frequently the attorney is paid, either in whole or in part, by fees."

This is not the situation at the present time nor was it accurate in 1929 when it was published. It is possible to count on the fingers of one hand the states in which the fee system figures in the trial of felony cases. Only in Arkansas, Nevada, Texas, and Virginia do the statutes indicate that it is an important factor in the compensation of the chief prosecuting official in the trial of felony cases. It is true that in Florida and Georgia the prosecutors in the inferior courts, having misdemeanor jurisdiction only, seem to be paid by fees, but six is the maximum number of states in which the fee system can be said to be important. The present problem seems to be not the abolition of the fee system, but rather the establishment of a salary scale sufficiently high to attract men of ability and experience.

VII.

Arthur V. Lashly, in the *Missouri Crime Survey*, makes the surprising statement that "In a vast majority of counties in Missouri the prosecuting attorney has no clerical help of any kind. The county

ney's Office—Do Modern Conditions Create New Duties for This Office?". 4 Indiana Law Journal 327-34 (February, 1929). S. B. McAlister. "The Fee System as a Method of Compensation for Texas County Officials," Southwestern Social Science Quarterly, vol. XIII, pp. 24-33 (June, 1932); Wylie Kilpatrick, Problems in Contemporary County Government (1930), Chapter XV of the latter is a discussion of the operation of the fee system in Virginia.

¹⁰⁴Moley, *op. cit.*, pp. 64-65.

court in some instances will authorize the employment of a clerk or stenographer, but the counties in which this is done are the very rare exceptions."¹⁰⁵ Obviously the county court is at fault here and not the legislature, but this description of the situation suggests a problem which is well within the province of a statutory analysis such as this present discussion: What have the legislatures provided with respect to subordinates and assistants for the district attorney?

Let it be said at the outset that most legislatures have been very niggardly in their provisions for assistance for the prosecuting attorney. In many of the states there is no blanket provision of law allowing the employment of necessary help. The county board in Illinois determines the number of subordinates and assistants, both professional and clerical, which the state's attorney in its county is to be allowed, but few legislatures have been so generous as to allow the county to determine its own needs. In most of the states the legislature attempts to fix by statute the number and salaries of the prosecutor's assistants in each of the counties of the state. One of the most absurd examples of this is California where the legislature has classified the fifty-eight counties into fifty-eight classes, and with respect to each class has specified the salary of the district attorney, the classes of assistants and the number of each class allowed in each county, and the salary which is to be paid to each assistant or clerk.¹⁰⁶ However, the California provisions at least appear to be inclusive enough to provide adequate assistance for every district attorney, while in most of the other states the legislature appears to have provided such assistance for only a few counties. For example, in Kentucky the statutes provide for one stenographer and two deputy commonwealth attorneys in counties over 200,000, for one stenographer and one assistant county attorney in counties over 150,000, and for district detectives in a few counties, but most counties of the state seem to be ignored completely and, in the absence of any statutory authorization, the prosecutor must pay for any assistance from his own pocket.¹⁰⁷ In Minnesota prosecutors of the larger counties appear to be adequately provided for. It is also provided that every county attorney may employ an assistant to be paid from his own pocket, except that in counties having a population be-

¹⁰⁵Missouri Crime Survey, p. 136.

¹⁰⁶California Political Code (1931), secs. 4230-4287.

¹⁰⁷Kentucky Acts of 1930, ch. 111, p. 378, ch. 119, p. 392; Acts of 1932, ch. 133, p. 637; Carroll's Kentucky Statutes (1922), secs. 125 b 1-4, 125 c, 136 a 1-4, 1366.

tween 28,100 and 30,600 the county is to pay the bill.¹⁰⁸ Aside from this special favor, diligent search has revealed no Minnesota statute allowing a county under 230,000 population to employ clerical or professional help for its prosecutor.

Where the legislature has seen fit to trust some other body with the duty of permitting the prosecuting attorney to employ assistants, that responsibility usually devolves upon the county board or upon the courts. The fact that the statute has authorized the local agency to provide such assistance does not guarantee that the power will be invoked but if the quality of prosecution in a locality is low, it has only itself to blame.

It is inconceivable that statutory permission to employ subordinates and assistants in the small prosecutor's office is as restricted as this search of the statutes indicates, and perhaps in some of the states the court, county board, or some other agency, has been given a general power to authorize assistance which has not been found. Nevertheless, even if some such provisions have been overlooked, it is evident that it is the general policy of legislatures to define rigidly in the statute not only the subordinates and assistants permitted but also the salary of each person so employed.

In general it is provided that appointments of such subordinates and assistants shall be made by the prosecuting attorney, sometimes with the required approval of the court or the county board and sometimes on his own responsibility alone. Missouri seems to supply the only example of an elected assistant, for in St. Louis the assistant prosecuting attorney is elected at the same time and for the same term as his chief.¹⁰⁹ The governor of Florida is given power to appoint assistant state attorneys,¹¹⁰ and in a very few other states appointments seem to be made directly by the court.

Although many of the statutes are silent on the question, it is probably safe to assume that the power of appointment in these cases carries with it the power to remove. Since the prosecuting attorney generally appoints his own assistants, in most places he has sufficient authority to exercise an effective control over his subordinates.

There is almost no mention of the qualifications of subordinates and assistants in the laws authorizing their appointment and it is apparently assumed that the judgment of the appointing authority

¹⁰⁸Laws of Minnesota (1931), ch. 310, p. 401; Laws (1929), ch. 187, p. 183; Laws (1925), ch. 15, p. 20.

¹⁰⁹Missouri Revised Statutes (1929), sec. 11282.

¹¹⁰Compiled General Laws of Florida (1927), secs. 4578-9.

may be depended upon to require such ability or experience as may be necessary.

The enumeration in the California statutes of the positions in the district attorney's office gives the most complete picture of the types of service which the prosecutor may be authorized to hire. The positions authorized are assistant district attorney, chief deputy district attorney, deputy district attorney, clerk, detective, process server, stenographer, messenger, assistants, secret service men, and special counsel.¹¹¹ Not every state has classified the prosecutor's office so elaborately. In fact most statutes merely provide for deputy or assistant prosecuting attorneys and for clerks and stenographers. In several states we find special provision for special investigators, secret service men, or detectives—usually one or two for each prosecutor's office—but undoubtedly the employment of such assistance is more widespread than the statutes would indicate because this expense can probably be covered by the contingent fund, which is established for many prosecuting attorneys, even where employment of investigators is not specifically authorized under the law.

Assistants and deputies are generally paid a salary from the same treasury which pays the prosecutor himself. In Arkansas, in 1929, the legislature provided for a general deputy in one circuit and the law states that his fees shall be the same as those of the prosecutor, but this is a most exceptional provision.¹¹² In the absence of statutory authorization to employ an assistant, or where the statute specifically provides that the county or state shall not be liable for an assistant's salary, payment must be made by the prosecutor himself.

Information in the statutes concerning salaries of the subordinates in the prosecuting attorney's office is not complete enough to make any analysis or tabulation worth while. Suffice it to say that they are not very high. Many of those listed in the statutes are those of assistants in the larger cities where a moderately high salary is expected. In New Jersey the assistant prosecutor receives from \$5000 to \$10,000 a year and, in a few other places, some men may get as much as \$6000 or \$7500. In most states, however, the assistant prosecuting attorney receives a salary under \$4000 and often as low as \$2500. The scale is not high to attract men of experience or to hold the inexperienced assistants after they become experienced.

A study of these provisions of law cannot in itself determine

¹¹¹California Political Code (1931), secs. 4230-4287.

¹¹²Arkansas Laws of 1929, p. 72.

the extent to which the prosecuting attorney's office is undermanned nor the extent to which his staff is actually underpaid. About all that it can be said to yield is the knowledge that legislatures have been shortsighted in meeting the problem. Where the prosecutor is a state officer, the appropriation for his office is made by the legislature itself and the needs of the office actually are brought to its attention at every session. Under such circumstances the legislature is the proper agency to deal with the question of number and salaries of subordinates but in most states the prosecutor is a local official and the county board is the body which appropriates for his office. When such is the situation, if the legislature inflexibly fixes number and salaries, the question is reconsidered only when forced to its attention by a prosecutor who must increase the size of his staff. The body which passes the appropriation ordinance covering the expenses of the prosecutor's office should be given full power to fix the number and salaries of the staff of his office in order that the demands of changing social conditions may be met immediately. This conclusion rests upon the fact that the local agency automatically considers the needs of the office at least once a year when it makes its appropriations, while the legislature acts only when an emergency is brought to its attention.

VIII.

Although it may seem illogical to discuss the creation of vacancies so long after the description of the filling of those same vacancies, it has seemed to the writers that filling vacancies is reasonably related to the original appointment or election of the prosecutor and should be treated along with that subject. Creation of the vacancy, on the other hand, is more or less of a restriction upon the prosecutor after he takes office, and for that reason is taken up at this time instead of earlier.

The laws of New York contain the following section which illustrates the circumstances under which an office becomes vacant:¹¹³

"Every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof:

1. The death of the incumbent;
2. His resignation;
3. His removal from office;
4. His ceasing to be an inhabitant of the state, or, if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;

¹¹³Consolidated Laws of New York (Cahill, 1930), ch. 48, sec. 30.

5. His conviction of a felony, or a crime involving a violation of his oath of office;
6. The entry of a judgment or order of court of competent jurisdiction declaring him to be insane or incompetent;
7. The judgment of a court, declaring void his election or appointment, or that his office is forfeited or vacant;
8. His refusal or neglect to file his official oath or undertaking"

In addition, sometimes it is provided that the office is vacant if the incumbent fails or refuses to exercise his duties for a certain period, sometimes thirty days, or if he absents himself from the state for more than thirty or sixty days, or some other specified length of time, without permission from the legislature or county board.

The procedure for the removal of the prosecuting attorney is the only one of these factors which calls for discussion. Although any removal procedure is seldom invoked, the threat of potential use inherent in an effective machinery of removal may raise appreciably the quality of service rendered by a prosecutor's office. For that reason it is important to summarize the devices in use for that purpose.

In twelve states the voters may petition for a recall election by which to determine whether or not the prosecuting attorney shall continue to hold office. This device, of course, permits the electorate to register immediately its dissatisfaction with any particular action of that official, to remove him from office, and to put some other man in his place.

It is far more generally provided that the power of removal be given to the courts, and the following enumeration taken from the Oklahoma statutes is an example of the grounds upon which the courts may remove a prosecuting attorney:¹¹⁴

1. Habitual or willful neglect of duty.
2. Gross partiality in office.
3. Oppression in office.
4. Corruption in office.
5. Extortion or willful overcharge of fees.
6. Willful maladministration.
7. Habitual drunkenness.
8. Failure to account for money coming into his possession.

Other items which might be added to this list, taken from statutes of other states, are conviction for felony, conviction for gambling, or of malfeasance or incompetence in office. The statutes of New

¹¹⁴Compiled Statutes of Oklahoma (1921), sec. 2394.

Mexico contain a similar enumeration which, if possible, is somewhat broader than the preceding list for it adds the generous provision that the court may remove for any reason which seems sufficient to it.¹¹⁵

The actual steps in this procedure are much the same from one state to another. The court may institute the proceedings to remove the prosecuting attorney upon petition from the taxpayers, upon an information by the attorney-general, upon indictment by the grand jury, or sometimes upon its own initiative. The court may appoint a special prosecutor to handle the case or may ask the attorney-general or a neighboring local prosecutor to act. In some states a jury is required; in others it is not. If the accused official is found guilty of the particular charge, the court imposes sentence which may be removal from office alone or in other cases may include also fine or imprisonment.

Although the procedure for removal by the courts is very nearly the same from one state to another, there seems to be little agreement as to its character. It appears from the statutes that it is a criminal proceeding in some places, and in others it may be *quasi-criminal*, civil, or of a character all its own.¹¹⁶ In any case, this removal procedure operates to remove an incumbent who legally occupies his office, and it must be distinguished from *quo warranto* which is brought to question the right of the person to hold the office which he occupies.

Perhaps it may be possible to account for the different characters which this procedure assumes by the fact that actions such as malfeasance in office are merely grounds for removal from office in some states while in others the same act constituting malfeasance may be a misdemeanor, the penalty for which includes removal from office. In all, thirty-five states provide for removal of the prosecuting attorney by the court in some such procedure.

Many of the legislatures have provided that failure of the prosecuting attorney to perform some particular duty, such as enforcement of the statutes against liquor or gambling, is a misdemeanor upon conviction for which the prosecutor is to be removed from office. In all the states where these provisions have been found, they are in addition to some other general removal procedure.

In Connecticut, where the court is the original appointing authority, it has full power to remove its appointees summarily,¹¹⁷ and in

¹¹⁵New Mexico Statutes (Annotated, 1915) sec. 3955.

¹¹⁶See cases cited in 46 *Corpus Juris* 997.

¹¹⁷Connecticut General Statutes (1930), sec. 5365.

Massachusetts the district attorney may be removed by a majority of the members of the supreme court of the state.¹¹⁸ In Indiana, also, the supreme court is given the power to remove the prosecuting attorney.¹¹⁹

In Georgia, Louisiana, New Jersey, and Tennessee the prosecutor may be impeached by the usual process, and in Maryland he may be ousted from office by a two-thirds vote of the senate upon the recommendation of the attorney-general of the state.¹²⁰ The attorney-general of Rhode Island is the prosecuting official and, inasmuch as he is an elected state officer, he is removable by impeachment.¹²¹ In Delaware the attorney-general, who appoints the local prosecutors, is subject to impeachment but he has full power to remove his own appointees.¹²² Of these states, Louisiana also has the recall, and Tennessee provides not only for impeachment but also for the usual court removal as described above and, in addition, a district attorney in Tennessee may be removed by address upon a two-thirds vote of both houses of the legislature.¹²³ Oregon and Washington both provide for recall and for the usual court procedure for removal. In addition, in Washington the prosecuting attorney may be removed by a three-fourths vote of both houses,¹²⁴ and in Oregon the district attorney may be removed by a two-thirds vote of both houses if the governor also approves.¹²⁵

In Florida the governor, who appoints the state attorney, may also remove him,¹²⁶ and in Maine, where only the county attorney is elected, he may be removed by the governor and council.¹²⁷ In Michigan, Minnesota, New York, South Dakota, and Wisconsin the prosecuting attorney may be removed by the governor, usually for cause and after a hearing. Wisconsin, Maine and Florida seem to provide for no removal except by the governor but in the other states of this group, the statutes also provide for removal by the courts. Wyoming is apparently the only state in which the county board may remove the prosecutor.¹²⁸

¹¹⁸General Laws of Massachusetts (1921), ch. 211, sec. 4.

¹¹⁹Indiana Statutes (Burns Annotated, 1914), sec. 172.

¹²⁰Constitution of Maryland, art. V, sec. 7.

¹²¹Constitution of Rhode Island, art. XI, sec. 3.

¹²²Constitution of Delaware, art. VI; Delaware Revised Statutes (1915), ch. 17, sec. 539.

¹²³Code of Tennessee (1932), secs. 1877 ff., 11864; Constitution of Tennessee, art. VI, sec. 6.

¹²⁴Constitution of Washington, art. IV, sec. 9.

¹²⁵Constitution of Oregon, art. VII, sec. 20.

¹²⁶Constitution of Florida, art. IV, sec. 15.

¹²⁷Revised Statutes of Maine (1930), ch. 93, sec. 15.

¹²⁸Compiled Statutes of Wyoming (1920), secs. 1395-7.

Obviously it is impossible to evaluate the effectiveness of a removal procedure merely by reading it in a statute but it is safe to generalize to the extent of saying that the recall is probably the most formidable of the removal weapons which have been enumerated. It may also be accurate to say that the general removal procedure involving a trial before a court holds few terrors for any prosecuting attorney because, under most such statutes, it is probably almost impossible to remove a prosecuting attorney for anything short of a criminal act. It is a difficult task to prove charges of general misconduct or incompetence in office. The policy, which appears in a few states, of allowing the governor to remove local prosecutors is unquestionably a wise step toward giving him some effective control over the law enforcement for which he is made responsible by most constitutions.

IX.

The power of the governor to remove represents a most direct form of administrative control of the local prosecuting official and is a significant reduction of the complete independence which that official enjoys in the majority of states. Such a power, however, is a negative device invoked, as a general rule, only after some flagrant misconduct on the part of the prosecuting attorney. In a few states there is some indication that legislatures are beginning to realize the need for some centralized, positive control of prosecution by administrative officials of the state.¹²⁰ In Rhode Island and Delaware it would be impossible to give to the attorney-general any more control of prosecution than he already has, but elsewhere this positive control, if it exists at all, is no more than an embryo.

The provision of law which most frequently appears is an anæmic section giving to the attorney-general the power to exercise a general supervision over the local prosecuting attorney. In some of these states this pious wish is reinforced by giving to the attorney-general the added power to require reports from local prosecutors. Arizona, California, and Idaho have both provisions mentioned while Florida, New Hampshire, and South Dakota have only the first. In Ohio, Texas, and West Virginia the attorney-general is given authority to require reports but apparently is not specifically given the general supervisory power. The state department of public welfare of Pennsylvania may require the district attorney to give information

¹²⁰For an extended discussion of the relation of the state government to prosecution see Harmon Caldwell, "How to Make Prosecuting Effectual," 16 *Journal of the American Judicature Society* 73 (October, 1932)

on the administration of the criminal law. Michigan and Utah not only give the attorney-general this general supervision but require by statute that the local prosecuting attorneys submit reports to him at least annually. Alabama, Iowa, Louisiana, Maine, and North Dakota also require by statute that the prosecutor report to the attorney-general. In Oregon he must report to the secretary of state, in Wyoming to the state commissioner of law enforcement, and in Washington to the governor. In Connecticut the state's attorney must submit an annual report to the comptroller of the state. The statutes of Maine are an exception in that they provide a sanction to enforce the submission of the required reports. Any county attorney who fails to report forfeits his salary for the current quarter. It is quite generally provided that the attorney-general shall consult and advise with prosecuting attorneys, and many statutes permit the attorney-general to require the assistance of the local prosecutor in all cases affecting his section of the state. In addition the prosecuting attorney is sometimes required to cooperate with the state bureau of criminal identification and to forward criminal records to the state prison.

Perhaps the foregoing discussion implies that state officers are powerless to raise the quality of prosecution unless given specific statutory authorization as exemplified in the preceding paragraph. Even in those states which have none of the provisions mentioned here, it is probable that an intelligent, aggressive governor or attorney-general could make life quite miserable for the incompetent or corrupt prosecuting attorney. In New Hampshire the statute specially requests the attorney-general to report on the work of the various county solicitors,¹³⁰ and under the laws of New York the attorney-general, if so directed by the governor, is given very full power to investigate in all matters concerning public peace, safety, or justice.¹³¹ It is probable, however, that this power of investigation could be exercised to a sufficient extent in most states without any such specific provisions of law.

In some jurisdictions—Nebraska for example—the attorney-general has power concurrent with that of the local prosecutor and in his discretion may step in and direct any criminal case.¹³² In Arizona the attorney-general assists the county attorney if so directed by the governor,¹³³ and the attorney-general of New Jersey may assume

¹³⁰Public Laws of New Hampshire (1926), ch. 17, sec. 22.

¹³¹Consolidated Laws of New York (Cahill, 1930), ch. 18, sec. 62.

¹³²Compiled Statutes of Nebraska (1929), ch. 84, sec. 204.

¹³³Revised Code of Arizona (1928), sec. 52.

control of a prosecution if he is requested to do so by the court which is hearing the case.¹³⁴

Many of the legislatures in states where the prosecuting attorney is a county officer have enacted some provision giving the county board of supervisors or commissioners general supervision over the prosecutor. It is impossible to tell from the statutes alone how important this power may be but it usually contains no enforcement provision and for that reason is probably quite ineffective. In many states, of course, the statutes define the amount to be appropriated for the prosecutor's office each year and little discretion is left to the appropriating agency which is often the county board. However, in those few states where the county board is free to squeeze the prosecuting attorney's office by refusing to make a needed appropriation, it is possible that the board can exercise some effective control.

The district court in Wyoming, whenever it feels that public interest requires, may appoint a special prosecutor,¹³⁵ and county commissioners in Washington may employ other attorneys when they deem it necessary for the interests of the county. Whether this special counsel in Washington may supersede the regular prosecutor in a criminal case is not entirely clear but the language of the statute might easily be construed to mean just that.¹³⁶ In New Mexico associate counsel may participate in a prosecution if the court and the district attorney or attorney-general approve, and in a few other states the county board may provide special counsel as the need arises.¹³⁷

In Idaho, Oregon, and Virginia the statutes contain sections which are almost identical in language providing that in a prohibition case any citizen may employ special counsel to assist the regular prosecuting attorney and the court shall not permit any such case to be dismissed until it has heard the objection of this private associate counsel.¹³⁸ Any prosecuting witness in Kansas may similarly employ associate counsel to assist the county attorney, and the provision applies in any criminal case.¹³⁹ Any citizen in Minnesota may provide such private counsel in prosecution under the corrupt practices act.¹⁴⁰

The Pennsylvania statutes allow the association of private coun-

¹³⁴New Jersey Laws of 1932, p. 498.

¹³⁵Compiled Statutes of Wyoming (1920), sec. 1457.

¹³⁶Compiled Statutes of Washington (Remington, 1922), sec. 4130.

¹³⁷New Mexico Statutes (Annotated, 1915), sec. 1860.

¹³⁸As an example see the Idaho Compiled Statutes (1919), sec. 2641.

¹³⁹Revised Statutes of Kansas (1923), ch. 19, sec. 717.

¹⁴⁰Minnesota General Statutes (1923), sec. 569.

sel in a criminal prosecution and, if the district attorney fails or refuses to act or if the private counsel and the district attorney differ in their view of the case, the court may permit the private counsel to conduct the proceeding.¹⁴¹

Few statutes specifically authorize the association of private counsel in a criminal prosecution. However, such a procedure involves no expenditure of public funds and it is probable that few, if any, states would refuse to allow the family of a murdered man to employ an experienced criminal lawyer to assist an inexperienced young prosecutor.

It is not surprising that the majority of states have relied upon the statutes, the courts, and the ballot to restrict the complete independence of the prosecutor. The people of the United States have not looked with favor upon devices for centralizing administrative control of local officials in the state capitol and, consequently, the laws are full of sections making it the duty of the prosecuting attorney to enforce some particular statute and providing a penalty if he fails to do so. Some reference has already been given to these provisions as grounds for removal of the prosecutor by court action, but it is important also to note that quite often the penalty attached to such sections does not involve removal but only fine or imprisonment. Another provision of similar nature, which appears in many codes, provides a penalty, usually including removal, for failure to account for funds which may be collected by the office of the prosecutor.

In California, Idaho, and Nevada the legislature has even defined the office hours which the prosecuting attorney must observe. Many other states require that he must keep an office at the county seat, and in Arizona, Idaho and Virginia he must also live at the county seat or within ten miles of it.

Aside from the few states in which the fee system has not disappeared, a provision similar to the following Iowa statute often appears:¹⁴²

"No county attorney shall accept any fee or reward from or on behalf of anyone for services rendered in any prosecution or the conduct of any official business . . ."

It is unquestionably safe to assume that it is quite beyond the pale of the law everywhere for a prosecutor to accept any gratuity in return for neglecting some public duty. Most states, of course, have

¹⁴¹Pennsylvania Statutes (1920), sec. 9095.

¹⁴²Code of Iowa (1927), ch. 258, sec. 5180 a 3.

the usual section prohibiting public officers from being interested in public contracts, and the Kansas statutes specifically name the county attorney and enjoin him from having any pecuniary interest in road contracts.¹⁴³

We have already dealt in section V with the circumstances which disqualify a prosecutor from acting in any particular case and it is not necessary to repeat that discussion here, but it is important to devote some attention to the restrictions upon the private practice of the prosecuting attorney. More than half the states have no laws whatever upon the subject and the provision which most frequently appears forbids the partner of the prosecuting attorney to assist in or defend in any criminal case which it is the duty of the prosecutor to prosecute. Seventeen states have this provision and thirteen specifically prohibit the prosecuting attorney from assisting or defending in any criminal case during his term of office. In eleven states the prosecuting attorney is forbidden to participate in any civil case which involves the same facts as any pending criminal case. In Kentucky, Mississippi, and Texas the restriction is phrased to prevent the prosecutor from appearing in any case in opposition to the interests of any public authority, and in New Mexico he may not take any case in which the law requires him to represent the public. The laws of California prescribe the office hours of the district attorney and provide further that he may not work on any private case during office hours. In six states the prosecutor, after retiring from office, may not defend in any case which he previously prosecuted. In Wisconsin he is forbidden to be attorney for any common carrier.¹⁴⁴ The statutes of New Hampshire provide that the county solicitor may not take any civil case involving intoxicating liquor in any way,¹⁴⁵ and in Oregon the partner of the district attorney may not participate in any divorce case.¹⁴⁶

In addition to imposing these general restrictions upon the office of prosecuting attorney, many legislatures have at least recognized that the enormous discretion which attaches to the office should be controlled, and many provisions of law are obviously attempts to restrict this discretion. Inasmuch as such statutes are intimately related to the procedure in criminal prosecution, they will be summarized and discussed in a subsequent treatment of the prosecuting duties of the prosecuting attorney.

¹⁴³Revised Statutes of Kansas (1923), ch. 68, sec. 1130.

¹⁴⁴Wisconsin Statutes (1929), secs. 348, 312.

¹⁴⁵Public Laws of New Hampshire (1926), ch. 144, sec. 57.

¹⁴⁶Oregon Laws (Olson, 1920), sec. 3171.

X.

After presenting the mass of material which appears on the preceding pages, it is advisable to have some sort of recapitulation. The items of interest which have been recorded are to a large extent the comments on the variations and modifications which appear in general provisions from one state to another. To repeat those here would mean the inclusion of large parts of the foregoing discussion, but there are certain important features of general practice which should be summarized even if it does involve restatement.

As far as matters of general practice and policy may be concerned, this statutory analysis has largely confirmed previous impressionistic observations although in certain directions it has altered those impressions. Perhaps the outstanding disclosure is the fact that only a negligible number of states rely upon the fee system to compensate the prosecuting attorney. Beyond that, we have found that in most states he is a constitutional officer and that in many jurisdictions the constitutions have left the legislature little freedom to adapt the office to changing needs of the community. The most important qualification for the office has been found to be that requiring that the prosecutor be an attorney at law. The only general age restriction is twenty-one years and very few states prescribe any minimum amount of experience as a practicing attorney. If legislatures should raise the standards with respect to these two items alone, the average of competence in the office should rise considerably. Almost everywhere the office is filled by election, and the jurisdiction is defined upon a territorial basis without regard to the amount of work to be done. The fact of election necessarily makes the office highly political, while the territory with a small population pays less than more populous areas and therefore attracts less able men to the office. For this reason it is worth while at least to consider whether or not it is preferable for a state to have its prosecutors serve districts of nearly equal population. The method of selecting prosecuting attorneys is highly important. Direct election of the prosecutor seems to us as undesirable as the election of judges.¹⁴⁷

¹⁴⁷To quote Professor Caldwell in this connection: "Most of the reasons which militate against the popular election of judges, also stand opposed to the popular election of the administrative officers of our prosecuting system. Every thinking person knows that election by popular vote is determined not by merit or ability, but by popularity, and that popularity is not always based on merit." 16 *Journal of the American Judicature Society* 74 (October, 1932).

It appears from the statutes that legislatures have been altogether too reluctant to give either the prosecutor or any other local authority sufficient freedom to meet the staff needs of the office. Inasmuch as the prosecuting attorney is usually a county officer, the county board, as the budget making authority of the county, should have power to determine the number of, to fix the salaries of, and to pay the subordinates and assistants needed by the prosecuting attorney.

In very few states do we find satisfactory provision for the removal of the prosecutor and under most statutes the incompetent or dishonest official can feel quite sure that he will hold office until the end of the term for which he was chosen. Legislatures throughout the entire country have attempted to enforce responsible service from the prosecutor by the agency of the ballot and the criminal law rather than by any administrative control from any source. In almost every state in the union it would be possible to open the way to more efficient prosecution by increasing the official interest of the state government in local prosecution and by providing more definitely for supervision and expert assistance from the state department of justice.

This study of provisions of law organizing the office of prosecuting attorney leads directly to the hope that future constitution-makers will leave the office of prosecutor to be created and defined by the legislature. It leads also to the hope that legislatures in creating and defining the office will concern themselves less with temporary patchwork and more with a mature consideration of the general functions of the prosecuting attorney.