

The American Prosecutor in Historical Context

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This is the second of two articles detailing the development of the office of the American prosecutor. The first part appeared in the March/April issue of the magazine. For this reason, the endnotes begin with number 32, where they left off in the first part of the article.

The American Prosecutor From Appointive to Elective Status

This section examines the democratic movement during the period from 1789 to the Civil War that changed the local prosecutor from an appointed to an elected official. In these early days of the new republic, the country shifted from a limited democracy that was ruled by a few franchised citizens to a democracy that extended the vote to almost all citizens. At the same time, governing power continued to be decentralized as the state's influence over local authority declined and weakened. With the power of the vote and the election of President Andrew Jackson in 1828, more and more offices became elective.

As Jacksonian democracy swept the land, sparked by the spirit of independence in the new states, two important changes occurred. The position of the local judge changed from appointed to elected, which in turn directly helped make the office of the local prosecutor elective as well. A separation of powers occurred that moved the prosecutor from the judicial branch of government to the executive. These two changes gave the American prosecutor a new set of responsibilities, power and authority. Ultimately they became the foundation for the independent discretionary authority that was to distinguish this office from that of any other prosecutor in any country in the world.

The Early Republic, A Limited Democracy: 1789-1820

The federal system of prosecution established in 1789 provides a freeze-frame of the trends and philosophies that were predominant in criminal prosecution at the beginning of the American nation. The U.S. attorney general was a weakened office with vague supervisory powers, acting in an advisory capacity, and with limited appellate jurisdiction. Primary responsibility for prosecution was delegated to state and local prosecutors. The concept of local prosecution was well established by 1789, with most of the states utilizing deputy attorneys general for prosecution.

Even though the attorney general was the nominal head of state prosecution, in reality the local prosecuting attorney was moving swiftly toward achieving his own localized power. Local courts and local appointments or recommendations hastened this trend and marked a concomitant decline in the centralized power of the attorney general.³² Massachusetts, for example, had created the office of the district and county attorney in a statute of 1817 and placed it under the nominal supervision of the attorney general. By 1843 the position had become so independent that the attorney general's office was abolished as being unnecessary.³³

In the first 30 years of the new republic there were few changes to the limited duties and responsibilities of the prosecuting attorney, and there was little alteration in the prosecutor's base of power. The appointive status was the major reason for this stability. The prosecutor could not make independent decisions or exercise choice and discretion without regard for the opinions and politics of those who appointed him (and in those days, unlike today, all prosecutors were male). Whether the appointee was the governor, as in Pennsylvania, the attorney general, as in North Carolina, the local judge, as in Connecticut, or the local court, as in Virginia, the prosecutor was subordinate to another official within a political process upon which his tenure depended.

Appointive status was not exceptional during this period; few offices were elective and few citizens were electors. There were strict limitations on the general franchise, and the nation was, by modern standards, a very limited democracy. Voting was regulated by age, sex, race and property ownership. Those actually allowed to cast ballots in the general elections constituted a very small proportion of the population.

A review of the first constitutions of the 13 states indicates just how limited democracy was. The only office that was elected by the people in all states was the position of legislator. The office of the governor was on the ballot in only six of the 13 states: Massachusetts, Rhode Island, Connecticut, Pennsylvania, Delaware and Maryland. In New York, New Jersey, New Hampshire, Virginia, North Carolina, South Carolina and Georgia, the governor was either appointed or elected by the legislature. Only five of the first constitutions, Massachusetts, New Jersey, Maryland, Virginia, and Georgia, mention the office of the attorney general. Even these states list the office in the judicial rather than the executive article of the constitution.

Most of the first state constitutions were silent about the elective status of local officials. New Jersey and Pennsylvania elected their county sheriffs and coroners at large, while Maryland elected only the sheriff. North Carolina made provision for these county offices but declined to say in the constitution whether they would be elected or appointed. In fact, they were appointed. Virginia had no provision for the election of local officers, but did say that they would continue, as had been the colonial custom, "to be nominated by their respective courts."

In North Carolina, South Carolina and Virginia, county and local officers were elected indirectly by the legislature. In New York, Massachusetts and New Jersey, they were appointed by the governor with the consent of the legislatures.

Only the state of Connecticut made mention of local prosecutors. Referring to the statute of 1704, its constitution states simply that "there is no attorney general, but there used to be a King's Attorney in each county; but since the King was abdicated, they are now attorneys to the Governor and company."

Expanded Democracy and Elected Offices: 1820–1860

The stature and power of the prosecuting attorney increased not as a result of changes to the legal code in the first 30 years of the republic but rather as an outgrowth of a broader political movement that began about 1820. It was highlighted by the presidency of Andrew Jackson and culminated prior to the Civil War.³⁴ The period of Jacksonian Democracy saw increased democratization of the American political process. Its effect was to redefine the political nature of officeholders nationwide. It caused a greater number of public officials to be popularly elected and it established local elections to elect local officials. These movements expanded and strengthened the concept of decentralized government, which had been the hallmark of colonial government. They eventually gave greater independence to elected officials and established positions that required the exercise of discretion.

This democratic upsurge, although affirming the basic populist spirit that had operated in the colonial period, was fueled by the westward expansion. As new states joined the union, more progressive constitutions hastened the addition of popularly elected offices. Vermont, Kentucky and Tennessee were the first three states to enter the union during the Washington administration and before the turn of the century. Vermont (1791) and Tennessee (1796) adhered fairly rigidly to the pattern of the original states by providing only for the election of assemblymen. Kentucky (1792) adopted the more progressive examples of New Jersey and Pennsylvania that permitted county officers, most notably the sheriff and coroner, to be elected in their counties.

In several states formed out of the Northwest Territory, Ohio (1802), Indiana (1816) and Illinois (1818), the constitutions decreed the election of governor and numerous local offices. Although there was no mention of judicial elections or elections of the prosecuting attorney in any of their constitutions, such alterations were possible if the legislature so desired. For example, in 1821, the first prosecutor in Ohio, elected in and serving Cuyahoga County, was provided by statute.³⁵

While none of these states mentioned the office of prosecuting attorney specifically, all included some mention of prosecution. Article 29 of the Vermont constitution required that all prosecutions be public and that indictments include the phrase "against the peace and dignity of the state." Kentucky provided for an attorney general that would appear for the commonwealth "in all criminal prosecutions and in all civil cases in which the commonwealth shall be interested in any superior court." Tennessee mentioned neither prosecuting attorneys nor an attorney general but did set limits on the amount of money to be paid for attorneys appearing "for the state in Superior Court."

The District Attorney as a Minor Judicial Figure

Although today the local prosecuting attorney is considered an executive officer and the primary law enforcement official in his or her district, in the early republic the prosecutor was viewed as a minor figure in the court. The position was primarily judicial and only quasi-executive. As a subsidiary of the courts, the prosecutor was considered an adjunct to the real powers of the courts, the judges.

There is much evidence to support this thesis. Most telling is the fact that the prosecuting attorney, whether district attorney, county attorney or attorney general, was originally mentioned in the judicial article of the constitution. Even in states where separate articles were written for local and county officers, the prosecuting attorney, for the first half-century at least, was relegated to a subsection of those articles establishing the structure and officers of the state court system. Never was the prosecutor listed as a member of the executive branch, nor described as an officer of local government. The prosecutor was, in the eyes of the earliest Americans, clearly a minor actor in the court's structure.

Greater deference and attention was given to two other officers of the county: the county sheriff and the county coroner. Their positions in the early American criminal justice system clearly outstripped that of the prosecuting attorney. Their importance is further substantiated by the fact that these were the first offices to gain independent status and to be locally elected.

The earliest literature and proceedings of the courts indicate that the sheriff was the foremost member of the criminal justice system as it existed before the Civil War, and no other office was in even close competition. In 1816 when a member of the New York Bar, John Tappen, prepared a manual describing the New York courts and government for junior and entering members, he gave an extensive treatment of the sheriff's office and the duties of 20 other offices.³⁶ He did not once mention the prosecuting attorney, even though New York had established a seven-district court system in 1796 and had placed an assistant attorney general in charge of prosecution in each district. In 1801 chapter 246 of the state laws provided for a district attorney for each district. Lack of even the most perfunctory attention by Tappen leads to the conclusion that the role of district attorney at that time was minor in the criminal justice hierarchy. Historians studying the Virginia courts in the early republic describe the sheriff's revered status but also make no mention of the prosecuting attorney.

Gaining Elective Status and Separation from the Judicial Branch of Government

None of the early constitutional amendments affected prosecution until judges gained elective status. "In the colonial period, and for some decades thereafter, the prosecutor's office was in fact an appointive one, appointing being in some cases by the governor and in other by the judges... As with judicial offices, however, appointment almost everywhere gave way to popular election in the democratic upsurge of the nineteenth century; and it became the universal pattern in the new states."³⁷

The popular election of judges was a key element in creating locally elected prosecutors. States revised their constitutions and increased the number of local elective offices. In May 1798, Georgia revised its constitution and became an innovator by allowing its citizens to elect not only local executive officials but also local judges. "Five justices of the inferior court shall be elected by the voters in each county, to preside in the inferior courts of the county; and justices of the peace shall be elected annually by the voters in every militia captains district."

Mississippi (1807) created the offices of attorney general and prosecuting attorney as separate entities. Prosecuting attorneys were indirectly elected in districts; that is, they were elected by voice vote of the assembly in session. Alabama adopted a similar procedure in 1819. Louisiana failed to provide for the election of judges in its 1812 constitution and, not unexpectedly, failed also to provide for elected prosecuting attorneys. It did, however, establish the office of prosecuting attorney separate and apart from that of the attorney general, another indication of the growing independence of the office from centralized authority.

After Andrew Jackson was elected in 1828, the trend toward more elective offices and an expanded franchise swept the United States, affecting the constitutions and statutes in almost every state. During the next 20 years, seven of the 13 founding states amended their constitutions to accommodate this new spirit. The attorney general became an elected position in Rhode Island and New York. Lower court

judges and justices of the peace were elected in Rhode Island (1842) and New York (1846); and only justices of the peace in Pennsylvania and Delaware. Georgia, the state that had first provided for elected jurists, amended its constitution in 1839 to provide for prosecuting attorneys in each county to be elected by the general assembly.

In 1832 Mississippi became the first state to include in its constitution a provision for the popular election of local district attorneys. It also allowed for the election of all judges on the circuit and appellate levels. Fourteen years later in 1846, Iowa voted to hold popular elections for judges and county attorneys. In New York the prosecuting attorney became a constitutional office in 1846. The district attorney was established by the Pennsylvania legislature on May 3, 1850, a move that was motivated by "a wave of home rule sentiment in the country."³⁸

The move to elect judges and prosecutors was not unanimously supported. As Professor Caldwell, a critic of judicial elections, stated: "Most of the reasons that militate against the popular election of judges also stand opposed to the popular election of the administrative officers of our prosecutive 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."³⁹ Despite these concerns, when the election of judges finally came so did that of prosecuting attorneys.

By the Civil War, public perception of the role and responsibilities of the public prosecutor had changed. For the first time, some of the new state constitutions listed the prosecuting attorney in the executive article along with other county officers including the sheriff, the coroner and the clerk. The prosecutor's new elective status and independence from the court was a major force in defining prosecutorial functions. The public began to recognize and ask for a clear and distinct separation between the duties and powers of the prosecutor and those of the courts.⁴⁰

Roscoe Pound, writing about the influence of the French law and thought in the United States in the first half of the 19th century, described the changing nature of the public prosecutor. The public prosecutor's increasing independence during this period, the shift from appointive to elective, from judicial to executive status, exemplifies the French belief, dictated by Montesquieu, that there should be full and complete separation between the branches of government. In this respect, at least, the American local prosecutor is much more clearly descended from the procureur publique than from the king's attorney.⁴¹

By 1850 the trend was clear and irreversible. For the most part, the new states thereafter provided for a prosecuting attorney in their constitutions; those that did not, provided for one by law. By 1912, when New Mexico and Arizona were admitted, all 48 states had such an officer, 38 by constitution and 10 by law.⁴² Only five states did not provide for locally elected prosecutors: Delaware, Rhode Island, Connecticut, New Jersey and Florida.⁴³

It is interesting to note that the four states that did not provide for local elections of prosecutors were all original members of the Union, suggesting that they chose to preserve the colonial forms of early prosecution. Two of the states, Rhode Island and Delaware, are geographically so small that it was probably not feasible to operate a local system of prosecution.⁴⁴ In both these states the elected attorney general is the principal officer of prosecution.

The relationship between judicial elections and elected prosecutors appears to be one where the prosecutors rode the coattails of the judges to gain elective status. If the judges did not gain elective status then neither did the prosecutor. In New Jersey prosecutors represent local jurisdictions, but they are appointed by the governor with the advice and consent of the senate and are supervised by the attorney general. The same appointive procedure is followed for judges. In Connecticut local prosecutors were appointed by the local court until 1984, when Article 23 of the constitution was amended to take the prosecutor out of the judicial branch and place him in a newly created independent constitutional agency called the Criminal Justice Commission.⁴⁵ This independent agency is connected to the executive branch for administrative purposes only. The 12 Connecticut state's attorneys are appointed by the commission to eight-year terms. Deputy state's attorneys are also appointed by the commission after review by the state attorney.

Finally, of interest is the structure of prosecution in the two newest states. Alaska, the 49th state, was admitted to the union in 1959. Its constitution empowers the attorney general to conduct prosecutions

through prosecutors in the local jurisdictions who are appointed by the attorney general. In Hawaii (also 1959) the position of attorney general does not exist. The prosecution function is divided between elected and appointed: the prosecutors in three of the four counties are elected while the mayor appoints the prosecutor for Maui.

By 1859 the office of the American prosecutor had been defined as a locally elected position with executive functions separate from the judiciary. Now the groundwork was laid for the final transformation in his identity. With elective status it was possible for him to claim and exercise discretionary power. Of all the powers of the prosecutor, his authority to bring charges and dismiss them is the most controversial and criticized. This authority was not gained easily or quickly as the next (and final) section on the development of the American prosecutor will show, but the addition of discretionary power to the office produced a uniquely American prosecutor.

The American Prosecutor's Discretionary Power

This section traces the controversial history of the prosecutor's discretionary power, namely his unreviewable authority to bring charges or dismiss them. It continues tracing the American prosecutor's journey after gaining elective status and becoming independent of the judiciary.

Twenty years after the Civil War, the prosecutor had become a unique amalgam of the offices and historical influences that had preceded him. Like the private citizen in the English system, or the procureur or the schout, he could initiate those prosecutions he chose. Like the English attorney general, he could terminate prosecutions by informing the courts that the state was unwilling to proceed further. Because he was a locally elected official, he was free to apply the laws to his jurisdiction as he felt they best served his constituency. And, because he had been conferred discretionary authority by state constitutions or statutes, his decisions were virtually unreviewable. It was these last two characteristics that made him a center of power in the American criminal justice system.

The controversy surrounding this discretionary power continues unabated even today despite a long history of case law in support of the power. Critics decry the weakening of the grand jury as an independent check on prosecution and oppose prosecution plea agreement (plea "bargaining") practices. However, their attempts to limit discretion in the form of legislated sentencing guidelines, mandated sentences, habitual offender statutes and the like have had just the opposite effect.

Constitutions, Statutes and the Court Uphold the Prosecutor's Discretionary Power

The freedom to "make a choice among possible courses of action or inaction," or unreviewable prosecutorial discretion, was in the end what truly set the American prosecuting attorney apart from all other members of the criminal justice system.⁴⁶ The discretionary power of the American prosecuting attorney had become indisputable in three crucial areas. The prosecutor alone had the power to decide whether criminal action would be brought; to decide the level at which an individual would be charged, and the prosecutor could not be prevented from terminating prosecution when appropriate and necessary.

The transformation of this once minor court figure is well demonstrated in case law. A series of court cases, beginning in 1883 and continuing to the present, has almost unanimously affirmed the prosecutor's unshared and unreviewable powers in this aspect of the criminal law.⁴⁷ By 1883 in *People v. The Wabash, St. Louis and Pacific Railway*, the Illinois Court of Appeals voiced their strong interpretation of the powers of the prosecuting attorney: "He is charged by law with large discretion in prosecuting offenders against the law. He may commence public prosecutions in his capacity by information and he may discontinue when, in his judgment the ends of justice are satisfied."⁴⁸

Attempts to compel the prosecuting attorney to proceed in cases where he felt criminal prosecutions were not warranted have persistently failed. In *Wilson v. County of Marshall*, the prosecutor was said to have "absolute control of the criminal prosecution."⁴⁹ In cases in New York,⁵⁰ New Jersey⁵¹ and California,⁵² the state courts declared that they lack the power to compel the prosecuting attorney to enforce the penal code. "The remedy for the inactivity of the prosecutor is with the executive and ultimately with the people."⁵³

Further buttressing the prosecutor's discretionary power are court rulings that support the prosecutor's right to determine what crimes he will investigate, and under what circumstances. In a Wisconsin case, *State ex. rel. Kurkierewicz v. Cannon*, the family of an 18-year old who had been shot by a policeman under suspicious circumstances sought a writ of mandamus from the courts to compel the prosecutor to order an inquest into the causes of death.⁵⁴ The family cited an earlier Wisconsin case, *State v. Coubal*, in which the court had held that although the prosecutors' duties are discretionary, they remain subordinate to the will of the legislature.⁵⁵ Again, the court refused to interfere with the discretion of the prosecuting attorney. In *Wilson v. State*, a 1949 Oklahoma court decision defended the prosecutor's right to charge a defendant with a charge that was less than the evidence would support.⁵⁶ In several federal cases including *Howell v. Brown*, *Milliken v. Stone* and *Puglach v. Klein*, the courts ruled that similar unfettered discretion exists at the federal level.⁵⁷

By 1912 when Arizona and New Mexico were admitted to the Union, the process of consolidating prosecutorial power and discretion in the local prosecuting attorneys was essentially complete. The local prosecutor was the primary representative of the public in the area of criminal law.

Prosecutorial Discretion is Discovered: Checks and Balance or Abuse of Power?

The long slow evolution to power culminated in the public's belated recognition and concern. By the 1920s, after almost three hundred years of existence, the office of the prosecuting attorney finally was to become the subject of a number of commission studies and reports focusing on their central role in the criminal trial process. The impetus for many of the studies was a whole new set of problems facing America after World War I—new technology and the automobile, society's rising expectations, increasing populations, new immigrants and prohibition, among others. Topping the list for concern was crime.

Most of the commissions attempted to define the local criminal justice system and assess its ability to cope with the stresses of the turbulent post war period. Some reports were politically motivated, as was the Chicago report of 1921, which was prepared by a political opponent of the Cook County state's attorney.⁵⁸ However, most reflected earnest attempts to remedy the then decaying law enforcement structure.

State and local crime commissions were formed in Baltimore and Chicago in 1921, in Cleveland in 1922⁵⁹ and for the state of Missouri in 1926. Commissions also met in Georgia, New York, Illinois, Minnesota, Pennsylvania and California before the end of the decade.⁶⁰ Almost all of them took a long hard look at the prosecutor. Most were shocked by the extent of his power and dismayed by his inability to control the crime situation. The California Crime Commission (1929) called for more attention to the "unsupervised area of plea-bargaining," and suggested that the power of the prosecutor in this area be diluted.⁶¹

In 1934 a National Commission on Law Observance and Enforcement (NCLOE) was formed to study the status of criminal justice in the United States under the leadership of the legal scholar, George W. Wickersham. The Wickersham Commission included some of the most notable legal minds of the day, including Wickersham, Roscoe Pound of Harvard University, Newman Baker of Northwestern and Charles Bettman, the author of the Cleveland Crime Commission Study. The commission concentrated an entire volume of its report on the duties and functions of the prosecuting attorney.

The report was highly critical of the situation in the criminal courts. The commission felt that the political nature of the prosecutor was detrimental to the best administration of justice and that the direct election of prosecuting attorneys provided neither qualified candidates nor a proper check on the prosecutor's discretionary practices.

About the same time, between 1933 and 1935, a comprehensive series of articles about the public prosecutor was published in the *Journal of Criminal Law and Criminology*. The series was co-authored by Newman Baker and Earl DeLong, also of Northwestern University. Baker and DeLong were the first to describe the paradoxes embodied in the local prosecutor: "The people of the United States have traditionally feared concentration of great power in the hands of one person and it is surprising that the power of the prosecuting attorney has been left intact as it is today."⁶² Baker and DeLong were especially impressed with the power that the prosecuting attorney had attained. "Nowhere," they proclaimed, "is it more apparent that our government is a government of men, not of laws."⁶³ They

pointed out that the prosecutor was shaped only by those who elected him and that popular election had meant that the local standards had come to determine how the law was applied. And this, they argued was the crucial factor in the effectiveness of the criminal laws. "The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals acting largely for themselves. How it is applied outweighs in importance its enactment or its interpretation."⁶⁴

Other commentators had been wary of a power that was only checked at the ballot box and warned that it would lead to abuses. Judge William B. Quinlin of Wisconsin, speaking before a meeting of the state's district attorneys in 1921, exhorted them "not to legislate."⁶⁵ He pointed out that, in his opinion, the district attorney was duty bound to equitably prosecute all crimes brought to his attention. He feared that the voter was not likely to provide diligent checks on unlimited discretion. As another author has said: "To some extent (the prosecutor) derives his authority from statute, but more largely he relies on custom. The people look to him for results; they are not likely to ask whether he has stayed within the exact limits of his powers."⁶⁶

Baker and DeLong, however, recognized that it was no accident that the prosecutor was allowed to exercise wide discretion and that he often enforced the laws as a direct expression of local custom and sentiment. They knew that the system characteristically produced satisfactory prosecutors for the majority of American jurisdictions and that there was too direct a connection between the voters and the officeholder for any crime that was genuinely perceived as dangerous to the community to go unprosecuted. At the same time, they noted that the rise of crime would force the prosecutor to "steer a middle course" between initiating all actions and following only his personal preferences.⁶⁷

Despite the public's criticism and opposition to the prosecutor's discretionary power, the courts did not agree. With little hope of changing case law, opponents focused on procedures that allowed discretion to operate. Two issues generated considerable interest: the weakening of the grand jury and the "abuse" of justice through plea "bargaining."

Discretion, Accusatory Power and the Grand Jury

By the 1930s the grand jury was losing ground to the prosecutor, who had come to "dominate the grand jury process" in his position of advisor and presenter of evidence. "The grand jury" said political scientist Austin MacDonald, "is poorly fitted to perform its allotted tasks—it is virtually compelled to rely on the prosecutor for its facts, witnesses and opinions."⁶⁸ Twenty-four states had by-passed the grand jury process, and almost all criminal cases were being filed by means of prosecutor information. In other states, there was movement for similar change—for a procedural recognition of a legal fact of life—that the power to charge no longer was controlled by the grand jury. Charging was in fact a function of the locally elected prosecutor.

Raymond Moley argued that the use of the information rather than the indictment system: "properly centers responsibility upon the prosecutor for actions which are apparently largely under his control even when indictments only are used. He seems to dominate the grand jury to such a degree that its actions are in reality his own, and for that reason they should be his nominally as well as actually."⁶⁹

Justin Miller, in a study published by the University of Minnesota Law Review agreed with Moley and added that the use of informations was a fiscal boon to criminal justice administration. His study showed that informations were more expeditious, less expensive and more efficient, resulting in the initiation of fewer unsuccessful prosecutions.⁷⁰

Two factors helped save the grand jury. One was the subpoena and immunity power of the grand jury. The other was the secrecy of its proceedings and its value for reviewing sensitive, socially controversial or politically explosive cases. As a result, although the prosecutor controlled the flow of information and evidence to the members of the grand jury, he escaped the political consequences of an unpopular decision. He could claim that the power to indict or not to indict in that specific case had been in the grand jury's hands and not his.⁷¹

Despite its inherent value as a check and balance on prosecutor discretion, the grand jury's impotence became evident to the legal reformers of this century. In 1961 MacDonald wrote that, "the present trend

seems to be toward the further expansion of the powers of the prosecuting attorney and the virtual abandonment of the grand jury system in ordinary criminal proceedings.”⁷²

Discretion and Plea Agreements

Plea agreements are not a new phenomenon. They apparently originated in 17th century England as a means of mitigating unduly harsh punishment. Indeed, it was noted that if a person accused of any crime chose to plead guilty and offer up his accomplices, the king “might grant him life and limb.” If he failed to fulfill the conditions imposed upon him, he was hanged on his own condition.⁷³ Although plea bargaining was apparently widespread from the beginning of the Republic, studies did not confirm its pervasiveness until the 1920s. Few courts, however, discussed the practice and most of those that did, condemned it.⁷⁴

The Wickersham report was particularly disturbed by the issue of plea bargaining, which was constantly referred to as an “abuse” of the process. The report expressed the opinion that the prosecuting attorney had gained too much power and too many responsibilities, recommending that the states institute a “systematized control of prosecutions under a director of public prosecutions or some equivalent official with secure tenure and concentrated and defined responsibility.”⁷⁵

Although the vast majority of cases are disposed by pleas and often times negotiated pleas, and the court system recognized it could not support the abolition of plea negotiation, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) called for its end by 1978.⁷⁶

As crime continued to increase and place even higher demands on the dwindling resources in the courts, however, abolishing plea bargains was simply not feasible. Moreover, new laws dealing with crime that, in effect, transferred power from the court to the prosecutor expanded its use. A notable example is the habitual offender laws that provided for enhanced sentencing of repeat offenders. As William McDonald of Georgetown University noted, “When mandatory sentences are involved, the charging decision becomes the sentencing decision... In short, when the penal code is such that the prosecutor’s charging decision can make a major impact on the types of sentence to be served, the prosecutor’s domain is expanded into the traditional judicial prerogative of sentencing.”⁷⁷

Looking to the Future

In 1931 the Wickersham Commission wrote, “In every way the prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power. We have been jealous of the power of the trial judge, but careless of the continual growth of the power of the prosecuting attorney.”⁷⁸ According to Professor Newman Baker, his position was secure, because “the permanence of the prosecutor as he exists at present, is substantially buttressed by constitutional provisions in most of the 48 states and revision of such constitutional provisions comes slowly.”⁷⁹

In 1971 the National Association of Attorneys General commented that “there is little probability that the basic pattern (of increased power and prestige for local prosecutors) will be changed; there is every indication that it will be strengthened.”⁸⁰

One can only hazard a guess as to how the nature of the American prosecutor will change in the new century. There is little doubt that he or she will continue as a locally elected official. But there is some doubt as to whether his or her discretionary power will remain unchanged. No matter what the future holds, one fact is still clear. After three hundred and fifty years of existence, the American prosecutor is unique, and has been uniquely formed out of America’s rich soil of diversity, innovation and willingness to change.

Endnotes

³² Newman Baker, “The Prosecuting Attorney - Provisions of Organizing a Law Office,” *Journal of Criminal Law and Criminology* 23 (1932), 926, 957-959.

33 National Association of Attorneys General (NAAG), *Report on the Office of the Attorney General* (Raleigh, N.C): The National Association of Attorneys General, 1970), 15. See also Elliot Richardson, "The Office of the Attorney General: Continuity and Change," *Massachusetts Law Quarterly* 53 (1968), 6.

34 NAAG, Report, *supra* note 33, at 19.

35 Alfred Bettman, *Prosecution* (Cleveland,OH: Cleveland Foundation, 1921).

36 John Tappen, *The County and Town Officer* (Kingston, NY: 1816).

37 Lewis Mayers, *The American Legal System* (New York: Harper and Row, 1964), 413.

38 John J. Poserina, "Appointed Attorney General's Power to Supercede an Elected District Attorney," *Temple Law Quarterly* 33 (1959), 83.

39 Baker, *supra* note 32, at 962.

40 Presently, North Carolina is the only state that still defines the prosecutor as a member of the judicial branch of government.

41 See Roscoe Pound, "The Influence of the French in America," *Illinois Law Review* 3 (1908), 354. On independence of the U.S. attorney, see *Howell v. Brown*, 85 F. Supp. 537, 540 (D. Nebraska, 1949).

42 See Baker, *supra* note 32, at 955-959. 955-959. The 10 states are Connecticut, Delaware, Maine, Rhode Island, Ohio, Missouri, Kansas, Nebraska, Wyoming and Minnesota.

43 Florida later altered its procedures, and the prosecuting attorney is now locally elected.

44 Rhode Island does not even have a county government structure.

45 The commission is composed of two judges, two attorneys and one civilian appointed by the governor. The commission terms are co-equal with the term of the governor.

46 Jack M. Kress, "Progress and Prosecution," *Annals of Political and Social Sciences* 423 (January 1976), 99-116 citing Kenneth Culp Davis. See *People v. Newcomber*, 284 Ill. 315, 120 N.E. 244 (1918).

47 See *People v. Newcomber*, 284 Ill. 315, 120 N.E. 244 (1918) (mandamus denied to state's attorney seeking to compel trial judge to accept nolle prosequi).

48 12 Ill. App. 263 (1883).

49 257 Ill. App. 220 (1930).

50 *People v. Berlin*, 361 N.Y.S. 2d 114 (1974).

51 See *State v. LeVien*, 44 N.J. 323, 209 A.2d 97 (1965). See also *State in the Interest of F.W.*, 130 N.J.Super. 513, 327 A.2d 697 (1974).

52 *People v. Adams*, 117 Cal. Rptr. 905 (1974).

53 *Milliken v. Stone*, 7 F.2d 397, 399 (S.D.N.Y. 1925).

54 42 Wis.2d. 368, 166 N.W.2d 255 (1969).

55 248 Wis. 247, 21 N.W.2d 381 (1946).

56 209 P.2d 512, 514 (Okla. 1949).

57 *Howell v. Brown*, 85 F. Supp. 537 (D. Neb. 1949); *Milliken v. Stone*, 7 F.2d 397 (S.D.N.Y. 1925); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961).

58 John J. Healy, *The Prosecutor in Chicago in Felony Cases* (Chicago, 1921), 307.

59 Alfred Bettman, *Prosecution* (Cleveland, Ohio: Cleveland Foundation, 1921), 56-60. The Cleveland survey included a complete description of the duties and responsibilities of the office of the prosecutor and included an attempt to statistically describe the functions of the office.

60 See National Commission on Law Observance and Enforcement (NCLOE), *Report on Prosecution*. (Washington, DC, Government Printing Office, 1931).

61 Newman Baker, "The Prosecutor—Initiation of Prosecution," *Journal of Criminal Law and Criminology* 23 (1933) 770, at 771.

62 Baker, *supra* note 32, at 934.

63 Baker, *supra* note 62, at 771.

64 *Id.*, 796.

65 William B. Quinlin, "The District Attorney," *Marquette Law Review* 5 (1921), 190, 194.

66 Austin F. MacDonald, *American State Government and Administration*, 6th ed. (New York: Tomas Crowell, 1961), 474.

67 Baker, *supra* note 62, at 771.

68 MacDonald, *supra* note 67, at 474-475. Notable exceptions to this are North Carolina, Virginia and Connecticut.

69 Raymond Moley, "The Initiation of Criminal Prosecution by Indictment or Information," *Michigan Law Review* 29 (1931), 403.

70 *Id.* See Justin Miller, "Information or Indictment in Criminal Cases," *Minnesota Law Review* 8 (1924), 379-408.

71 See Moley, *supra* note 70, at 403.

72 MacDonald, *supra* note 67, at 474.

73 Sir James Stephen, "Criminal Procedure from the Thirteenth to the Eighteenth Century," *Two Select Essays in Anglo-American Legal History* (1908), 485.

74 James E. Bond, *Plea Bargaining and Guilty Pleas*. (New York: Clark Boardman Company (1975), 12.

75 NCLOE, *Report on Prosecution*, 38. See also Kress, "Progress and Prosecution," 110-111; Roscoe Pound, *Criminal Justice in America*, American Constitutional and Legal History Series (New York:

DeCapo, 1972); Compare with views of Raymond Moley, "The Initiation of Criminal Prosecution by Indictment or Information," *Michigan Law Review* 29 (1931), 403.

76 Standard 3.1, Task Force on Courts, National Advisory Commission on Criminal Justice Standards and Goals, (Washington DC, Government Printing Office, 1973), 46.

77 William F. McDonald, "The Prosecutor's Domain," *Criminal Justice Readings*, vol. 3, ed. by George S. Bridges, et al. (Pine Forge Press, Thousand Oaks, CA, 1996), 247.

78 National Commission on Law Observance and Enforcement (NCLOE), *supra* note 61.

79 Baker, *supra* note 32, at 927.

80 National Association of Attorneys General (NAAG), *Report on the Office of the Attorney General* (Raleigh, N.C.: The National Association of Attorneys General, 1971), 103.