Indiana Law Journal

Volume 30 | Issue 1 Article 4

Fall 1954

Nonfeasance: A Threat to the Prosecutors' Discretion

NONFEASANCE: A THREAT TO THE PROSECUTORS' DISCRETION

It is generally conceded that punishment for the commission of a criminal act is an effective means[1] of reducing the steadily increasing crime rate in the United States.[2] Under present criminal law standards, however, there can be no punishment until there has been legal prosecution and conviction.[3] Thus, the prosecution of criminal offenses becomes a pivotal point in all attempts to reduce crime.

---

67. Two possible methods exist of overcoming the favorable exceptions granted to the Government. One is to utilize another exception to counteract the first; second is to neutralize the exception by adhering to general contract law. See notes 61 and 65 *supra* and text.

1. "Punishment should be inflicted, firstly, because it is right to do so. But such punishment may also have very useful effects: it may stimulate reformation by bringing a wrongdoer to a realization of the ethical significance of his behavior; it may also deter. Such punishment provides far-ranging instruction in the social values." HALL, PRINCIPLES OF CRIMINAL LAW 130 (1947). See also Ewing, *A Study on Punishment,* 21 CAN. B. REV. 102, 116 (1943); Gausewitz, *Considerations Basic to a New Penal Code,* 11 WIS. L. REV. 346, 353 (1936); Note, *Punishment and Moral Responsibility,* 7 MOD. L. REV. 205 (1944).

The modern proponent of deterministic behaviorism is likely to object to punishment of any sort, preferring the view that society, and not the violator of the law, is the sinner or that the criminal is sick and should be treated accordingly. See MENNINGER, THE HUMAN MIND (1945); WHITE, CRIME AND CRIMINALS (1933).

2. In 1952, crime in cities increased 8.1 percent, showing gains in all offenses for the first time in seven years. This was a general rise in crime of 8.2 percent over the 1951 figures. 23 UNIF. CR. REP. 71 (1952). The first six months of 1953 showed a 2.5 percent increase over the same period in the preceding years and a 9.0 percent increase over that period of 1951. 24 UNIF. CR. REP. 1 (1953). Since 1950, there has been a 20 percent increase in the crime rate in contrast with a population rise of only 6 percent. The Indianapolis Star, April 22, 1954, p. 20, col. 1.

Prior to 1951, the crime problem in the United States was serious enough to warrant national attention. KEFAUVER, CRIME IN AMERICA (1951).

3. This idea is embodied in what Professor Hall calls the "principle of legality" and defines as the "limitation on penalization by officials, effected by the required prescription and application of *specific rules.*" HALL, PRINCIPLES OF CRIMINAL LAW 19 (1947). The principle, which springs from an ultimate concept of justice, expresses itself in the due process clauses of the Fifth and Fourteenth Amendments.

The general process of prosecution embraces the activities of several law enforcement agencies; *i.e.,* police, prosecutor, jury, and judge. Traditionally, the initial charge against an alleged offender is made by the police, and, then, carried to the prosecutor or the grand jury. In most jurisdictions either of these agencies may institute prosecution

Presently, varying degrees of discretion are exercised by the four agencies entrusted with prosecution of alleged criminal offenders, police, prosecutor, jury and judge; but of particular importance is that accorded the policeman and prosecutor. The policeman exercises discretion in deciding whether or not to arrest a person who has committed a minor violation of the criminal law.[4] The public is generally aware of this practice and grants tacit approval. When a formal complaint is signed by the policeman, the prosecutor utilizes discretion in determining whether or not the alleged offender will be indicted and tried for commission of the act.[5] Thus, the discretion granted the prosecutor is immensely larger in

---

against the alleged offender. Formal charge by the grand jury takes the form of an indictment, and was originally the only way of initiating a criminal proceeding. Today, however, the information filed by the prosecutor is widely used, 1 BISHOP, NEW CRIMINAL PROCEDURE §144 (1913), although commonly limited in application. Rule 7(a), FED. R. CRIM. P., forbids use of an information for any capital offense but permits its utilization for offenses the punishment for which exceeds one year if indictment is waived by the offender. In Indiana, the affidavit is substituted for the information and is substantially similar to that instrument. IND. ANN. STAT. §9-908 (Burns Repl. 1942).

A recent decision, which will necessarily be limited in use, permitted a conviction upon an affidavit submitted by the defendant and accompanied by his plea of guilty. People v. Jacoby, 304 N.Y. 33, 105 N.E.2d 613 (1952), *cert. denied,* 344 U.S. 864 (1952). This case was commented on in 66 HARV. L. REV. 360 (1952).

4. This fact is recognized in various works concerning criminal prosecutions. After recognizing a certain operation of discretion throughout the administration of criminal law, Dean Pound says simply: "The police exercise a certain discretion as to who shall be brought before the tribunals." POUND, CRIMINAL JUSTICE IN AMERICA 41 (1930). Professor Hall echoes these sentiments when applied to minor offenses. Hall, *Police and Law in a Democratic Society,* 28 IND. L.J. 133, 149 (1953), despite suggesting that the police have a duty to arrest upon reasonable grounds. *Id.* at 155.

The Indiana statute prescribing the duty of a peace officer to arrest uses permissive, rather than mandatory language. IND. ANN. STAT. §9-1024 (Burns Repl. 1942). However, this provision has been interpreted, in a dictum, as not affecting the common law duties of a policeman; the common law required that an officer arrest for a crime which he observes and prevent a crime which he anticipates. Hopewell v. State, 22 Ind. App. 489, 493, 54 N.E. 127, 129 (1899). There is another dictum which supports the proposition that a policeman has a duty to arrest all persons who violate the law. People v. Glennon, 37 Misc. 1, ——, 74 N.Y. Supp. 794, 799-800 (Sup. Ct. 1902).

5. United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945); State *ex rel.* Spencer v. Criminal Court, 214 Ind. 551, 556, 15 N.E.2d 1020, 1022 (1938); State *ex rel.* Gebrink v. Hospers, 147 Iowa 712, ——, 126 N.W. 818, 819 (1910); State *ex rel.* Bourg v. Marrero, 132 La. 110, 139, 61 So. 136, 147 (1913); Brack v. Wells, 184 Md. 86, 90, 40 A.2d 319, 321 (1944); Engle v. Chipman, 51 Mich. 524, 525 (1883); State *ex rel* McKittrick v. Wallach, 353 Mo. 312, 322, 182 S.W.2d 313, 319 (1944); Jones v. District Court, 67 Nev. 404, 410-411, 219 P.2d 1055, 1058 (1950).

See also 2 THORNTON, ATTORNEYS AT LAW §718 (1914); Curran, *A Federal Prosecutor Looks at the New Federal Criminal Rules,* 13 J. OF DIST. COL. B. A. 3 (1946); Glueck, *The Place of Proper Police and Prosecutory Work in a Crime Reduction Program* in PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 52, 60 (1934); Snyder, *The District Attorney's Hardest Task,* 30 J. CRIM. L. & CRIMINOLOGY 167, 180 (1940).

The only limitation generally imposed upon the prosecutor's exercise of discretion is that it not be exercised with corrupt intent. *E.g.,* Speer v. State, 130 Ark. 457, 463, 198 S.W. 113, 115 (1917); State *ex rel.* Williams v. Ellis, 184 Ind. 307, 312, 112 N.E. 98, 100

scope than that of the policeman; for if the prosecutor does not act, the judge and jury are helpless, and the policeman's work is meaningless. The prosecutor further dominates the administration of criminal law since he may dismiss or nolle prosequi with the court's approval at any time prior to the verdict.[6]

Implied in all grants of discretion is the desire that the laws be applied according to the circumstances of each case, for the use of discretion necessarily denies the advisability of prosecuting every violation of the law.[7] Probably the most convincing argument in support of a policy granting discretion in enforcement of the criminal law is that it provides for the elimination of charges which cannot be proved in court, thus saving time and expense for more sound cases.[8] It is also important when dealing with violations of a statute which exists chiefly for its deterrence value because the social importance of the prohibited act, or the amount of

(1915); State *ex rel.* Gebrink v. Hospers, *supra;* State *ex rel.* McKittrick v. Wallach, *supra;* 1 BISHOP, CRIMINAL LAW §460 (9th ed. 1923); THORNTON, *loc. cit. supra; contra,* State v. Jefferson, 88 N.J.L. 447, 97 Atl. 162 (1916), aff'd, 90 N.J.L. 507, 101 Atl. 569 (1917); State v. Winne, 12 N.J. 152, 96 A.2d 63 (1953), *motion for stay denied,* 27 N.J. Super. 120, 98 A.2d 898 (1953), *order denying bill of particulars aff'd,* 27 N.J. Super. 304, 99 A.2d 368 (1953). New Jersey has taken a unique position regarding this rule. See note 55 *infra* and accompanying text.

6. Originally, most jurisdictions permitted the prosecuting attorney to exercise the common law power of the Attorney General of England. His power to dismiss was unlimited prior to the trial. Also, before judgment but after the return of the verdict, the prosecutor could nolle prosequi. United States v. Brokaw, 60 F. Supp. 100, 101-102 (S.D. Ill. 1945). Statutes, however, have altered the common law on this matter. One of the most common limitations upon the power of nolle prosequi is to require the consent of the court. FED. R. CRIM. P. 48(a); GA. CODE ANN. §27-1801 (1953); IOWA CODE ANN. c.36, §795.5 (1946); MONT. REV. CODES ANN. §94-9505 (1947); N.Y. CRIM. CODE §671; PA. STAT. ANN. tit. 19, §492 (1930). Some of the preceding statutes ostensibly abolish nolle prosequi, permitting the court to dismiss upon its own motion as well as upon the motion of the prosecuting attorney. The important thing is that the court's permission is necessary to a dismissal of charges in these states. A helpful and relatively comprehensive discussion of nolle prosequi and its application in various jurisdictions may be found in People *ex rel.* Hoyne v. Newcomber, 284 Ill. 315, 120 N.E. 244 (1918). Additionally, the prosecutor may waive important issues in the prosecution, such as stipulating that the defendant was insane at the time the act was committed. Commonwealth v. Ragone, 317 Pa. 113, 176 Atl. 454 (1935).

7. Dean Pound suggests that discretion versus strict enforcement of the laws is one of the eternal jurisprudential arguments. POUND, *op. cit. supra* note 4, at 40-54.

8. Few, if any, of the authorities even consider this point, for it appears self-evident. If the prosecutor were forced to act upon every charge, however, the issue would assume importance. See Baker, *The Prosecutor: Initiation of Prosecution,* 23 J. CRIM. L. & CRIMINOLOGY 771, 772 (1933); Glueck, *supra* note 5, at 60; Miller, *The Compromise of Criminal Cases,* 1 So. CALIF. L. REV. 1, 31 (1927).

An unrepresentative survey showed that sixty-eight of seventy-three downstate Illinois prosecuting attorneys thought that they could prepare their cases as well as the defense. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, ILLINOIS CRIME SURVEY 267-268 (1929). This statement can be made only after many charges have been shelved by the exercise of the prosecutor's discretion.

harm resulting from it, may have changed since the statute was passed.[9] Discretion can tailor the enforcement of such a statute to the particular necessities of the community.[10] Under these circumstances, it fills the gap between morality and mores, catering generally to mores and violating morality where the two conflict.[11] A further advantage of the exercise of discretion in criminal prosecutions is its use as a counterbalance against the presumption that all laws are known.[12] When it is believed that no further violations will be committed by the alleged offender and the nature of the crime is such that the prescribed sanction seems unwarranted under the circumstances, refusal to prosecute saves the community unnecessary expense and animosity.[13] Discretion also enables a budgeting of time and energy so that the issues of the moment may be

9. Many statutes are passed to provide sanctions for conduct which arouse the ire of the particular generation yet do not so affect succeeding generations; and the harm resulting from the prohibited act may lose its seriousness as time passes. This suggests that the sanction should be changed, even though the law is still recognized as somewhat efficacious. Nevertheless, the law is permitted to remain through a combination of inertia and a desire to retain the sanction as a deterrent to the act which, though not warranting the punishment provided in the statute, is sought to be discouraged, *e.g.*, blue laws.

10. "Necessities" is the word chosen here rather than "desires" because the desires of the community may have a detrimental effect on other communities or submit the minority to lawlessness by a gentleman's agreement not to prosecute a certain type of offense. The courts have condemned prosecutors who permit the desires of the community to decide what offenses they should prosecute. "The duties of state's attorneys are to be performed regardless of public sentiment, and he who administers that office in deference to sentiment opposed to the law is unfit to hold that office or to be an attorney at law." *In re* Voss, 11 N.D. 540, 546, 90 N.W. 15, 18-19 (1902).

11. Proponents of the view that the law should represent all morality will consider this fact a disadvantage to discretion rather than an advantage since the prosecutor will tend to choose the alternative of not prosecuting a law which represents morality rather than mores. A rebuttal to the moralist's position is that not all violations of the moral code are meant to be punished by temporal society, especially those which are secretive or personal in nature. Furthermore, there is insufficient agreement concerning moral codes to satisfy each particular school of thought and yet draft a workable law. The disagreement between morality and mores is factual rather than theoretical, however, assuming that morality is the acme of conduct and mores are man's attempts to achieve morality. Unfortunately, man does not always attempt to achieve morality.

12. This presumption is both a matter of convenience and a matter of policy. It fixes on the citizen the duty to ascertain the law, and, once this duty is imposed on him, he must govern his conduct accordingly. The presumption is made irrebuttable to avoid placing a premium on ignorance of the law. Avoiding criticism of the means whereby a new law is promulgated, the sheer bulk of the law today imposing criminal sanctions defies knowledge by any individual. Of course, the major offenses are known to all ordinary persons, and these are not considered here; however, the many, many minor laws cannot be fully known. One has only his conscience to guide him in respect to them. What is here proposed is that the prosecutor weigh all these facts before he institutes an action for such an offense, even though the violation is clear.

13. One might call this a form of economy of punishment as that concept is recognized. See Snyder, *supra* note 5, at 173.

dealt with quickly, while temporarily laying aside less important violations.[14]

While the use of discretion offers many advantages to intelligent enforcement of criminal laws, it also entails many disadvantages. Primarily, it centralizes most of the power of local criminal law enforcement in one office and vests that office with a wide choice of action.[15] If this freedom of action is granted to an elected official, political aspirants and tacticians are attracted to the position. Thus, the office can become both a stepping stone to greater things and a powerful weapon in party machinations.[16] Flowing from the political nature of the office is the necessity of keeping one's self continually before the eyes of the electors.[17] This, however, is more an asset to prosecution than a detriment because of the desire to put before the voting public a good record of prosecutions.[18] Regrettably, even this can have a detrimental effect on prosecution since there is a temptation to waive felonies and permit pleas of guilty to lesser offenses in order to establish a good record of convictions.[19] In weighing the advantages of permitting discretion in the process of enforcing criminal laws against the disadvantages of doing so, the grant of discretion appears to be more desirable. Sanctions may

14. This statement embodies a facet of the money and time saving rationale discussed in note 8, and accompanying text, *supra*. One distinction may be made: in the previous case the sufficiency of evidence was of primary concern; in this instance, the sufficiency of the evidence is assumed, and the issue is the timeliness of the action. There are occasions when a particular offense or type of violation breaks out and spreads like a plague. When such a crisis occurs, a prosecutor saddled with numerous prior violations to prosecute is helpless to stem the trend.

15. "Few assemblies of men and government are entrusted with more power—with less accountability—than the prosecutor, for he has more power over life, liberty and reputation than any other person in America." Curran, note 5 *supra*, at 3. See MOLEY, POLITICS AND CRIMINAL PROSECUTION 48-49 (1929).

16. 76 A.B.A. REP. 401-402 (1951) contains an excellent critique of this situation. Similar comment is abundant. As the authorities point out, the underlying problem is that this marriage of prosecutor to politics too often begets crime as its offspring. POUND, *op. cit. supra* note 4, at 183-184; ILL. ASS'N FOR CRIMINAL JUSTICE, *op. cit. supra* note 8, at 251, 330; MOLEY, *op. cit. supra* note 15, at c.4.

One of the most recent works of this nature does not single out the prosecutor for politico-criminal association but discusses the extensive scope of politico-criminal connections in general. KEFAUVER, CRIME IN AMERICA (1951). See Glueck, *supra* note 5, at 60.

17. The end result of this desire often raises a conflict between the various law enforcement agencies who compete for publicity. Hobbes, *Prosecutor's Bias: An Occupational Disease,* 2 ALA. L. REV. 40, 44 (1949).

18. POUND, *op. cit. supra* note 4, at 183-184.

19. For instance, an estimated seventy-five percent of the findings of guilt in Cook County, Illinois, were of something less than the original charge. ILL. ASS'N FOR CRIMINAL JUSTICE, *op. cit. supra* note 8, at 260. Other comments on this practice may be found in MOLEY, *op. cit. supra* note 15, at 167; POUND, *op. cit. supra* note 4, at 183-184; Baker, *supra* note 8, at 788; Miller, *supra* note 8. The article by Dean Miller treats many legitimate uses of the compromise and suggests that it might profitably be extended still more.

be provided against improper exercises of discretion, but where it is denied completely, nothing can be substituted for the advantages it affords.

Admitting the advisability of utilizing discretion in law enforcement, it becomes necessary to decide which of the four agencies involved in the process of prosecution may best exercise it. Should this power be lodged in the policeman, perhaps the disadvantages which arise from political demands could be avoided, but others would ensue. If the policeman had a general, recognized discretion, his decisions would have to be made soon after the offender was apprehended; thus, he would not have the opportunity to weigh important interests which might not be immediately apparent. Again, because of the nature of his position, the policeman is the first to deal with the problem, and if he exercised discretion, he would act without the benefit of another's opinion. Even if discretion were exercised some time after the arrest, the characteristics of the average policeman belie the ability to make as qualified a judgment as the prosecutor, for his daily association with the people and his proximity to all phases of their lives tend to make him more emotionally impressionable.[20] Finally, the average policeman cannot be expected to possess the education required of lawyers. Presumably, superior education contributes to one's ability to make proper judgments.

Without considering the factual possibility that the grand jury does exercise general discretion, if this power be officially given it,[21] many of the disadvantages posited in the case of the policeman would also be present in that of the jury. The additional disadvantage of placing a vital portion of the law enforcement scheme in the hands of laymen, who cannot be as aware of the inherent, peculiar problems as the professional man, would also ensue. These arguments apply equally to grand and petit juries.

Realistically, the only possible contenders for the grant of discretion are the judge and the prosecutor. The judge's professional qualifications

20. See Hall, *supra* note 4, at 146-161. Also, other sources strongly indicate that the policeman is relatively easy to corrupt. KEFAUVER, CRIME IN AMERICA 14-15 (1951); 76 A.B.A. REP. 400-401 (1951).

21. See POUND, *op. cit. supra* note 4, at 41, 187. The function of the grand jury is not to determine whether or not there shall be a prosecution in this instance, but whether or not the facts shown and the evidence presented indicate that there is reasonable probability that an offense has been committed by the defendant. Admittedly, this point is subject to the argument that a discretion similar to the prosecuting attorney's may be exercised by the grand jury, but this does not coincide with the oaths generally required of grand jurors. See IND. ANN. STAT. §9-807 (Burns 1933) for the form of a typical oath. See also Miller, *Information or Indictment in Felony Cases,* 8 MINN. L. REV. 379, 381 (1924); Thompson, *Shall the Grand Jury in Ordinary Criminal Cases Be Dispensed with in Minnesota?,* 6 MINN. L. REV. 615-616 (1922); Note, *The Grand Jury: Its Investigatory Powers and Limitations,* 37 MINN. L. REV. 586, 587 (1953).

usually equal or surpass the prosecutor's, and where the judgeship is appointive instead of elective, political pressures do not influence the judge as much as they do the prosecutor. However, the exercise of discretion by the judge would assume the nature of an informal trial, and if the accused were submitted to prosecution by the judge's initial decision, the outcome of the trial might well be predicted. No objection could be made to the judge's exercise of discretion if he decided not to prosecute, because he is quite as capable as the prosecutor to weigh all the circumstances involved; but where he submits the accused to prosecution, a certain prejudice in favor of his first judgment might occur. It is manifestly desirable to separate the trier of the social consequences from the determiner of the law. Even if the judge concluded that prosecution would be inadvisable, the time necessary to make such a decision would seriously hinder the fulfillment of his other duties. At present, he does exercise discretion in sentencing, and this is somewhat analogous to the prosecutor's weighing of the circumstances when he decides whether or not to prosecute.[22] If both powers were centered in the judge, they would lose whatever efficacy they have as checks upon each other.

The prosecuting attorney, on the other hand, is exceedingly well-suited to exercise discretion in criminal prosecutions. He is educated, both generally and in the law.[23] Since his office is elective, he must always be sensitive to the needs and desires of the community.[24] Finally, the prosecutor should be a specialist in trial work and more capable than any of the other agencies, except perhaps the judge, to determine the sufficiency of the evidence. As a result of these factors, permitting the prosecutor to exercise general discretion while limiting that exercised by the other law enforcement agencies seems to be the most satisfactory system available.

Although it is generally conceded that the prosecutor should exercise discretion in carrying out the duties of his office, the limits of this responsibility are not clearly drawn.[25] State constitutions and statutes usually specify a general duty to prosecute, but seldom go further in

22. MOLEY, *op. cit. supra* note 15, at 44-45; POUND, *op. cit. supra* note 4, at 41.

23. Indiana is one of the several states which still do not require its prosecuting attorneys to be members of the bar.

24. But see note 16 *supra*.

25. "In spite of the fact that the major portion of this material [statutes requiring the prosecutor to prosecute specific offenses] sets forth the relation of the prosecutor to the initiation of prosecution, the enactments of the legislature do not define clearly the general duty of the prosecuting attorney to institute criminal proceedings when he has knowledge of a crime." Baker and DeLong, *The Prosecuting Attorney: Powers and Duties in Criminal Prosecutions*, 24 J. OF CRIM. L. & CRIMINOLOGY 1025, 1055 (1934).

guiding the prosecutor in his official actions.[26] Consequently, he must look to the courts for guidance, though they require only that his discretion not be exercised with corrupt intent.[27] Some statutes, however, do impose upon the prosecutor an absolute duty to prosecute certain violations upon reasonable charge being made.[28] None, except antilynching statutes in two states,[29] concern themselves with felonies, and most are of the type generally described as malum prohibitum, *viz.*, statutes pertaining to gambling,[30] liquor,[31] agricultural products,[32] taxes,[33] health,[34] and economic regulations.[35] Such laws are obviously ministerial in nature and not discretionary;[36] therefore, mandamus would lie to compel their enforcement.[37] However, a substantial issue presented by these statutes is whether the prosecutor or the court is the arbiter of the reasonableness of

26. *E.g.*, ARIZ. CODE ANN. §17-902 (1939); FLA. STAT. §34.12 (1951); IDAHO CODE ANN. §31-2604 (1953); ILL. ANN. STAT. c. 126, §.053 (1953); IND. ANN. STAT. §§49-2501, 49-2503 (Burns 1933); MD. ANN. CODE GEN. LAWS art. 10, §34 (Cum. Supp. 1951); MO. ANN. STAT. §56.060 (Vernon's 1949); NEB. REV. STAT. §23-1201 (1943); OHIO GEN. CODE ANN. §309.08 (Pages Rev. 1953); PA. STAT. ANN. tit. 16, §3431 (1930); TENN. CODE ANN. §9966 (Williams 1934); W. VA. CODE ANN. §371 (1949).

27. See note 5 *supra.*

28. See Baker and DeLong, *supra* note 25. Inherent in this demand is the problem of investigation by the prosecuting attorney, especially of the matters with which these statutes deal. *Ibid.*

29. S.C. CODE §16-59.2 (Supp. 1952); VA. CODE §18-39 (1950).

30. ARK. STAT. ANN. §84-2723 (1947); IDAHO CODE ANN. §18-3808 (1947); MONT. REV. CODES ANN. §94-2414 (1947); N.M. STAT. ANN. §41-2205 (West 1941); S.D. CODE §24.0206 (1939).

31. *E.g.*, ALA. CODE tit. 29, §117 (1940); KAN. GEN. STAT. §41-1107 (1949); ME. REV. STAT. c.57, §79 (1944); MINN. STAT. ANN. §340.38 (1945); N.D. REV. CODE §5-0115 (1943); OKLA. STAT. tit. 37, §92 (1951); VT. REV. STAT. §6173 (1947).

32. *E.g.*, DELA. REV. CODE c. 3, §1508 (1953); IND. ANN. STAT. §15-810 (Burns 1933); KY. REV. STAT. §217.270 (Supp. 1953); MISS. CODE ANN. §4411 (1942); N.Y. AGRICULTURE AND MARKETS LAWS §172d; OHIO GEN. CODE ANN. §1106 (1946); R. I. GEN. LAWS c. 5, §65 (1938).

33. TENN. CODE ANN. §1380 (Williams 1934).

34. *E.g.*, KY. REV. STAT. §217.130 (Supp. 1953); ME. REV. STAT. c. 27, §67 (1944); MINN. STAT. ANN. §33.19 (West 1945); MISS. CODE ANN. §7129 (1942); MO. ANN. STAT. §196.035 (Vernon 1949); N.J. REV. STAT. §24:18-10 (1937); OKLA. STAT. tit. 63, §355 (1951); S.C. CODE §32-1757 (1952).

35. *E.g.*, MINN. STAT. ANN. §80.22 (West 1945); NEB. REV. STAT. §59-507 (1943); NEV. COMP. LAWS §747.82 (Supp. 1941); S.C. CODE §66-69 (Supp. 1952); UTAH CODE ANN. §61-1-27 (1953).

36. The wording of the statutes explicitly places the duty to prosecute upon the prosecutor. By thus depriving him of discretion, they make his duties ministerial. Brack v. Wells, 184 Md. 86, 89-90, 40 A.2d 319, 321 (1944).

37. Mandamus lies to force an official to do a duty which is purely ministerial in nature. *Cf.* Brack v. Wells, *supra* note 36; Murphy v. Summers, 54 Tex. Cr. 369, ——, 112 S.W. 1070, 1071 (1908).

the charge.[38] The most likely interpretation is that the prosecutor makes this determination at his peril, having to answer to the court if the issue is contested.[39] Some statutes avoid this problem by authorizing an administrative board to make the final decision concerning the reasonableness of the charge.[40] When the board concludes that this has been done, the prosecutor must proceed.[41] Statutes explicitly requiring prosecution render nolle prosequi unavailable to the prosecutor, for if he could enter this after initiating prosecution, the mandatory nature of the statute would become a farce.[42]

When enforcing criminal statutes which do not require mandatory prosecution, various sanctions protect the public against abuse of the prosecutor's discretion. Logically, the means to be used depends upon the extent of the duty to prosecute and the remedy desired by the one invoking it. If actual prosecution be desired, mandamus would appear to be most appropriate, but this writ is not available for an official action which requires the exercise of discretion.[43] In addition, the practicability of mandamus as a remedy in situations necessitating a succession of acts requiring continual professional decisions, as in a criminal prosecution, may well be questioned.[44]

---

38. The grand jury might perform this function if the statutes be interpreted to mean that the prosecutor must act only if an indictment is returned. See Baker and DeLong, *supra* note 25, at 1055. Such an interpretation perverts the natural meaning of the statutes, however, since they generally state that the prosecutor must enforce this law or must act when a reasonable charge has been made. In view of the fact that the information is available in nearly all states for all charges except those involving capital punishment and that the mandatory statutes deal with nonfelonious offenses, it would not seem that the grand jury was meant to be the judge of the reasonableness of the charge. However, see note 29 *supra* and accompanying text.

39. *Cf.* Speer v. State, 130 Ark., 457, 461-462, 198 S.W. 113, 115 (1917); Kittler v. Kelsh, 56 N.D. 227, 232, 216 N.W. 898, 900 (1927); State *ex. rel.* Clyde v. Lauder, 11 N.D. 136, 145, 90 N.W. 564, 568-569 (1902).

40. A typical statute of this nature is the following: "It shall be the duty of each Commonwealth's attorney to whom the Board of Pharmacy shall report any violation of this chapter to cause appropriate proceedings to be commenced and prosecuted without delay, for the enforcement of the penalties as in such case provided, and to prosecute appeals under §54-432.2." VA. CODE §54.523 (1950); see also ILL. ANN. STAT. c. 45, §.042 (1953); NEB. REV. STAT. §81-332 (1943); OHIO GEN. CODE ANN. §1295 (1946); WYO. COMP. STAT. ANN. §54-312 (1945).

41. The prosecutor need not, however, abstain from prosecuting until the board acts, for he has a sworn duty to prosecute criminal violations. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

42. But see Baker and DeLong, *supra* note 25, at 1061.

43. See note 36 *supra.*

44. *Cf.* Brack v. Wells, 184 Md. 86, 90, 40 A.2d 319, 321 (1944).

When a prosecutor's actions constitute misconduct in office, *i.e.*, malfeasance,[45] misfeasance,[46] or nonfeasance,[47] he is subject to disbarment, impeachment, or indictment.[48] Although impeachment and indictment are available only to punish misconduct done in an official capacity, disbarment is a more unrestricted sanction.[49] It is a general policing tool to protect the integrity of the court.[50] However, since a disbarred attorney cannot practice, the fact that the prosecutor's actions might be cause for disbarment must necessarily influence his decisions. This device has been used to remove a prosecuting attorney from office under statutes requiring him to be a member of the bar, and employed thus, it can be a substitute for impeachment.[51]

Some state constitutions and statutes specifically provide for the impeachment of various public officials, including the prosecuting attorney.[52] While the court is usually entrusted with the power to remove the prosecutor from office, in several jurisdictions the governor may perform this function.[53]

One method of disciplining official misconduct deserves particular attention because it involves imprisonment and fine as well as removal from office. Misconduct in office is an indictable misdemeanor in some

45. Malfeasance by an officer is the doing of an illegal act concerning his official duties. State *ex rel.* Martin v. Burnquist, 141 Minn. 308, 309-310, 170 N.W. 201, 203 (1918); State v. Miller, 32 Wash.2d 149, 152, 201 P.2d 136, 138 (1947); State *ex rel.* Knabb v. Frater, 198 Wash. 675, 680, 89 P.2d 1046, 1048 (1939). Commonwealth v. Mecleary, 147 Pa.Super. 9, 24, 23 A.2d 224, 230 (1941), further requires concurrence of corrupt intent or bad faith and the doing of the act.

46. Misfeasance by an officer is doing in a wrongful manner that which he is legally authorized or required to do. Holmes v. Osborn, 57 Ariz. 522, 540, 115 P.2d 775, 783 (1941); Stark Hickey, Inc. v. Standard Acc. Inc. Co., 291 Mich. 350, 357, 289 N.W. 172, 175 (1939); Robinson v. Ocean Township, 123 N.J.L. 525, 527, 9 A.2d 300, 301 (1939).

47. Nonfeasance in office is the failure to do that which one has a duty to perform. Brooks v. Jacobs, 139 Me. 371, 375, 31 A.2d 414, 416 (1943); Buckingham v. Fifth Judicial District Court, 60 Nev. 129, 136, 102 P.2d 632, 635 (1940).

48. Of course, he is not subject to all three sanctions in every state for any act of misconduct. 1 BURDICK, LAW OF CRIME §§272, 272a (1946).

49. *Ex parte* Wall, 107 U.S. 265 (1882); Moore v. Strickling, 46 W.Va. 515, 33 S.E. 274 (1899); 15 U. OF CHI. L. REV. 217 (1947).

50. *E.g., Ex parte* Wall, *supra* note 49; Wilbur v. Howard, 70 F. Supp. 930 (E.D. Ky. 1947); *In re* Sanitary District Attorneys, 351 Ill. 206, 184 N.E. 332 (1933); Commonwealth *ex rel.* Ward v. Harrington, 266 Ky. 41, 98 S.W.2d 53 (1936); *In re* Simpson, 9 N.D. 379, 83 N.W. 541 (1900); 2 ARK. L. REV. 248 (1948).

51. A federal court disenrolled the prosecutor. Since the disenrollment evidenced unprofessional conduct, the state court removed the prosecutor from office. Wilbur v. Howard, *supra* note 50. The governor of Kentucky had tried to remove him from office for misconduct but was unsuccessful. The court held that the constitutional means of impeachment was the exclusive method for removing a public officer from office. Commonwealth *ex rel.* Atty. Gen. v. Howard, 297 Ky. 488, 180 S.W.2d 415 (1944). See 2 ARK. L. REV. 248 (1948); 15 U. OF CHI. L. REV. 217 (1947).

52. *E.g.*, CONN. CONST. Art. IX, §3; LA. CONST. Art. 7, §1.

53. *E.g.*, MICH. CONST. Art. IX, §7; N.Y. CONST. Art. 9, §5; MICH. COMP. LAWS §14.143 (1948); MINN. STAT. ANN. §351.03 (West 1947).

states, and conviction of a public officer for such an offense effects an automatic removal from office.[54] Consequently, a showing of misconduct in office is sufficient not only to punish the prosecuting attorney, but also to remove him from office. When the prosecutor acts with corrupt intent, utilization of a criminal sanction to punish the violation is apt, and removal from office is fully warranted. Since nonfeasance and misfeasance are usually indicative of the prosecutor's inability to perform his duties adequately, removal from office for these reasons should be a matter for the voters, not the courts.

Unfortunately, the duty to prosecute is seldom clear in any specific instance. Nevertheless, a criminal action for nonfeasance in office has been predicated upon an implied duty to prosecute.[55] Although the statute upon which the indictment was based does not differ materially from those found in many states stipulating the general duties of the prosecutor, the court interpreted it so as to require him to exercise discretion.[56] Admittedly, this is not an outrageous demand;[57] however, the court employed the reasonable man test to determine that an omission to investigate a specific complaint indicated a failure to exercise any discre-

54. *E.g.*, ILL. ANN. STAT. c. 37, §.396 (1936); N.C. GEN. STAT. §14-230 (1951); TENN. CODE ANN. §§11116, 11119 (Williams 1934); UTAH CODE ANN. §76-1-17 (1943). A brief discussion of these statutes and their general application may be found in 1 BURDICK, LAW OF CRIME §§272, 272a (1946). Generally, misconduct in office sufficient to warrant indictment involves corrupt intent. United States v. Haas, 167 Fed. 211, 214 (1906); Commonwealth v. Brownmiller, 141 Pa.Super. 107, 120, 14 A.2d 907, 913 (1940). *Cf.* Speer v. State, 130 Ark. 457, 462, 198 S.W. 113, 115 (1917); State *ex rel.* Johnson v. Foster, 32 Kan. 14, 43-44, 3 Pac. 534, 539 (1884). *Contra,* State v. Winne, 12 N.J. 152, 175, 96 A.2d 63, 75 (1953).

55. Defendant, prosecuting attorney, was charged with wilful failure to perform his duties by not using all reasonable means to detect and prosecute gambling violations, though this duty was imposed upon him by law. The duty to investigate and prosecute was implied from N.J. REV. STAT. §2:182-5 (1937), now N.J. REV. STAT. §2A:158-5 (Supp. 1951), which sets out the general duties of the prosecutor. This statute differs from those mentioned in note 26, *supra,* only in the words, "he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." Since this was a case of first impression, although enactment had occurred 55 years earlier, the court could have interpreted the statute to be subject to the general discretion of the prosecutor as was the case when the law was passed. In fact, Oliphant, J., took that position in dissenting. Instead, the court affixed an absolute duty on the prosecutor to investigate each charge. Anything less exhibits lack of good faith, which, the court says, is equivalent to bad faith and sufficient to uphold the conviction. State v. Winne, *supra* note 54. One might question whether there is not a difference between "bad faith" and "corrupt intent," even though the court says that it is not necessary to charge the latter since that would be the same as malfeasance. Only New Jersey has asserted that allegations of wilfulness or corruption are unnecessary to an *indictment* for misconduct in cases where intent has not been rendered superfluous by statute.

56. *Id.* at 174, 96 A.2d at 74. See note 55 *supra.*

57. Having elected a person to office and paid him reasonable compensation, the public has a right to the exercise of his faculties because that exercise is precisely what they bargained for and what the person agreed to give.

tion.[58] Under this interpretation, the prosecutor exercises personal judgment at his peril, for his decision might not coincide with the conclusion a reasonable man would reach under the same circumstances. Furthermore, it is an extremely difficult task to prove that discretion has been exercised,[59] whereas an allegation of indictable failure to act is easy to make. Although the allegation must be proved in order to convict the prosecutor of nonfeasance, such charges could be used to harass him at politically strategic times.[60] Obviously, such a limitation obliterates the many advantages to be gained from an unlimited, bona fide exercise of discretion.

A final, extralegal control on the prosecutor's use of discretion in the enforcement of the criminal laws is his personal relationship with the public; the voting populace control his political fortunes, and private clients contribute to his professional success. Even if official duties require his complete attention, he is undoubtedly constantly aware of the possibility of returning to private practice. This, of course, requires clients, and they are apt to remember the manner in which he performed the duties of his public office. Consequently, if his actions as a prosecutor antagonize the public, he will find expression of this in a loss of votes and clients.

Absolute enforcement of all known violations of the criminal law has never been attempted and, indeed, is seldom suggested because the practical difficulties encountered in achieving the success of such a program are insurmountable.[61] The alternative, discriminatory enforcement, entails the exercise of discretion. Because of the nature of the prosecutor's office, he is more aptly suited to exercise personal judgment than any of the other agencies involved in criminal prosecution.[62] Absolute, uncontrolled discretion in his hands, however, would delegate a degree of power foreign to democratic theory and contrary to existing

58. "A county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction. This discretion applies as much to the seeking of indictments from the grand jury as it does to prosecuting or recommending a *nolle prosequi* after the indictment has been found, but he must at all times act in good faith and exercise all reasonable and lawful diligence in every phase of his work." *Id.* at 174, 96 A.2d at 74.

59. An exercise of discretion which resulted in a decision not to prosecute would be especially difficult to prove, even if the "proper investigation" test applied in State v. Winne, *id.* at 174, 96 A.2d at 75, were used. In such a case, the sufficiency of the investigation would simply replace the exercise of discretion as the disputed issue.

60. Furthermore, the harassing tactics could be used with a degree of immunity from retaliation. The courts frown upon the only legal remedy available to the prosecutor if he is so harassed: an action for malicious prosecution. *See* Watts v. Gerking, 111 Ore. 641, 656, 228 Pac. 135, 137 (1924).

61. See note 8 *supra.*

62. See p. 80 *supra.*

law. Thus, the degree of latitude to be granted the prosecutor becomes pertinent. The traditional restriction on the prosecutor's discretion, not to exercise it with a corrupt intent, protects the public from the dishonest official but not from the negligent or ignorant one.

If the prosecutor's discretion is further limited by the requirement that it be exercised in a manner consistent with the standards of the reasonable man test, the public is protected not only against the dishonest prosecutor but also against the ignorant or negligent one. Unfortunately, the price of the additional protection is too high, for all the advantages presently accruing from the prosecutor's freedom of action are thereby forfeited, especially the personal judgment most desired in an office which demands selective use of time and talents. Since the ballot is considered to be the most appropriate method for selecting capable government officials, it should offer adequate protection in this instance.[63] If the prosecutor elects to omit prosecution when his judgment tells him that the community would profit by it, the sanctions of disbarment and removal from office, plus the loss of public approval and good will, should induce him to act in the best interests of society.

HEARING EXAMINER STATUS: A RECURRENT PROBLEM IN ADMINISTRATIVE LAW

The current controversy concerning the Civil Service Commission's role in administering the hearing examiner program under Section 11 of the Administrative Procedure Act[1] points up what may be an inherent weakness of this Act. This weakness is the concept of a semi-independent hearing examiner which grew out of the recommendations of the Attorney General's Committee on Administrative Procedure in 1941 and which was substantially embodied by Congress in the APA in 1946.

Prior to the formation of the Attorney General's Committee formidable efforts were directed toward curbing the powers of administrative

63. "Neither lack of intellect, learning, nor even moral courage, in a prosecuting attorney, judge or other elective officer, constitutes a disqualification to act officially, and a judge would no more be justified in supplanting a prosecuting attorney for such deficiency than would the latter be warranted in demanding a more learned, conscientious and capable judge to hear the causes he must prosecute. The responsibility for lack of capacity in officers must rest on the people who elected them." State *ex rel.* Williams v. Ellis, 184 Ind. 307, 321, 112 N.E. 98, 103 (1915).

1. 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).