NOTE

PROSECUTOR'S DISCRETION *

The discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty and reputation than any other public official. A proper exercise of this power expedites the speedy and efficient administration of criminal justice by eliminating cases in which there is little likelihood of conviction in the early stages of prosecution. It also enables the prosecutor to eliminate or defer a criminal prosecution as part of a tactical move. However, the future of many individuals and the protection of the community may hinge on the judgments of a prosecuting attorney who, through inertia, bias, inability or inexperience, unwisely exercises the responsibilities of his office. Since he is usually an elected official, questions of political expediency may affect both the diligence with which he carries out his functions and his choice of assistants. Personal enmities or friendships may have a similar effect. On the other hand, these dangers can be reduced substantially by controls which mitigate against the abuse of discretion. The purpose of this Note is to examine the more significant areas in which the prosecutor's discretion operates.

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The Law Review wishes to express its appreciation for the generous cooperation of the personnel of the Philadelphia District Attorney's Office whose assistance was of great value.


2. See Hobbs, supra note 1, discussing the effect of the prosecuting attorney's bias on investigation and courtroom action.

3. Baker & DeLong, supra note 1, at 698-702, indicate that the lack of qualifications and inexperience found in the small town's prosecuting attorney's office are not as prevalent in the larger communities where better salary and office provisions are offered.

4. Cf. California, where the local prosecuting attorney either may be elected or appointed according to the local county charter. CAL. CONST. art. XI, § 5; CAL. POL. CODE §§ 4013, 4021 (1944). In many of the counties of Connecticut, the judges of the criminal court appoint the prosecuting attorney. CONN. GEN. STAT. § 7664 (1949). The governor of New Jersey, with the advice and consent of the senate, appoints the local prosecutor. N.J. STAT. ANN. § 2A:158-1 (1939). In North Carolina some local prosecutors are appointed. N.C. GEN. STAT. §§ 7-203, 7-235, 7-408 (1953). In two states, the prosecution function is carried on by the attorney general. DEL. CONST. art. III, § 21; R.I. CONST. art. VII, § 12; R.I. GEN. LAWS c. 10, § 5 (1938).

5. See MOLEY, POLITICS AND CRIMINAL PROSECUTION 74-94 (1929).
INVESTIGATION OF CRIME AND INITIATION OF PROSECUTION

One of the varied responsibilities of the prosecutor is his duty to investigate crime and to initiate prosecution against suspected individuals. For the most part the nature and extent of this function is not set forth by statute, although there are exceptions. Some statutes provide that the prosecuting attorney must institute criminal or civil proceedings for certain specified violations. Case law indicates that the prosecutor has a duty to cause the investigation, arrest, and prosecution of violations of the law that come to his knowledge and for which the police or private complainants have taken no action unless he has a good faith reason for his inaction. The effect of this power in the prosecutor has been to create an area of discretionary action. Courts generally refuse to order the prosecutor to initiate a prosecution on the ground that it is a discretionary act which may not be compelled by mandamus. However, the failure of the prosecutor to enforce the law is generally held to be ground for removal.

To aid the prosecutor in the initiation of prosecution a few states have given him the power to subpoena any person deemed to have relevant

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12. See text at pp. 1083-86.
information and to compel his testimony under oath. Proponents of such measures claim that the grand jury is inefficient in conducting secret investigations. While such authority would undoubtedly aid the prosecuting attorney in uncovering criminal activity, there is a possibility of serious and permanent harm to an individual's reputation if the prosecutor should use his authority for personal or political advantage by conducting investigations of political opponents without proper cause. A recent bill proposed by the Philadelphia District Attorney might obviate this difficulty. It would give the prosecutor inquisitorial power in cases of conspiracy, bribery, corruption of public officials, election violation or systematic violations of the law, but would require court authority before it could be used.

**FORMAL ACCUSATION**

*By Indictment*

Once there has been an initial determination to prosecute an individual, a formal accusation is necessary before he can be subjected to a criminal trial. Indictment by a grand jury is the traditional, and still widely employed, method of accusation. It is the prerogative of the prosecuting attorney to appear before and advise the grand jury. The accused and other parties cannot appear as a matter of right. Many statutes provide that the prosecutor must appear before the grand jury at its request. While most cases presented to the grand jury have been

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13. DEL. CODE ANN. tit. 29, § 2505 (1953); FLA. STAT. ANN. § 34.14 (1943). Some states limit the prosecutor's inquisitorial authority to investigations of felonies and provide it can be exercised only with court approval. N.M. STAT. ANN. § 41-3-8 (1954) (additional provision that the power may not be exercised while the grand jury is in session); OKLA. STAT. ANN. tit. 22, § 258 (1937). In New Jersey, investigators attached to the prosecutor's office are enabled to administer oaths, N.J. STAT. ANN. § 41:2-3.1 (Supp. 1954), but have no power to subpoena witnesses or compel testimony. See State v. Eisenstein, 16 N.J. Super. 8, 13, 83 A.2d 777, 779 (1951), aff'd, 9 N.J. 347, 88 A.2d 366 (1952).


16. See note 14 *supra*.

17. CLARK, CRIMINAL PROCEDURE 122 (2d ed., Mikell 1918).

18. Felonies must be prosecuted after grand jury accusation in 22 states as well as the federal courts. These states are: Ala., Del., Ga. (there being no provision in the constitution or statute, it is presumed that common law prevails), Ill., Ky., Me., Md., Mass., Miss., N.H., N.J., N.Y., N.C., Ohio, Ore., Pa. (the prosecuting attorney can present an indictment if the accused waives the grand jury requirement), R.I. (the accused can waive the grand jury indictment with leave of court except in cases of murder), S.C., Tenn., Tex., Va., and W. Va.


21. See, e.g., ME. REV. STAT. c. 148, § 6 (1954); MISS. CODE ANN. § 3921 (1942); N.Y. CODE CRIM. PROC. § 253; ORE. REV. STAT. § 8.670 (1953).
heard preliminarily by a magistrate, there is usually no requirement that the accused shall have had such a hearing, and the prosecutor can submit charges to the grand jury against individuals who have never had a preliminary examination. It would appear, therefore, that a previous dismissal of a charge by a magistrate would not prevent the prosecutor from submitting the case to the grand jury. Since a grand jury cannot indict unless the evidence before it shows that the accused is prima facie guilty, there is a theoretical check on unjustified prosecutions. In many instances, however, it appears that the grand jury merely “rubber stamps” the suggestions of the prosecutor and thereby permits him to make the real determination of who will be formally accused.

In the event that a grand jury refuses to indict, there is divergence of opinion on whether the same charge can be submitted to a subsequent grand jury. Many jurisdictions permit resubmission of an ignored charge, but only upon order of the criminal court. This prevents continuing harassment of an individual through repetitive presentation of an unfounded charge to a grand jury, but it does not completely foreclose

22. When a person is arrested on a criminal charge, he is brought before a magistrate for a preliminary hearing. If the magistrate finds that the evidence against the person establishes probable cause to believe the person is guilty of the offense for which he was arrested, the magistrate will hold him, either in jail or on bail, for accusation and trial. If probable cause is not established, the magistrate will discharge the person from the arrest. Clark, op. cit. supra note 17, at 88.


24. When the grand jury returns an indictment against a defendant who has not had, or has been discharged at, a preliminary examination, he can be taken into custody and held for trial without any further proceedings. Clark, op. cit. supra note 17, at 89.

25. Clark, op. cit. supra note 17, at 135.


Georgia has no requirement of court approval, but permits only two submissions of the same charge. A third submission is permitted upon order of the court if the bills were ignored because of fraud, or if new evidence against the defendant is discovered. Ga. Code Ann. § 27-702 (1953). Utah permits resubmission of an ignored charge only at the next ensuing term of the criminal court and only upon court order. Utah Code Ann. § 77-20-2 (1953). West Virginia, by statute, permits unlimited resubmission. W. Va. Code Ann. § 5294 (1949).
vindication of a public wrong because of premature submission of a complaint.

By Information

An alternative to the grand jury indictment as the method of formal accusation is the prosecutor's information. There is a wide disparity among the states as to the extent to which the formal accusation may be made by information. The range extends from federal law, where a defendant has a constitutional right to a grand jury indictment for any crime punishable by more than one year of imprisonment, to some western states where there is no limit on the permissible use of the information. The major division among the states, however, is on the issue of whether or not an information can be used for the more serious crimes. Comparison among the states is complex because of distinctions in the classification of crimes. At present there are twenty-six states which permit accusation by information for those crimes which are classified by the respective state as felonies. While there are undoubtedly differences as to the lesser crimes which would fall in this category, there will be substantial unanimity on the major crimes. A recurrent exception to the authority to accuse for a felony by information is a provision excluding its use where the offense is punishable by either death or life imprisonment.

29. See Clark, supra note 17, at 144.
30. "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . ." U.S. Const. amend. V. See Ex parte Wilson, 114 U.S. 417 (1885); United States v. Moreland, 258 U.S. 433 (1922). This requirement can be waived by the accused. Fed. R. Crim. P. 7(b).
31. See note 33 infra. See also ALI Code of Criminal Procedure §§ 113-17 (1930); Moley, The Initiation of Criminal Prosecutions by Indictment or Information, 29 Mich. L. Rev. 403 (1931); Dession, From Indictment to Information—Implications of the Shift, 42 Yale L.J. 163 (1932).
33. Ariz., Ark., Cal., Colo., Conn. (applies to all felonies except those punishable by death or life imprisonment), Fla. (applies to all felonies except those carrying capital punishment), Idaho, Kan., La. (applies to all felonies except those carrying capital punishment), Mich., Minn. (applies to all felonies except those punishable by death or life imprisonment), Mo., Mont., Neb., Nev., N.M. (accusation by information allowed only when the grand jury is not in session, but the grand jury meets only when ordered by the court or the Board of County Commissioners or a petition by 10% of the voters in the county), N.D., Okla., S.D., Utah, Vt. (applies to all felonies except those punishable by death or life imprisonment), Wash., Wis., Wyo.

Iowa permits accusation of felonies by information when the grand jury is not in session in county district courts. Iowa Code Ann. § 769.2 (1950). The grand jury, however, seems to meet periodically. See Perkins, The Trial Information in Iowa, 13 Iowa L. Rev. 264, 285-89 (1928).

Indiana permits the accusation of all felonies, except treason and murder, by the sworn affidavit of any person. Ind. Ann. Stat. §§ 9-908, 9-1123 (Burns 1933). The statute says that the affidavit shall be submitted to the prosecuting attorney and he shall approve it. Id. § 9-909. It appears, however, that the prosecuting attorney, despite the mandatory statutory language, has the discretion to approve or disapprove the affidavit. See Ops. Att'y Gen. of Ind. 78 (1938).
34. See note 33 supra.
Where the prosecutor has been granted the power to accuse by information, his discretion in using that power is generally delimited by a requirement that the defendant have been held at a preliminary examination before a magistrate. The efficacy of this procedure in controlling the prosecutor's discretion as to when and against whom to proceed is impaired by the fact that frequently it appears that magistrate's hearings may be completely dominated by the prosecuting attorney. Furthermore, in the absence of an express statutory provision to the contrary, it is generally held that discharge by one magistrate on a finding of no probable cause will not preclude presenting the case to another magistrate in order to get the prerequisite magisterial action.

Of the jurisdictions requiring preliminary examinations, some allow the prosecutor to inform only for crimes for which the defendant was held; others permit the prosecutor to inform for any crime revealed in the evidence before the magistrate so long as the crime embodied in the information bears a reasonably close relation to the offense for which the defendant was held. This prevents malicious prosecution but permits


In Louisiana, a preliminary examination is not considered a prerequisite to a prosecutor's information. La. Rev. Stat. Ann. §15:154 (1951); State v. Smith, 130 La. 701, 58 So. 515 (1912). The accused does, however, have a right to a preliminary examination before the information is filed if he so demands. If demand for a preliminary examination is made after the information is filed, it is discretionary with the trial court to grant or refuse the demand. Ibid. If at the preliminary examination the magistrate finds no probable cause to believe the defendant guilty, he is to be discharged. Id. §15:155.


37. This is because jeopardy has not yet attached. Gaffney v. Aldrich, 85 Mich. 138, 48 N.W. 478 (1891); State v. Kile, 96 Okla. Crim. 148, 250 P.2d 233 (1952). But cf. Wis. Stat. §355.20 (1953), which provides that the accused can be rearrested and reexamined after discharge by a magistrate only upon discovery of new evidence.


the prosecutor to decide which crime the evidence fits without being bound by the magistrate's designation.

Some jurisdictions permit the prosecutor to file an information for a felony after preliminary procedures other than a hearing before a magistrate. Among the proceedings deemed satisfactory are special permission by the court, or a sworn affidavit based on personal knowledge of the affiant that a crime was committed, or a combination of the two. Several states dispense with the requirement of a preliminary procedure before the information for crimes committed during or near to the term of the criminal court. A few states permit the prosecutor to file an information for a felony without any statutory requisite of a preliminary procedure to limit the prosecutor's discretion. It seems reasonable to infer that in those jurisdictions which do not require a magistrate's hearing, the prosecutor will be permitted to inform despite a previous discharge by a magistrate on the same charge, since jeopardy has not yet attached.

All states that provide for accusation by information retain the procedure of indictment by grand jury, but the latter will be seldom used since the grand jury is generally called only infrequently. Only two

42. Nev. Comp. Laws § 11328 (1929); State v. Wells, 39 Nev. 432, 159 Pac. 520 (1916).
43. N.D. Rev. Code § 29-0902 (1943) (No preliminary procedure is required to the filing of an information against crimes committed during the term of the court). Wyo. Comp. Stat. Ann. § 10-607 (1945) (No preliminary procedure is required where the information is filed within 30 days before or after the first day of the criminal court's term; if this method is utilized, and the defendant is not tried at that term of court because of a motion to continue by the prosecution, the accused is entitled to an immediate preliminary examination).
44. In Connecticut, a preliminary examination is not a prerequisite to a prosecutor's information, State v. Hayes, 127 Conn. 543, 580-81, 18 A.2d 895, 914 (1941), but a statute provides that the trial court has control over informations and may at any time, upon motion of the defendant, dismiss an information because there was insufficient cause to justify bringing the information. Conn. Gen. Stat. § 8769 (1949). Florida merely provides that the information is to be filed under oath. Fla. Stat. Ann. § 904.01 (1944). In Iowa, where the prosecutor's information will lie only when the grand jury is not in session (see note 33 supra), the only prerequisite provided is that the information be verified. Iowa Code Ann. § 769.6 (1949). In Indiana where accusation is made by affidavit with approval of the prosecuting attorney (see note 33 supra), no preliminary procedure seems to be required. No provision was found in Vermont.
45. But cf. N.D. Rev. Code § 29-0905 (1943) (No information may be filed after such dismissal without leave of court).

states have statutory provision for the possibility of a conflict between these two methods of accusation. One authorizes and the other prohibits an information after a grand jury has refused to indict on the same charge.\textsuperscript{47} Decisions in other states also vary.\textsuperscript{48} One court held that an information could be filed on a charge that had been ignored by the grand jury, even though a court order would have been necessary in that state to resubmit the bill to the grand jury.\textsuperscript{49}

The prosecutor who has unrestricted power to accuse could, if he is so inclined, harass individuals for any of a number of reasons, including the desire to enhance his reputation by means of the publicity and possible conviction, or the honest but mistaken belief of the guilt of the accused. The requirement of a preliminary hearing before a magistrate affords some protection, but, since the prosecutor is generally immune from civil suit for malicious prosecution,\textsuperscript{50} the only other significant checks are extrinsic measures designed to penalize official misconduct.\textsuperscript{51}

\textit{Discretion Not to Accuse}

In those states where indictment by grand jury is the exclusive method of accusation for serious crimes,\textsuperscript{52} there is the possibility that the prosecutor might interfere with the movement of the charge from the magistrate to the grand jury. This problem apparently has seldom been considered.\textsuperscript{53}

\textsuperscript{47} Idaho prohibits the prosecutor from filing an information accusing a person of a charge that has been ignored by a grand jury. \textit{Idaho Const. art. I, § 8.} The same charge may, however, be resubmitted to a subsequent grand jury by order of the court. \textit{Idaho Code Ann. §§ 19-402, 19-403 (1948).} Washington allows an ignored charge to be resubmitted to the grand jury or to become the subject of a prosecutor's information upon order of the court. \textit{Wash. Rev. Code § 10.28.180 (1951).}

\textsuperscript{48} \textit{Ex parte Moan, 65 Cal. 216, 3 Pac. 644 (1884); State ex rel. Latour v. Stone, 135 Fla. 816, 185 So. 729 (1939); and State v. Whipple, 57 Vt. 637 (1885).} Permit an ignored charge to become the basis of an information. \textit{Contra:} State v. Boswell, 104 Ind. 541, 4 N.E. 675 (1885); Richards v. State, 22 Neb. 145, 34 N.W. 346 (1887).


\textsuperscript{50} Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917); Anderson v. Bishop, 304 Mass. 396, 23 N.E.2d 1003 (1939); Watts v. Gerking, 111 Ore. 641, 228 Pac. 135 (1924). But cf. Carpenter v. Sibley, 153 Cal. 215, 94 Pac. 879 (1908) (civil action allowed against the district attorney, but the defense of immunity was raised).

\textsuperscript{51} See text at pp. 1075-77 infra.

\textsuperscript{52} See note 18 supra.

\textsuperscript{53} Although few decisions were found on this point, there is evidence that the nol pros is used prior to formal accusation. An Illinois survey in 1929 found that about 3\% of the felony cases entering the preliminary hearing were nol prosed there. \textit{Illinois Crime Survey 269 (1929).}
but in one state by statute and in others by judicial decision it is held that the prosecutor may enter a nol pros before a formal accusation has been made. Several states, however, have statutes that prohibit such action. Where allowed, it would appear that the use of the nol pros is subject to the same restrictions, such as court approval, as apply when used to stop prosecution after the formal accusation.

On the other hand, there are statutes in some states allowing accusation of felonies by information which seem to give the prosecutor complete discretion in determining whether or not an information will be filed against persons held by the magistrate, although several of these require him to file a statement with the court, within a specified period, containing his reasons for a decision not to inform. A few also provide for the filing of an explanatory statement, but add that the court may order the prosecutor to file the proper information after examination of his statement and the evidence in the case. Only one jurisdiction makes it mandatory for the prosecutor to file an information against a person held at a hearing. In absence of statute the prosecutor may probably simply fail to inform.

In order to protect the rights of an individual who has been held in a preliminary proceeding, some states have passed statutes limiting the prosecutor’s discretion not to accuse, since his failure to act may result in the defendant’s being bound on the charge indefinitely. Some statutes provide for dismissal of the charge if a formal accusation or a

57. See text at note 73 and note 73 infra.
trial does not take place within a stated period from the time the defendant is held by a magistrate. Other jurisdictions meet the problem obliquely by requiring that the prosecutor file either an information or a statement of his reasons for not informing within a limited period. The status of the accused in such states is unclear if the prosecutor simply fails to act. Of course, if he presents his reasons for not informing and the court does not or cannot overrule him, the charges are dismissed. Arguably, the same result should be reached if he has not acted at the end of the period on the same theory as the statutes which provide expressly for dismissal. However, this has not been settled.

The conclusive effect of dismissal either by act of the prosecutor or lapse of time varies from state to state. Some states' statutes hold that such dismissal does not bar future prosecution for the same charge; others are contra. In a few it is a bar only if the alleged crime was a misdemeanor. In the absence of statute, the weight of authority is that dismissalbars further prosecution.

**Discontinuance or Changing of a Charge: The Nol Pros**

The entrance of a formal accusation against the defendant may not result in a trial on that particular charge. At common law the attorney general had absolute power to dismiss a prosecution on his own official

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63. See text at notes 109-11 and notes 109-11 infra. Limited statutory protection to individuals held in jail awaiting accusation is given by statutes which provide that if a jailed person is not accused within a specified period after incarceration the court shall discharge him from jail, N.C. Gen. Stat. §15-10 (1953); Pa. Stat. Ann. tit. 19, §781; id. tit. 17, §473 (Purdon 1930); S.C. Code §17-509 (1952), or admit him to bail, R.I. Gen. Laws c. 625, §56 (1938), or the court shall discharge him from jail unless it appears that material witnesses for the state have been enticed or kept away or prevented from attending by illness or accident. Wis. Stat. §355.01 (1951).

64. See Ex parte Trull, 133 Kan. 165, 168, 298 Pac. 775, 777 (1931).

65. N.D. Rev. Code §29-0907 (1943); Utah Code Ann. §77-17-2 (1953); Wis. Stat. §355.17 (1951). Even if the statute has no such provision, it is reasonable to infer that the defendant is to be discharged if the court takes no action on the statement.


69. See note 112 infra.
responsibility. In a few states, the prosecutor retains this power, but some jurisdictions have placed the nol pros authority entirely within the discretion of the court. Other states, including Pennsylvania, require court approval of the entry of a nol pros. Under such a provision, the prosecutor’s refusal to continue the case will not end the proceeding if the court appoints a substitute; on the other hand, the court has no power to dismiss a prosecution over the prosecutor’s objection, despite a request by the injured party or a prior agreement with the prosecuting attorney.

Although the nol pros is an important device in the administration of the criminal law, there are no statutory criteria governing its use. A study of the use of the nol pros in the Philadelphia criminal courts gives some indication of the standards used in actual practice. In 1954, 12.4% of criminal indictments in Philadelphia were disposed of by means of the nol pros; their distribution among the various types of offenses charged is shown by Table II. A study of the trial lists prepared by the district attorney’s office during the nine month period from May 1, 1953 to January 31, 1954 gives some indication of why this action was requested as recorded by the assistant district attorney assigned to prosecute the case. Table I categorizes the reasons listed for the entrance of the nol pros during this period.

70. CLARK, op. cit. supra note 17, at 154; Note, 33 CORNELL L.Q. 407 (1948).
72. These statutes provide that the nol pros is abolished, but that the court may dismiss a charge on motion or on motion of the prosecuting attorney. ARIZ. CODE ANN. §44-1506 (1939); CAL. PEN. CODE §1385 (Supp. 1953); IDAHO CODE ANN. §19-3504 (1948); IOWA CODE ANN. §795.5 (1950); MONT. REV. CODES ANN. §94-9505 (1947); NEV. COMP. LAWS §11197 (1929); N.Y. CODE CRIM. PROC. §671; N.D. REV. CODE §29-1804 (1943); OKLA. STAT. ANN. tit. 22, §815 (1951); OR. REV. STAT. §134.150 (1953); S.D. CODE §34.2204 (1939); UTAH CODE ANN. §§77-51-4 (1953); WASH. REV. CODE §10.46.090 (1951). KANS. simply provides that the court may dismiss a charge on motion. KAN. GEN. STAT. §62.1437 (1949).
73. ARIZ. STAT. ANN. §43-1230 (1947); COLO. STAT. ANN. c. 48, §463 (1935); DEL. R. CRIM. P. 48(a); GA. CODE ANN. §27-1801 (1953); IND. ANN. STAT. §9-910 (Burns 1933); KY. CRIM. CODE §243 (Carroll 1948); ME. REV. STAT. c. 89, §117 (1954); MICH. STAT. ANN. §§28.969, 28.942 (1954); OHIO REV. CODE §2941.33 (1953); N.J. R. CRIM. P. 3:11-3(a); PA. STAT. ANN. tit. 19, §492 (Purdon 1930); TENN. CODE ANN. §11716 (Williams 1934); see State v. Costen, 141 Tenn. 539, 213 S.W. 910 (1919); TEX. CODE CRIM. PROC. ANN. art. 577 (1954); WYO. COMP. STAT. ANN. §10-823 (1945).
76. Commonwealth v. Cundiff, 149 Ky. 37, 147 S.W. 767 (1912).
78. Ohio provides that the prosecuting attorney may nol pros a charge, with the court’s consent, only for “good cause.” OHIO REV. CODE §2941.33 (1953). Those jurisdictions which lodge the nol pros power within the discretion of the court generally provide the vague standard that the power shall be exercised only “in furtherance of justice” or “for good cause.” See statutes cited in note 72 supra.
79. See p. 1082 infra.
80. See p. 1068 infra.
TABLE I

Reasons for the Entry of the Nol Pros by the Philadelphia District Attorney's Office, May 1, 1953 to January 31, 1954

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Number of Indictments</th>
<th>Percentage of Nol Prossed Bills</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecuting Witness Dead</td>
<td>21</td>
<td>1.35</td>
</tr>
<tr>
<td>Technical Reasons</td>
<td>43</td>
<td>2.77</td>
</tr>
<tr>
<td>Not Sufficient Evidence</td>
<td>91</td>
<td>5.87</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>142</td>
<td>9.16</td>
</tr>
<tr>
<td>Lack of Prosecution</td>
<td>404</td>
<td>26.07</td>
</tr>
<tr>
<td>Prosecution Withdrawn</td>
<td>488</td>
<td>31.49</td>
</tr>
<tr>
<td>No Reasons Given</td>
<td>361</td>
<td>23.29</td>
</tr>
<tr>
<td>Total</td>
<td>1550</td>
<td>100.00</td>
</tr>
</tbody>
</table>

The Administrative Function

Observations of the motions for nol pros in the Philadelphia criminal courts over a four week period and interviews with the personnel of the district attorney's office indicate that the nol pros performs a variety of functions. As an administrative tool, the nol pros enables the prosecutor to correct mistakes made by the grand jury and to clear the dockets of cases which cannot be tried successfully either because of lack of evidence or because of the time limitations imposed. Technical reasons such as the statute of limitations, duplication of other bills, or formally defective indictments may prevent prosecution. Since charges against persons held by the magistrate are forwarded to the grand jury in Philadelphia without any screening of the evidence by the district attorney's office, there were cases in which there was not sufficient evidence to present a prima facie case. Unless the offense is extremely serious, the charge is nol prossed to clear the docket without further investigation by the prosecuting attorney.

A more serious administrative problem arises when witnesses for the commonwealth are unavailable. In a few cases the death of the prosecuting witness acts as a complete bar to prosecution since the testimony of the prosecuting witness may be essential to convict. In this situation, the nol pros is entered upon proof of death. In many cases the failure of the commonwealth's witnesses to appear may result in a lack of prosecution. Although the nol pros was entered in some of the less serious offenses for this reason on the first listing, most of the cases are relisted at least once, and more serious offenses are relisted many times. Generally, the office is hesitant to enter a nol pros on the first listing without consulting the prosecuting witness. In one case, the charge was for the theft of articles worth seventy-five cents. Although defendant had several witnesses prepared to testify to his innocence, the prosecutor moved for a continuance.

81. See text at and following note 105 infra.
to consult the prosecuting witness. Where it is extremely doubtful that the witnesses will ever appear, however, it might be better to dismiss the case. One case involved a charge of attempted robbery by two men with long criminal records. The only witnesses had returned to Sweden, and information from the Swedish Consulate indicated that their return to this country was extremely doubtful. Despite this, the prosecutor refused to move for a nol pros and left the defendants to their remedy for failure to receive a speedy trial.\textsuperscript{82} Although the seriousness of the crime and the defendant's record deserve consideration, the failure to dismiss such a charge defeats one of the important purposes of the nol pros.

A similar problem arises when the defendant cannot be found. In some of these cases, listed in the \textit{miscellaneous} category, it was known that the defendants were in another jurisdiction. Unless the offense is quite serious, this generally results in the entry of a nol pros and a forfeiture of bail.

\textit{A Tool of Selectivity}

In addition to its administrative function, the nol pros enables the prosecutor to dismiss a case due to changed conditions and to exercise some degree of selectivity of prosecution. In many cases the prosecuting witness has requested that the charges be dropped because the difficulty with the accused has been adjusted. As indicated by Table I, \textit{prosecution withdrawn} constitutes the most common reason for the use of the nol pros. Many of the charges for various forms of assault and battery are a result of marital or extra-marital spats. Although the complaining party may have been injured, by the time the case is brought to trial the use of criminal process is regretted. Similarly, in the case of neighborhood fights, the defendant's signing of a peace bond is generally satisfactory to the complainant. Unless dangerous weapons were used by the accused, the charge is generally nol prosed at the request of the complaining party. Accusations of passing bad checks and statutory rape are also common subjects of private compromise. In many instances, criminal process is used simply as a form of private relief. By the time of the trial the desired settlement generally has been made, whereupon the complainant has no wish to prosecute. Where the defendant has merely promised restitution, however, the request to discontinue the case is generally refused until restitution is actually made. A related problem arises in cases where the employee "borrows" property of his employer. Although this may be technically a criminal conversion, these charges are generally nol prosed where it appears that the complainant is using criminal process merely to effect recovery of his property.

Where a private compromise or recovery in a civil suit has been made, the complainant has little interest in further prosecution. Even if he can be persuaded to continue the criminal case, his apathy is often so pronounced that he is an extremely weak witness. In doubtful cases the

\textsuperscript{82} Ibid.
prosecutor may find it expedient to accept the compromise or even to participate in the settlement. This form of compromise has been recognized as an important part of the administration of the criminal law in the case of misdemeanors for which the complainant has a civil remedy.82a

Some states, including Pennsylvania, have given the court or the committing magistrate the power to dismiss misdemeanors on a statement of the injured party that the dispute has been settled.83 Since a record of similar complaints against the defendant may necessitate a prosecution, it might be better to subject the dismissal of these cases by the court or magistrate to the prosecutor’s concurrence.84

A more questionable practice is the acceptance of guilty pleas to an offense lesser than, but included within the original charge. Although the trial lists in the Philadelphia office showed exceptionally little of this type of bargaining,85 it may be more common in other jurisdictions due to the desire to maintain a favorable record of convictions and the administrative difficulty of conducting a full trial for all accusations.86 Many considerations enter into the use of the nol pros for this purpose. Technical problems of proof may make conviction on the original charge uncertain.87 In the case of the multiple offender, the prosecutor may believe that the jury would consider the punishment too exacting for the acts in question.88 The prosecutor may have a similar reaction to cases in which the defendant’s youth, his lack of a previous record, and the possibility of restitution make punishment for the original charge appear unnecessarily severe.89

Although acceptance saves the state the cost of prosecuting the case in what may be a long and expensive trial, it precludes society from imposing its full sanction upon the convicted criminal. To the extent that a lesser sentence accompanies the plea of guilty than would be imposed upon conviction of the original charge, the deterrent effect of penal sanctions is reduced. The use of this device would permit individualized treatment of the offender, but it is not clear that the prosecutor is as well qualified to make the requisite evaluation as are other state officials.90 Moreover, acceptance of the plea leaves little on the record for public

82a. See Michael & Wechsler, Criminal Law and Its Administration 533 (1940).
84. The court or magistrate may dismiss without the concurrence of the prosecutor under these statutes. See note 83 supra.
85. In only a few of the cases listed under the miscellaneous caption was the reason stated that the nol pros was entered due to the guilty plea to another offense. In about a dozen of those bills for which no reason was given, the defendant had pleaded guilty to a lesser offense.
86. Moley, op. cit. supra note 5, at 156-165, 187-88.
88. Id. at 510.
89. Id. at 521-29.
90. See Moley, op. cit. supra note 5, at 187-88.
scrutiny and is rarely subject to review by a higher court, but wins political friends and builds a high record of convictions to exhibit to that element of the community which insists on a strict enforcement of the law.

A similar problem is the nol prossing of minor charges against defendants who are on parole. In some instances these charges were nol prossed when the back time on the paroled conviction was much greater than the maximum penalty on the immediate charge. Although a conviction would force the defendant to serve a much longer sentence than the maximum penalty provided for the new offense, such offense casts doubt on the defendant's suitability for parole and the problem should be placed under the administration of the parole officers.

On the other hand, there are some circumstances in which the prosecutor's discretion to nol pros seems desirable in terms of selective prosecution. Where the defendant has a history of psychopathic or psychiatric disorders and has been committed to an institution for the insane, for example, the indictment was sometimes dismissed. In a few instances a nol pros was entered where the accused was extremely ill and unable to stand trial for the charges placed against him. In this type of case, the prosecutor must be careful not to nol pros cases where the defendant is only temporarily incompetent; where it is doubtful whether or not the accused is incompetent, the more appropriate procedure would be a motion for a hearing on that issue. Moreover, whether the situation is only temporary or permanent, it certainly does not establish irresponsibility for the crime itself. Properly employed, the nol pros removes from the docket cases in which society no longer has any desire to prosecute because of the condition of the accused, without foreclosing further prosecution should the defendant unexpectedly recover.

The Requirement of Court Approval

The prosecutor's discretion in the use of the nol pros is an enormous power in the hands of one public official. Its use is generally not subject to publicity and public scrutiny. Unbridled, it enables a local prosecuting attorney to guarantee almost absolute immunity from the sanctions of the law to any class of persons, should he desire to employ it in that manner. In the hands of a corrupt official it can virtually stymie law enforcement. Some states have made the entry of a nol pros subject to

91. Id. at 189-90.
92. Once jeopardy has attached, the entry of a nol pros without the consent of the defendant bars further prosecution on the same charge. Mount v. State, 14 Ohio 295 (1846); State v. Richardson, 47 S.C. 166, 25 S.E. 220 (1896); Ga. Code Ann. §§27-1801 (1948); La. Rev. Stat. Ann. §§15:330, 331 (1951); N.J. R. Crim. P. 3:11-3(a). If jeopardy has not attached, the accusation may be reinstated during the same term of court with court consent. Condos v. Superior Court, 29 Ariz. 186, 239 Pac. 1032 (1925); State v. Lenon, 331 Mo. 591, 56 S.W.2d 378 (1932). If further prosecution is desired after that term has elapsed, a new accusation must be brought. State v. Dix, 18 Ind. App. 472, 48 N.E. 261 (1897).
court approval. Although such a law was in effect in Philadelphia when this study was made, its effect as a check on the prosecutor is difficult to appraise. In only three instances was it recorded that the court had refused a motion for nol pros, and in a few cases it was recorded that the nol pros was entered at the court’s suggestion. Although the court’s reasons for refusal were not given, serious offenses were involved in two of the cases and in these the basis for the motion was the inability of the prosecution to locate its witnesses.

The apparent infrequency of court action, in addition to the evidence of the rest of the study, may be indicative that the prosecutor’s discretion in entering the nol pros is conscientiously and intelligently used by the Philadelphia District Attorney’s office. Although judicial control may be a contributing factor to the exceptionally few number of bargainings for pleas of guilty to lessor offenses, this is probably more attributable to the district attorney’s policy against this type of compromise. Since the court has neither the means nor the time to investigate the advisability of discontinuing the prosecution, court approval may be a perfunctory operation in many cases. However, the necessity of requesting the nol pros in open court and the requirement of court approval may operate to restrain the more apparent abuses without unduly limiting the advantages derived from the entry of a nol pros.

CONTROL OF THE CRIMINAL CALENDAR

The prosecutor’s control of the criminal calendar in many jurisdictions places the time of trial within the discretion of the prosecutor, and in some cities, he may also select the judge he wishes for the individual case. The trial court may have the actual power to control the calendar, but the prosecuting attorney has long performed this

94. Only three were recorded on the trial lists during the nine month period studied. Of course, there may have been many more which the assistant district attorneys failed to record.
95. See note 85 supra.
98. Id. at 384.
99. See Furia The Right of the District Attorney to Prepare the Criminal Calendar, 26 Temp. L.Q. 128, 131 (1953). There is some authority that this is the function of the prosecutor. State v. Silvius, 22 R.I. 322, 47 Atl. 888 (1900); see Orabona v. Linscott, 49 R.I. 443, 144 Atl. 52 (1928). The following states place this power in the court or provide that the cases shall be listed for trial according to a fixed statutory scheme. Ariz., Ala., Ark., Cal., Del., Ga., Idaho, Ind., Iowa, Ky., La., Minn., Miss., Mont., Neb., Nev., Ohio, Tex., Utah, Va., Wash. and W. Va. In N.Y. and Okla., the only provisions are those giving the trial courts of inferior criminal jurisdiction control of their calendars. Mass. and N.C. vest this power in the prosecutor.
function since his familiarity with the complexities of each case enables him to estimate the time required for adequate preparation and the approximate length of the trial. If the court sets the date for trial, the prosecutor may be forced to request continuances, which are apparently granted in most instances, since a failure to grant these continuances would force the prosecutor to try poorly prepared cases or to dismiss a large number of prosecutions by means of the nol pros. However, unrestricted control of the criminal calendar may foster inefficiency and procrastination in the preparation of cases, and the power to distribute cases among the presiding judges places the defendant at an unfair disadvantage since he is unable to veto the prosecutor's action or propose his own preferences.

The constitutional right to a speedy trial does not adequately protect the defendant nor deter the prosecutor's delay in bringing the accused to trial. The terms of the guarantee are vague and ambiguous. If it is violated, in the absence of statute, the defendant is not entitled to have the charges dismissed but must bring mandamus to compel his trial. If held in jail, however, habeas corpus will lie to obtain his release. In several states, statutory remedies vest discretionary power in the trial court to dismiss an accusation if there is an unreasonable delay in bringing it to trial; others require the court to dismiss the accusation if the defendant is not brought to trial within a specified time after accusation unless good cause to the contrary is shown. A few states provide that the

100. Note, 48 Col. L. Rev. 613, 615 (1948).
101. This was in practice in New York County from 1910 to 1922. N.Y. Sess. Laws 1909, c. 542. Such a critical breakdown of the calendar resulted that the statute was repealed. See Note, 48 Col. L. Rev. 613, 616 (1948).
102. THE MISSOURI CRIME SURVEY 168 (1926).
103. ORFIELD, op. cit. supra note 97, at 383.
105. The constitutions of all but six states: Massachusetts, New Hampshire, North Carolina, Oregon, Nevada, and New York, guarantee the right to a speedy trial. Of these, only Nevada and New York guarantee the right by statute. Nev. Comp. Laws § 10654(1) (1929); N.Y. Code Crim. Proc. § 8(1). There has been no decision on the application of U.S. Const. amend. VI to state proceedings. Comment, 39 J. Crim. L. & Criminology 193-200 (1948).
106. See HELLER, THE SIXTH AMENDMENT 60 (1951).
109. DEL. R. CRIM. P. 48(b) (If there is unnecessary delay in trial, the court may dismiss the prosecution). La. Rev. Stat. Ann. § 15:8 (1951) provides that if three years, in the case of felonies, or two years, in the case of misdemeanors, have elapsed from the accusation, it is the prosecutor's duty to nol pros the charge; if he fails to nol pros, the court may do so; N.J. R. Crim. P. 3:11-3(b), permits the assignment judge, at any time after six months from the return of the accusation, to direct that a case be tried on a specific day; if the prosecutor fails to comply, the court may dismiss.
period in which a defendant must be tried begins at the date of the magistrate’s hearing.111

Where further prosecution will be barred,112 dismissal within a specified period may operate as an effective deterrent to delay. In a majority of jurisdictions, however, dismissal is not automatic, but can be effected only if the defendant makes a timely demand for trial113 and some states specifically provide that the period of limitation runs only from the defendant’s demand.114 Moreover, some states provide not for dismissal but only for the release115 or bail116 of a defendant whose trial has been delayed beyond a fixed period of time. Although this protects the accused from prolonged imprisonment, it may have a negligible effect on the prosecutor’s diligence in speeding trial.


114. Ga. Code Ann. § 27-1901 (1953); Ill. Ann. Stat. c. 38, § 748 (1936); People v. Suilatalski, 331 Ill. App. 31, 72 N.E.2d 447 (1947). The Illinois provision applies only to those defendants on bail; if the defendant is jailed by the magistrate, he must be brought to trial within four months of incarceration or the charge is to be dismissed.


Automatic dismissal of the charge at a specified time after the magistrate’s hearing or formal accusation would effectively control unnecessary delays without sacrificing the prosecutor’s convenience in setting the time of trial. However, the operative effect of such automatic dismissal may conflict with the safeguard of requiring court approval of the use of the nol pros as well as most restrictions on the prosecutor’s discretion to dismiss charges, since the prosecutor could accomplish the same thing simply by failing to act. Fairness to the accused at least demands that the power to assign cases among the judges be given to someone other than the prosecutor. Reasonable estimates of the time required for trial might easily be obtained from the prosecuting attorney so that, once the calendar was prepared, a presiding judge could distribute the cases without a serious loss of administrative efficiency.  

**CONTROL OF THE PROSECUTOR**

As an elected official, the prosecutor in exercising discretion is perhaps best controlled by the forces of public opinion. Where an aroused public insists on the enforcement of a particular statute, a thorough prosecution is likely. In many cases, however, an exercise of discretion in accordance with the desires of the community enables the prosecutor, by failing to prosecute, to effect a virtual repeal of state laws which are disfavorable to his constituents. The extent to which these and other abuses of discretion can be controlled depends upon the efficacy of the removal procedure and the powers which the state government may exercise over the local prosecutor.

**Removal Procedures**

In nearly all states, the local prosecutor is subject to removal upon action of the state legislature. Some states provide for impeachment; others allow a removal simply upon vote of the legislative body. In a few, the legislature by a two-thirds vote sends a recommendation to the governor who may act to comply with that recommendation. These methods seem to be an ineffective means of control, since convincing the requisite number of the legislators that a local prose-

117. Such a rule has been adopted in Kings County of New York. See McDonald v. Goldstein, 191 Misc. 863, 83 N.Y.S.2d 620 (Sup. Ct. 1948).
118. See Baker, supra note 36, at 784.
120. E.g., Ark. Const. art. XV, § 1; Mich. Const. art. IX, § 1; Pa. Const. art. VI, § 3.
121. Md. Const. art. V, § 7 (two-thirds vote of senate on recommendation of attorney general); Tenn. Const. art. VI, § 6 (two-thirds vote of each house); Wash. Const. art. IV, § 9 (three-fourths vote of each house).
The district representative may be in allegiance with the prosecutor and would have a great amount of influence in the legislature, and representatives from other districts may be extremely hesitant to remove a local prosecutor without an overwhelming showing that immediate removal is necessary.

Many states have provided for less cumbersome procedures. A local trial, with or without a jury, on charges of misconduct is a common provision as indicated by Tables III and IV. However, both judge and jury may be subject to local political pressures which may strongly influence the result. Time consuming motions by the accused and his recourse to appeal may delay removal for years. Removal by the governor after notice and hearing is a more speedy procedure, but may be equally subject to political pressures. Removal may be effected in Massachusetts and Missouri by means of a petition to the highest court of the state. This permits a disposal of the substantive issue in relative freedom from political pressures and eliminates the delay of time consuming appeals.

Where removal procedures are inadequate, prosecutions for misdemeanors in office and the threat of disbarment may aid in the control of the prosecutor. Most of the grounds for removal are also statutory misdemeanors in many states as shown by Table V, and in other states, the common law misdemeanor of official misconduct may still be in effect. In some states, as is indicated in the tables, the court may or must remove the prosecutor upon conviction of one of these offenses. However, such a prosecution is a poor substitute for effective removal procedures. Since a corrupt motive is an essential element of these crimes, conviction can

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124. See pp. 1083-85 infra.
125. Me. Rev. Stat. c. 89, § 112 (1954) (accusation by verified complaint of any person; grounds for removal are violation of any statute, failure to perform duties faithfully and efficiently); Mich. Stat. Ann. § 6.696 (1936) (accusation by verified complaint of any person; grounds for removal are misconduct, wilful neglect of duty); Minn. Stat. Annotations § 351.03 (1946) (grounds for removal are malfeasance and nonfeasance); N. D. Rev. Code §§ 44-1101, 44-1103 (1943) (accusation by verified complaint of five qualified electors or by complaint of attorney general; grounds for removal are misconduct, malfeasance, neglect of duty, gross incompetency); N. Y. Const. art. IX, § 5; S. D. Code § 48.0203 (1939) (accusation by governor or complaint of any person; grounds for removal are wilful failure to perform duty, wilful refusal to perform duty, wilful neglect to perform duty, gross incompetency, being guilty of any violation of the law); Wis. Const. art. VI, § 4 (accusation is by verified complaint of any taxpayer; grounds for removal are inefficiency, neglect of duty, misconduct, malfeasance); Wis. Stat. §§ 17.09(3), 17.15(3), 17.16(2) (1953).
127. State v. Wallach, 353 Mo. 312, 182 S. W. 2d 313 (1944); State ex inf. McKiritch v. Wymore, 345 Mo. 169, 132 S. W. 2d 979 (1939).
128. See p. 1086 infra.
129. See Miller, Criminal Law § 162 (1934).
only control the more extreme abuses of discretion. Since many states require that the prosecutor be an attorney duly admitted to the bar of the state courts, disbarment would at least prevent his re-election and might be used as a basis for inducing the legislature to remove the prosecutor.

The Attorney General

At common law, the public prosecuting official was the attorney general, who exercised wide powers of supervision over all criminal investigations and prosecutions. Although in some instances the actual prosecutor was merely a private citizen, the attorney general apparently could assume personal control of such proceedings as he saw fit.

In states in which the attorney general retains his common-law powers in addition to those enumerated by statute, he may exercise concurrent powers with the local prosecuting attorney in the initiation and prosecution of criminal cases, and it has been held that he may, at his discretion, supersede and replace the local prosecutor. In a few states, however, the attorney general has no powers overlapping those given to the local prosecutor, and in others, the attorney general possesses only those powers specifically given to him by statute or constitution.

135. In Kentucky, for example, after several unsuccessful attempts at removal (see Northcutt v. Howard, 279 Ky. 219, 130 S.W.2d 70 (1939); Attorney General v. Howard, 297 Ky. 488, 180 S.W.2d 415 (1944)), a federal district court was persuaded to disenroll a state prosecutor for misconduct in the performance of his official state duties. Wilbur v. Howard, 70 F. Supp. 930 (E.D. Ky. 1947), moot on appeal, 166 F.2d 884 (6th Cir. 1948).
138. People v. Gibson, 53 Colo. 231, 125 Pac. 531 (1912); Commonwealth v. Kozlowsky, 238 Mass. 379, 131 N.E. 207 (1921); State ex rel. Young v. Robinson, 101 Minn. 277, 112 N.W. 269 (1907); State ex rel. Ford v. Young, 54 Mont. 401, 170 Pac. 947 (1918).
140. E.g., State v. Ehrlick, 65 W. Va., 700, 64 S.E. 935 (1909).
A common provision in states, that specifically enumerate the attorney general’s powers is the power to institute prosecution in cases on which the local prosecutor has failed to act.\textsuperscript{142} Many state statutes approach the common law more closely by allowing the attorney general to supersede the local prosecutor in any prosecution and to any extent necessary.\textsuperscript{143} Some jurisdictions give the attorney general a limited power of assistance,\textsuperscript{144} which enables him to participate actively in the prosecution of

\textsuperscript{142} ARIZ. CODE ANN. § 4-601(a)(2) (Supp. 1952); CAL. CONST. art. V, § 21; IOWA CODE ANN. § 132(2) (1946); LA. REV. STAT. § 15:23 (1951); ME. REV. STAT. c. 20, § 9 (1954); NEB. REV. STAT. § 84-204 (1943); NEV. COMP. LAWS § 7312 (1929); N.M. STAT. ANN. § 4-3-2(b) (1953); N.D. REV. CODE § 54-1202 (1943); S.D. CODE § 34.0403 (1939); VT. REV. STAT. § 463 (1947). In Arizona, Nevada and New Mexico, the attorney general must exercise this power when directed by the governor. In Iowa, the attorney general is to exercise this power when ordered to do so by the governor, legislature, or the governor’s executive council. In a few states, this may be done only when directed by the governor. IDAHO CODE ANN. § 31-227 (Supp. 1953); ME. CONST. art. V, § 3; OKLA. STAT. ANN. tit. 74, § 18(e) (Supp. 1954); VA. CODE § 2-90 (1950). Idaho also provides that the attorney general is to initiate and prosecute criminal cases when directed by the legislature.

\textsuperscript{143} In some states, this may be done at the attorney general’s discretion. ALA. CODE tit. 55, § 235 (1940); CAL. POL. CODE §§ 470(5), 477, 478 (1944); LA. REV. STAT. ANN. §§ 15:23, 15:156 (1951); ME. REV. STAT. c. 20, § 9 (1954); NEB. REV. STAT. § 84-203 (1943); NEV. COMP. LAWS § 7316(c) (1929); S.C. CODE § 1-237(2) (1952); S.D. CODE §§ 34.0403, 55.1501(2) (1939); VT. REV. STAT. § 454 (1947). Of these, Nebraska, Nevada, South Carolina and South Dakota compel the attorney general to supersede the local prosecutor when directed by the governor. NEB. REV. STAT. § 84-205(9) (1943); NEV. COMP. LAWS § 7316(c) (1929); S.C. CODE § 1-233 (1952); S.D. CODE § 55.1501(2) (1939). Nebraska also requires the attorney general to supersede when directed to do so by the legislature. NEB. REV. STAT. § 84-205(9) (1943). South Carolina and South Dakota also provide that the attorney general is to supersede the local prosecutor upon the direction of either branch of the legislature. S.C. CODE § 1-233 (1952); S.D. CODE § 55.1501(2) (1939). New Mexico provides that the attorney general is to supersede the local prosecutor if he fails or refuses to perform his duty, and, if after a thorough investigation, the grand jury deems supersede necessary. N.M. STAT. ANN. § 4-3-3 (1953).

In other states, this may be done only when so directed by the governor or some other state officer or body. By the governor: GA. CODE ANN. § 40-1610 (1949); KAN. GEN. STAT. § 75-702 (1949); MD. CONST. art. V, § 3; MASS. ANN. LAWS c. 12, § 3 (1952); MINN. STAT. ANN. § 8.01 (1946); N.H. REV. LAWS c. 24, § 8 (1942); N.J. STAT. ANN. § 52:17A-4(F) (1955); N.Y. EXEC. LAW § 63(2); N.C. GEN. STAT. § 114-2(1) (1952); OHIO REV. CODE §§ 109.02, 2939.10 (1953); OKLA. STAT. ANN. tit. 74, § 18(b) (Supp. 1954); ORE. REV. STAT. §§ 180.070, 180.080 (1953); VA. CODE § 2-90 (1950); WIS. STAT. § 14.53(1) (1953). Of these, Kansas, Maryland, Massachusetts, North Carolina, Oklahoma, Ohio, Oregon and Wisconsin also require the attorney general to supersede the local prosecutor when requested to do so by the legislature. New Jersey requires the attorney general to supersede within the assignment of the superior court or the county governing body. N.J. STAT. ANN. § 52:17A-4(F) (1955). Oregon permits supersede when the attorney general is so requested by any state officer, board or commission. ORE. REV. STAT. § 180.060(d) (1953). The attorney general may supersede when so directed by the judge of the criminal court, N.D. REV. CODE §§ 11-1606, 54-1204 (1943), or by the president judge of the criminal court, PA. STAT. ANN. tit. 71, § 297 (Purdon 1942). Washington provides that upon request of the governor, the attorney general shall investigate violations of the law. If after such investigation, the attorney general believes that the prosecutor has failed or neglected to prosecute criminal violations, the attorney general shall direct any action he deems advisable. If the prosecutor fails to comply, the attorney general shall supersede. WASH. REV. CODE § 43.10.090 (1951).

\textsuperscript{144} ILL. ANN. STAT. c. 14, § 4(4) (1951); IND. ANN. STAT. § 49-1924 (Burns 1951); MISS. CODE ANN. § 3845 (1942); MO. ANN. STAT. § 27.030 (Vernon 1951);
cases. Others provide that he may supervise the activities of the prosecutor, which, without the power of assistance, would permit only direction of a most general nature. Where he has both of these latter powers, however, a limited supersedeure might be effected in some cases by gaining entry to the prosecution through the power of assistance and control by means of his power of supervision.

The sporadic use of these statutes has produced little state control over the local prosecuting attorney. The attorney general's powers in the administration of the criminal law are largely incidental to his non-criminal activities, which constitute the bulk of the work of his office. Since duties to exercise these powers are only rarely imposed, the attorney general is unlikely to exercise much control over the local prosecutor.

More effective state control over the local prosecutor has long been advocated. Delaware and Rhode Island have made all prosecutions the responsibility of the state attorney general for many years. Similar plans have been proposed for adoption in other states. Such centraliza-

N.D. Rev. Code § 54-1201(4), (5) (1943). In New Mexico the attorney general is to assist the prosecutor only when so directed by the governor. N.M. Stat. Ann. § 4-3-2(1) (1953). In addition, Maryland requires the attorney general to assist the prosecutor when so directed by the legislature. Md. Const. art. V, § 3. The attorney general of Maine can assist the prosecutor only in the prosecution of treason and murder cases. Me. Rev. Stat. c. 20, § 9 (1954). In South Carolina he can assist only in the presentation of capital cases to the grand jury. S.C. Code § 1-237(1) (1952). In Vermont he may assist only in the preparation of indictments and informations and appear before the grand jury. Vt. Rev. Stat. § 455 (1947).


147. County of Sacramento v. Central Pacific R.R., 61 Cal. 250 (1882); State ex rel. Nolan v. District Court, 22 Mont. 25, 55 Pac. 916 (1899).


150. Id. at 358, 396.


152. See De Long, supra note 149, at 380.
tion of prosecution may not be entirely desirable in larger states nor necessary for the purposes of controlling the prosecutor’s discretion. The desire of a particular community to enforce the laws according to its needs should be respected if this will not be inimical to the interests of the state. The local prosecutor’s failure to combat organized crime effectively may be remedied by granting supervisory and supersedeure powers at the state level. The American Bar Association’s Commission on Crime has proposed that the attorney general be given the power to supersede the prosecutor whenever he believes this will further the interests of the state. This would provide an immediate remedy for abuses of the prosecutor’s discretion, but should only rarely be necessary since the threat of supersedeure combined with the possibility of a subsequent removal by the governor or the highest court of the state should deter failures to prosecute serious violations of the law.

CONCLUSION

Within the statutory framework considered, the application of the criminal law to individual defendants is subject to a vast amount of discretion in the prosecutor to effect a flexible system of prosecution. To protect the individual, some immediate restrictions are imposed. As against the overzealous, the magistrate and the grand jury function as some protection against unfounded accusations. Statutory remedies for delay in accusation or trial safeguard against the malicious and inefficient. On the other hand, to protect the community’s interest in law enforcement, it has been deemed expedient to subject the power of nol pros to court control and to provide for removal for flagrant violations of duty rather than force prosecution by a mandamus proceeding. However, where immediate relief is needed from the prosecutor’s neglect of duty, the attorney general may have the authority to force immediate action.

The efficacy of many of these restrictions is at best open to question. The magisterial system and the grand jury in many cases may well be controlled by the prosecutor, and court approval of the nol pros may be merely perfunctory. Even in the case of a gross abuse of discretion, removal may be extremely difficult due to local political pressures and the inertia of state governing bodies. Although the attorney general could provide immediate relief in many states, the failure to impose duties in the exercise of this power, the fact that criminal matters are a negligible part of his work and political pressures flowing from his need for votes make the exercise of this power a rare occasion.

154. ABA Model Department of Justice Act §7(5) (1953). Under §7(4) the attorney general must supersede when so requested by the governor and may do so when requested by the grand jury.
155. The Model Act also provides for removal of the local prosecutor by the governor or the highest court of the state. Id. §9.
Public interest in the administration of the criminal law, rather than further legislation, is needed to insure that the grand jury and magisterial system operate efficiently. Similarly, since the nol pros is such an essential tool of prosecution, perhaps it would be unwise to legislate additional restrictions on its use. On the other hand, it might be well to consider curing the defects of the sanctions of removal and the powers of the attorney general. Removal on petition to the highest court of the state and an appointed attorney general would reduce the impediment of political pressure. Imposing duties on the attorney general in the exercise of his powers over the local prosecutor and extending his activities as a supervisor of the administration of the criminal law would reduce the barrier of administrative inertia. Although the prosecutor's discretion is essential, these measures might make existing sanctions against its abuse more effective.
### TABLE II

**Distribution of Nol Pros Among Offenses Charged in Philadelphia for 1954**

<table>
<thead>
<tr>
<th>Offense Charged</th>
<th>Guilty</th>
<th>Acquitted</th>
<th>Nol Pros</th>
<th>Total Accusations</th>
<th>Nol Pros Processed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>57</td>
<td>12</td>
<td>8</td>
<td>77</td>
<td>10.4</td>
</tr>
<tr>
<td>Voluntary Manslaughter</td>
<td>46</td>
<td>15</td>
<td>42</td>
<td>103</td>
<td>40.8</td>
</tr>
<tr>
<td>Sex Crimes</td>
<td>385</td>
<td>92</td>
<td>58</td>
<td>535</td>
<td>10.8</td>
</tr>
<tr>
<td>Rape</td>
<td>31</td>
<td>17</td>
<td>2</td>
<td>50</td>
<td>4.0</td>
</tr>
<tr>
<td>Burglary</td>
<td>440</td>
<td>64</td>
<td>16</td>
<td>520</td>
<td>3.0</td>
</tr>
<tr>
<td>Assault and battery; aggravated assault and mayhem</td>
<td>1105</td>
<td>433</td>
<td>578</td>
<td>2116</td>
<td>27.3</td>
</tr>
<tr>
<td>Robbery</td>
<td>480</td>
<td>100</td>
<td>25</td>
<td>605</td>
<td>4.1</td>
</tr>
<tr>
<td>Arson</td>
<td>4</td>
<td>1</td>
<td>—</td>
<td>5</td>
<td>—</td>
</tr>
<tr>
<td>Frauds: False pretenses, forgery, bad checks</td>
<td>545</td>
<td>55</td>
<td>92</td>
<td>692</td>
<td>13.3</td>
</tr>
<tr>
<td>Thefts, larceny, receiving stolen goods</td>
<td>1384</td>
<td>243</td>
<td>146</td>
<td>1773</td>
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<td>Embezzlement</td>
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<td>Conspiracy, bribery, corrupt solicitation, extortion</td>
<td>175</td>
<td>24</td>
<td>35</td>
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<td>Perjury, subornation</td>
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<td>Guns, carrying concealed weapons, etc.</td>
<td>507</td>
<td>153</td>
<td>53</td>
<td>713</td>
<td>7.5</td>
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<td>Lottery, bookmaking</td>
<td>1105</td>
<td>308</td>
<td>45</td>
<td>1458</td>
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<td>Totals</td>
<td>6267</td>
<td>1518</td>
<td>1103</td>
<td>8888</td>
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1. These figures were compiled by and received from the Office of the District Attorney of Philadelphia.
TABLE III

Removal of Prosecutor from Office by Summary Hearing (trial without jury)

<table>
<thead>
<tr>
<th>Grounds for Removal</th>
<th>Neglect of Duty</th>
<th>Incompetence</th>
<th>Malfeasance</th>
<th>Corruption</th>
<th>Gross Partiality</th>
<th>Maladministration</th>
<th>Failure of Refusal to Perform Duty</th>
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<tbody>
<tr>
<td>Wilful or Habitual</td>
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<td>×</td>
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<td>Wilful</td>
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<tr>
<td>Wilful and Corrupt</td>
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<td>×</td>
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<td>Wilful</td>
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<tr>
<td>Wilful and Wanton</td>
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Idaho Code Ann. § 19-4115 (1948)

Ind. Ann. Stat. § 49-836 (Burns 1951)
Iowa Code Ann. §§ 66.1, 66.3 (1949)

Nev. Comp. Laws §§ 4860, 4861, (1929)
N.H. Rev. Laws c. 45, § 7 (1942)
N.C. Gen. Stat. § 128-16 (1952)
Ohio Rev. Code § 309.05 (1953)

S.D. Code § 48.0204 (1939)
<table>
<thead>
<tr>
<th>Grounds for Removal</th>
<th>Failure or Refusal to Perform Duty</th>
<th>Wilful Maladministration</th>
<th>Gross Partiality</th>
<th>Misdemeanor in Office</th>
<th>Incompetence</th>
<th>Corruption</th>
<th>Oppression</th>
<th>Malfeasance</th>
<th>Misfeasance</th>
<th>Misconduct</th>
<th>Neglect of Duty</th>
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<td>N.M. Stat. Ann. §§ 5-3-3-5-3-21 (1953)</td>
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<td>N.D. Rev. Code §§ 44-1002, 44-1011 (1943)</td>
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<td>Ore. Const. art. VII (amend), § 6</td>
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<td>Tex. Const. art. 5, § 24</td>
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**Prosecutor's Discretion**
TABLE V

MISDEMEANORS AFFECTING THE PROSECUTOR'S DISCRETION

<table>
<thead>
<tr>
<th>Neglect of Duty</th>
<th>Malfeasance</th>
<th>Oppression</th>
<th>Omission to Perform Duty</th>
<th>Failure or Refusal to Perform Duty</th>
<th>Partiality</th>
<th>Wilful and Malicious Abuse of Authority</th>
<th>Others</th>
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<tr>
<td>ALA. Code tit. 41, § 212 (1940)</td>
<td>Wilful</td>
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<td>ARIZ. Code Ann. § 43-3923 (1939)*</td>
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<td>CAL. Gov. Code § 1222 (1944)*</td>
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<td>Wilful or Corrupt</td>
<td>Wilful Palpable</td>
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<td>FLA. Stat. Ann. § 925.01 (1944)</td>
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<td>IOWA Code Ann. § 740.3 (1950)</td>
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<tr>
<td>KY. REV. Stat. § 61.170 (1953)**</td>
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<td>MISS. Code Ann., § 2298 (1942)</td>
<td>Wilful or Knowing</td>
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UNIVERSITY OF PENNSYLVANIA LAW REVIEW [Vol. 103]
<table>
<thead>
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<th>Statute</th>
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<tr>
<td>Neb. Rev. Stat. § 28-724 (1948)*</td>
<td>§ 2084</td>
<td>§ 9971 Palpable Wilful or Corrupt</td>
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<td>Rev. Comp. Laws (1929)</td>
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<td>S.C. Code § 50.8 (1952)**</td>
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<td>S.D. Code § 13.1301 (1939)</td>
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</table>

* On conviction, the court may remove the prosecutor.

** On conviction, the court must remove the prosecutor.

*** On conviction, the court may remove upon the jury's recommendation.