THE DISTRICT ATTORNEY—A HISTORICAL PUZZLE

The interested student probing into the English background of American criminal procedure is apt to experience a distinct surprise when he discovers that the traditional manner of conducting criminal prosecutions in England in no way provides for or includes a public prosecutor such as our district attorney.[1] The nearest present-day counterpart of the American district attorney is the Director of Public Prosecutions whose office was created in 1879 by the Prosecution of Offenses Act.[2] Prior to 1879 there was no English functionary who even vaguely resembled the American prosecuting officer. On the other hand, there seems to be evidence that the American district attorney was in existence in certain colonies during the 18th century or before.[3] This variance in our adjective law of crime from that of England may fairly be regarded as somewhat of a minor phenomenon, especially since it obtained in some of the colonies prior to the Revolution.

Hypotheses which seek to explain this puzzle suggest three obvious lines of inquiry. The first covers the possibility that conditions peculiar to the New World scene caused our forefathers to adapt to their own needs an already extant facet of common-law criminal procedure. Second, and logically less probable, is what might be called a spontaneous combustion theory for the creation of the public prosecutor in America. This is to say that one or more groups in our early history merely created the office spontaneously to solve procedural problems native to the colonies. Third, and somewhat akin to the first possibility, is the chance that several of the original colonies may have adopted a non-common-law institution already known to them through some channel. It is with the last possibility that this paper primarily concerns itself. The fundamental purpose of the paper is not to present any dogmatic conclusions, but rather to suggest, and proffer some evidence in support of the third hypothesis.

On Criminal Prosecution at Home and Abroad

Historically, scholars have classified criminal procedure into three systems.[4] Today, however, there are but two in western society:

[1] CHITTY, I A PRACTICAL TREATISE ON THE CRIMINAL LAW ... (1816); STEPHEN, I A HISTORY OF THE CRIMINAL LAW OF ENGLAND 493-495 (1883); HOWARD, CRIMINAL JUSTICE IN ENGLAND 1 (1931).

[2] 42 & 43 VICT. c. 22 (1879), IV HALSBURY'S LAWS 696-698.

[3] At least in the Middle Atlantic colonies. See *infra*.

[4] ***E.g.***, ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 3-12 (1913).

that of the continental or civil law system, and that of the Anglo-American system. The outstanding feature of criminal prosecution in the continental countries is the existence of a public prosecutor in whose hands rests the sole right and power to accuse, collect evidence, and manage prosecutions for the state. In England, on the other hand, the right and power to accuse, collect evidence, and manage prosecutions has traditionally rested with the individual and the police.[5] Their right and power to accuse has always been exercised through the utilization of the basic institutions of the Grand Jury, the Coroner's Inquest, the Attorney-General (in very special cases), and the Justice of the Peace.[6] The majority of English criminal actions (even today) are either private or police prosecutions employing the Grand Jury or the Coroner's Inquest at the accusatory level. To illustrate their significance in the mind of a great common-law lawyer, we might note that Chitty, in his comprehensive work on criminal procedure, devotes twenty-one chapters to this method of accusation and one to utilizing the respective authorities of the Attorney-General and Justice of the Peace. Indeed, the formal accusation of crime by any device other than the Grand Jury, a body of citizens, smacks of high-handed Star Chamber methods to Chitty. He remarks that the Grand Jury is the only safe and constitutional method of proceeding in such matters, and takes great pride in the emphasis upon the power of the individual to instigate action.[7] At the same time, he exhibits little affection for the continental system with its emphasis on the action being commenced by the state.

Since the majority of English criminal actions are instituted by private parties or the police, utilizing the Grand Jury, it may well be asked, how do the English manage their prosecutions beyond the accusatory level?

In a private prosecution (once an indictment or presentment has been returned by the Grand Jury) the private complainant puts the case in the hands of his own private solicitor. The police help the solicitor prepare the case. The solicitor turns the prepared briefs over to a private barrister who tries the case. They perform the functions of the American district attorney in collecting evidence and managing the prosecution at the trial level.

More common, however, is the police prosecution. If the crime involves violence the police take charge immediately. They round up

[5] See note 1 *supra*.

[6] *Ibid.* Note also ESMEIN, *op. cit. supra* note 4, at 336-339.

[7] CHITTY, *op. cit. supra* note 1, at 162. Also see comments of STEPHEN, *op. cit. supra* note 1.

evidence and witnesses. In courts of summary jurisdiction, justices' clerks and police court magistrates examine witnesses, thus cooperating with the police. These examinations, made outside the courtroom, result in written depositions which are presented at the trial. Everyone from the town clerk to the petty police officer in charge of the case acts as prosecuting attorney. In cases involving a judge and trial jury, all sorts of municipal officers, who are solicitors and barristers by profession, or private solicitors nominated by the local police, do the work.

The Law Officers of the Crown, the Attorney-General and the Solicitor-General, handle a few special types of cases,[8] most important of which is high treason.[9] However, their action is not typical of the ordinary and traditional English criminal prosecution.

As has been mentioned earlier, the nearest modern English counterpart of the American district attorney is the Director of Public Prosecutions. This official is appointed by the Home Secretary but is responsible to the Attorney-General. He prosecutes all offenses punishable by death and starts a prosecution should it be required in the public interest. Since this official has existed only since 1879 any further mention of him may seem irrelevant to our discussion. It is relevant, however, to use the office to illustrate once again the basic "constitutional" chasm which exists between English criminal prosecution and that of the continental countries. For, it has been pointed out that even though the English resorted to such a personage in the late 19th century, ". . . the powers and duties of the Director of Public Prosecutions [show] that Parliament never intended that he should be a prosecuting official of the type made use of in most other countries."[10]

At this juncture it should be recalled that here at home we have retained to this day, in many jurisdictions, the accusatorial institution of the Grand Jury. In addition we have a public prosecutor in whose hands rests the right and power to instigate accusations (in general the Grand Jury, where it exists, must still make the formal accusation), collect evidence, and manage prosecutions for the state.[11] In short, we have added a prosecutor of the civil law type to the English system.

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[8] Best details are in CHITTY, *op. cit. supra* note 1, c. 22.

[9] *E.g.* Attorney-General Lord Coke conducted proceedings against Sir Walter Raleigh in 1603. II COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1-59 (1809-1828).

[10] HOWARD, *op. cit. supra* note 1, at 39. Also see STEPHEN *op. cit. supra* note 1, at 501.

[11] This redundancy has led to some agitation among our political scientists for abolition of the Grand Jury. Nonetheless, it continues to persist in many jurisdictions.

From this discussion it appears obvious that the office of district attorney lies outside the tradition of English prosecution. Therefore, let us examine more fully our third hypothesis—to wit—that our public prosecutor is an adoption from a non-common-law source of which the obvious one is the civil law of the continent. Since the only other power which ever governed any portion of the area which became the original thirteen states was the Netherlands, let us turn to an examination of Dutch law and its possible bearing on our puzzle.

On the Dutch, the Civil Law, and New Netherland

Dutch law, including criminal procedure, is, like the substantive law and procedure of other continental countries, essentially the product of Roman, Canon, and "tribal" law.[12] In their criminal prosecutions the Dutch have always employed a public prosecutor whom they call the schout.[13] When the Dutch founded the colony of New Netherland in the 17th century, they brought their schout and system of prosecution with them.[14] Thus, it would be curious to determine whether or not the 17th century public prosecutor of the Dutch may have had any relation to the modern American public prosecutor, and thereby cast some light on roots which appear to have no traditional soil in England.

A glance at a map showing the areas claimed by England and the Netherlands along the eastern seaboard in the 1650's should help correct misinformed geographical ideas about New Netherland and its position relative to the English colonies.[15] New Netherland extended over a much larger area than is commonly imagined. The Dutch claimed and had settlements in what are now parts of Connecticut, New York, New Jersey, Pennsylvania, and Delaware.[16]

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[12] VAN LEEUWEN, COMMENTARIES ON ROMAN-DUTCH LAW (Kotze transl. 1921). Canon law leans in part on Roman law. Surveys of continental law are I, XI THE CONTINENTAL LEGAL HISTORY SERIES (1912-1918). Also of interest is VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE (1909).

[13] I VAN LEEUWEN, *op. cit. supra* note 12, at 15, 473; II *id.* at 353. Motley mentions the use of the schout as early as 1217 in the city of Middleburg; I THE RISE OF THE DUTCH REPUBLIC 35, 36 (1868). Schout pronounced "skout."

[14] Note the abstract of the duties of the schout at New Amsterdam quoted *infra*.

[15] A rough idea may be obtained from NETTELS, THE ROOTS OF AMERICAN CIVILIZATION 198 (1947).

[16] The classic contemporary description which has been handed down to us is that made by Adriaen van der Donck in 1649, in his REMONSTRANCE OF NEW NETHERLAND, translated by O'Callahgan in 1856. In essence, the northeast limit of Dutch settlement (though their claims extended somewhat further) was the Connecticut River Valley—which river the Dutch called the Fresh River. Northward from New Amsterdam the colony extended up the North (Hudson) River and its tributaries, and the southwestern limit was the Chesapeake Bay area with a line of settlement extending up the South (Delaware) River.

There had been Dutch traders in the Connecticut River Valley as early as

Thus, New Netherland comprised more than a village on Manhattan Island and a few feudal estates on the Hudson. However, a word of caution is necessary for it is not to be implied that the Dutch population at any time equalled the English in numbers (even in areas of the Dutch colony). Rather it is pointed out that a comparatively scattered land mass and its settlers (not necessarily Dutch) were under the political direction or subject to the influence of a continental power, the Netherlands. The question should immediately be raised: was this political control and influence exercised long enough and over a sufficiently large group of people to have one of its institutions, the public prosecutor, merit perpetuation? There appears to be enough evidence from the court records and statutes of the Middle Atlantic states (which roughly embrace the former Dutch colony), to justify at least a tentative answer in the affirmative.

The Schout and New Netherland

Wherever the Dutch went they took their laws and legal customs with them.[17] From the very beginning of New Netherland, Director Minuit and his council were provided with the services of a schout

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1614 and the Dutch had a small settlement and trading post, which they called Fort Good Hope, located in what is now the city of Hartford. Thomas Hooker called the area Dutch Point when he arrived in the 1630's. The Dutch and English settlers were constantly quarreling in Connecticut, and their leaders quarreling over it. For example, we find that the Particular Court of Hartford ruled on June 4, 1640:

> Whereas the Dutch Catle are impounded for trespassing the Englishmen's Corne, It is the judgment of the Courte that the Dutchmen shall be made acquainted w^th^ the trespasse, and satisfaction demaunded, the w^ch^ if they refuse to pay, the Cattell are to be kepte in the pownd three dayes, and then to be prysed & sold, and the trespasse to be satisfied, togather w^th^ the chardge of impounding, keepeing & tending the said Catle dureing their custody.

I THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT. . . . 51 (1850).

Finally the two groups adjusted their difficulties and halted some of the constand bickering by the Treaty of Hartford in 1650. The Dutch were to rule the western part of Connecticut and the English the Connecticut River Valley. II STATE PAPERS 170-172 (Hazard ed. 1792-1794). Some of the papers concerning the constant quarreling between the English and the Dutch over Connecticut may be found in XVIII PENNSYLVANIA ARCHIVES SECOND SERIES 277-322 (1874-1893).

In the South River district the modern city of Newcastle, Delaware, was the "center" for the Dutch settlements which were scattered from Cape Henlopen, (the Dutch settlement there was Whorekill) up beyond the Schuykill River (site of modern Philadelphia), including Chester County, Pennsylvania, and western Jersey beyond modern Burlington. Newcastle was called New Amstel, and continued to be the center of activity for the area even under the English. In upper Jersey there were settlements at Bergen, modern Elizabethtown, Newark, Woodbridge, and other places. Those settlements outside Bergen were lumped together under the name of Achter Col. (sometimes spelled Archer Coll in the records).

[17] Note I BURGE'S COMMENTARIES ON COLONIAL AND FOREIGN LAWS 90 (1907).

who sat on the council, albeit without a vote.[18] As in the Netherlands, he was to act as a public prosecutor and sheriff but in the colony he found himself with additional duties. He was to act as fiscal—an office of rather vague definition. The fiscal represented the Dutch West India Company as a sort of financial agent invested with legal powers.

The records for the first twenty-odd years of New Netherland are indeed scanty.[19] The first real court records which have survived, begin in 1653, and these are for the Court of Schout, Burgomasters and Schepens at New Amsterdam.[20] At this time one Cornelius van Tienhoven was the schout-fiscal at New Amsterdam. He appears to have been at logger-heads with the good burgomasters and councilors, for the burgomasters sent a stiffly-worded letter to the Amsterdam Chamber of the Dutch West India Company and complained of

[18] The powers and duties of the schout as defined by an ordinance of the Amsterdam Chamber of the Dutch West India Company on April 9, 1660 included the following:

> 3. He shall, *ex officio*, prosecute all contraveners, defrauders and transgressors of any Edicts, Laws, Statutes and Ordinances which are already made and published, or shall hereafter be enacted and made public, as far as those are amenable before the Court of Burgomasters and Schepens, and with this understanding that, having entered his suit against the aforesaid Contraveners, he shall immediately rise, and await the judgment of Burgomasters and Schepens, who, being prepared, shall, also, on his motion, pronounce the same.
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> 4. And, in order that he may well and regularly institute his complaint, the Sheriff, before entering his action or arresting any person, shall pertinently inform himself of the crime of which he shall accuse him, without being empowered to arrest anyone on the aforesaid information, unless the offense be committed in his presence.
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> 5. He shall take all his informations in the presence of two members of the Board of Burgomasters and Schepens if the case shall permit it, or otherwise in the presence of two discreet persons, who, with the Secretary or his deputy, shall sign the aforesaid informations.
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> 7. He shall take care in collecting and preparing Informations to act impartially, and to bring to light, the truth as clear and naked as possible noting, to that end, all circumstances which in any way deserve consideration, and appertain to the case.

LAWS AND ORDINANCES OF NEW NETHERLAND 374-375 (1868). The translator substituted the English word sheriff for the Dutch word schout. The two words are not synonymous.

[19] John R. Brodhead was commissioned by the New York State Legislature in 1841 to go to Europe and buy as many of the documents pertinent to the colonial history of New York as was possible. He discovered on his arrival in the Netherlands that all the records of the West India Company prior to 1700 had been sold as scrap paper. Such records as are extant (Dutch records) have been copied from the Royal Dutch Archives. See THE FINAL REPORT OF JOHN ROMEYN BRODHEAD . . . 9 (1845); also I DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK XXV (1856-1887).

[20] THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674, 7 Vols. (Fernow ed. 1897). For some detail of a few of the other courts which were established see LAWS AND ORDINANCES OF NEW NETHERLAND, viii, ix, x, 43, 55, 58, 77-78, 97; MINUTES OF THE ORPHANMASTERS OF NEW AMSTERDAM 1655 TO 1663, 2 Vols. (Fernow ed. 1902-1907).

Schout van Tienhoven. They made two requests: first, that the offices of schout and fiscal be separated; second, that the power to appoint the schout be vested in the burgomasters.[21] In due course the Amsterdam Chamber replied to, and granted, both requests with the proviso that the director and council, not the burgomasters, appoint the schout.[22] Oddly enough van Tienhoven continued in office as schout for over a year thereafter, but was finally replaced by a man named Nicasius de Sille.

The first real case in which it is possible to show the schout prosecuting appears on Monday, February 17, 1653.[23] Schout van Tienhoven appears as plaintiff against Stoffel Elsers, defendant. Van Tienhoven charged that the defendant had assaulted Adam Roelantsen, a wood cutter, after having called him from his work in the church, and given Roelantsen a thorough beating. The defendant denied the charge; but, since the action had occurred before witnesses on a public street, he was found guilty and placed on probation. From this time on the records are full of criminal actions in which Schout van Tienhoven acted as prosecutor in court.[24]

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[21] Letter dated December 24, 1653. I THE RECORDS OF NEW AMSTERDAM 144-146 (Fernow ed. 1897).

[22] Letter received July 21, 1654. *Id.* at 218.

[23] *Id.* at 54.

[24] *E.g. id.* at 154-155, 202-203, 207-208, 290-291 and *passim.* On April 16, 1655, the records show a particularly interesting case from the standpoint of prosecution since the questions asked the defendant are recorded along with his answers:

> The prisoner, on the above charge [assault] being heard in Court, says he did not know, what he did, inasmuch as he was drunk. Prays Mercy.
>
> The Heer Officer [van Tienhoven] being asked for proof, proceeded with his evidence, but requests, that the prisoner may again be heard.
>
> The Prisoner being heard on the following points, answered as appears in the margin.—
>
> Ques. I. Does he not know, where he drew his knife on the Skipper?
> Ans. I. No. As he was drunk.
> II. Did he then draw any knife?
> II. Yes. Against the sailors, who held a knife against his face.
> III. Does he not know, whether he had any words with the Skipper?
> III. No.
> IV. Does he not know, that he hath wounded the Skipper?
> IV. No; nor even that he threatened him.
> V. Does he not know, who was by or about?
> V. Yes: says that the Skipper struck him.
> VI. Did he ever quarrel with the Skipper before?
> VI. No.
>
> Ordered by the Court that the Officer [van Tienhoven] shall produce his proof in support of his action, as he claims, by next Monday. Meanwhile the Prisoner shall be again remanded to prison. *Id.* at 305-306.

The schouts at New Amsterdam for the years between 1653 and 1674 were Cornelius van Tienhoven, Nicasius de Sille, Pieter Tonneman, Allard Anthony, John Manning, Anthony de Mill, and Willem Knyff. Allard Anthony, and de Mill held the position under both the Dutch and the English. Some of the schouts in areas outside "New York" over the years included: John Ogden, Achter Col. (Elizabethtown, Newark, and some other towns in New Jersey); Tielman van

The Schout, Public Prosecutor and the English

In 1664 Charles II made a grant to his brother James, Duke of York, of the land which comprises New Netherland.[25] In August 1664 an English force appeared at New Amsterdam and demanded its surrender. Terms were arranged and the English took over the province in September. A law code commonly called the Duke's Laws was to serve as the basis for the legal system of the province.[26] However, it was not until June 1665 that the new English governor, Richard Nicolls, published a proclamation revoking the Dutch, and establishing the English, form of government.[27]

At the time of the English seizure Pieter Tonneman held the position of schout at New Amsterdam. Evidently shortly thereafter Allard Anthony was given the position.[28] The pertinent fact is, of course, that he continued to prosecute cases as had been done under the Dutch. A good illustration is a case on October 31, 1665.

> Allard Anthony Sheriff, plft. v/s Abram Pietersen Corbyn, deft. Plft. says that deft. was arrested by Capt John Jongh authorized thereto by special warrant from the General for having sold strong beer to the Indians in opposition to the order of the General made therein. Deft. answering says, that he sold nothing but beer to the Indians; says he was not aware, that it was prohibited; and states further, that he got a pass from Mr. Borton to pursue that trade, who verbally consented thereto. Whereas Mayor and Aldermen cannot perceive, that strong beer is directly forbidden by the last order enacted for this purpose, they refer parties, therefore, to the Honorable Governour Nicolls, the rather [?] as the above named John Jongh's commission mentions, that the culprit be brought before his Honor.[29]

These prosecutions continue in the court records. However, the outstanding fact is that they continue *after* June 1665, the date of

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Vleek, Claes Arentse Stoers, Bergen (New Jersey); Andries Hudde, Fort Casimir (Delaware); Andries Hudde, Gerrit van Sweringen, New Amstel (Newcastle, Delaware); Gregorius van Dyck, William Beekman, Fort Christiana (Wilmington, Delaware); Mattys Bengson, Altona (Delaware); Pieter Alrighs, South River (Upland, Pennsylvania; Newcastle and Whorekill, Delaware). See THE REGISTER OF NEW NETHERLAND 1626-1674, 38-47 (1865).

[25] I THE COLONIAL LAWS OF NEW YORK 1-5 (1894) contains a copy of the grant.

[26] The entire code with later additions and amendments may be found in *id.* at 6-71.

[27] *Id.* at 100-101.

[28] Anthony seems to have led a rather unusual career. In the first part of the court records he often appears as a defendant, once being accused of purloining a hogshead of tobacco. Finally he wound up as burgomaster and then schout, positions which only citizens of first rank were supposed to hold.

[29] V THE RECORDS OF NEW AMSTERDAM 311 (Fernow ed. 1897). The Court of Schout, Burgomaster, and Schepens was changed in name to the Court of Mayor and Aldermen, by the English.

Nicoll's proclamation.[30] The sheriff continued to prosecute in court on up to 1673 when the Dutch re-took the province.[31] The Dutch changed the name of the Mayor's Court back to the Court of Schout, Burgomaster, and Schepens.[32] Anthony de Mill was appointed schout.[33] De Mill and, later, his successor Willem Knyff prosecuted cases until the records end in 1674[34] when the province was returned to the English by treaty.

Now it becomes relevant to turn to what went on in terms of criminal prosecution in those areas of New Netherland outside what is now New York. While we have no court records such as those for New Amsterdam, there are, for the outside districts, fascinating bits of evidence which support the third hypothesis.

In New Jersey the first schout at Bergen was Tielman van Vleck who took office in 1661. The practice of prosecution by the schout must have continued after 1664, when the English took over, for during the second Dutch rule or "Colve" period, 1673-1674, we find that one Claes Arentse is schout at Bergen and receiving instructions in English from Colve.[35] Furthermore, Governor Colve was forced to use English instructions for the schout at Achter Coll (Elizabethtown, Newark, etc.), one John Ogden.[36] Ogden is also called sheriff in the records which indicates he may have held the job under both the English and the Dutch. Ogden was certainly familiar with acting

[30] *E.g.* V THE RECORDS OF NEW AMSTERDAM, *passim* (Fernow ed. 1897). The first prosecution by the sheriff is recorded as follows: Ao 1665. this 27th off June. Att a Court holden uppon the Citty Hall of N. Yorke. Present Mr Thomas Willet, Mayor; Mr Tho: d'La Val, Mr Oloff Stevensen, Mr Cornelis van Ruyven, Mr John Lawrence, Aldermen; Allard Anthony, Sheriff.

JURIES NAMES

Caleb Burton, Isaacq Bedloo, Christ hoogland, Balthw de Haert, Wm doruel, James Bullaine, John Gurland, John Browne, Charles Bridges, John damrel, Thos. Carvet, Saml Edsal.

Allart [sic] Anthony, Sheriff, Plantife v/s John Adely, defr. In an action of Assalt and Batterye against Tho. Kox. The Plt. demands off the defender (it beinge a case of great Consequence) ex Officio for the aforesaid Action a Penalty of fl. 150. The defender confessing the p'mises submits himselfe to the discretion of the Court. The honnble Court doth allowe to the Sheriff the somme of twenty gilders Wampum besides the Costs & Charges off the Court. Ady as above.

Id. at 267-268. Remember the change to English forms was made on June 12, 1665 when Nicolls revoked the Dutch system on paper. *Id.* at 248.

[31] Anthony Colve was made Governor-General. See "Benckes and Eversten's Charter," I THE COLONIAL LAWS OF NEW YORK 101-102. "Colve's Charter" may be found in *id.* at 102-104.

[32] *Ibid.*

[33] *Ibid.*

[34] VI, VII RECORDS OF NEW AMSTERDAM, *passim.*

[35] I NEW JERSEY ARCHIVES FIRST SERIES 125 (1880-1949). See also *id.* at 122-151.

[36] *Id.* at 135-139.

as a prosecutor for we find him proceeding against Robert van Quelen for removing goods from the home of the late Governor Carteret.[37] The court records for Burlington, a Quaker community, first reveal a public prosecutor or king's attorney in 1686.[38] Professor Reed, who wrote the introduction for the records, recognizes the prosecutor as an innovation and thinks the office may have been an informal creation of Governor Skene or the court itself.[39] He notes that there is no formal legal basis for the office given by 18th century commentators.[40] Interestingly enough, he also remarks that there did not seem to be any pressure for a grand jury for none existed until 1684.[41]

Can it be that the sheriff continued the role of schout in New Jersey as he seems to have done in New York? Can it be that the Quakers at Burlington acquired the idea of a public prosecutor from the Dutch practice and were merely adopting or adapting it to their own needs? We know that the district attorney existed all over New Jersey by the first part of the 18th century.[42] Do the origins go back to the 17th century Dutch experience? In view of the evidence at hand such an inference seems probable.

As early as December 1685, at a meeting of the Provincial Council of Pennsylvania in Philadelphia, the appointment of Samuel Hersent as prosecuting attorney for the County of Philadelphia, was attested.[43] The commission had been issued the month previous.[44] When the Council met on February 1, 1686, a discussion arose as to the advisability of having the sheriff (Hersent held the position) act as public prosecutor too. Consequently, it was decided to separate the two offices.[45] The inference is that henceforth Pennsylvania had a district attorney in the modern sense. Since this portion of Pennsylvania was formerly within the limits of New Netherland, and had Dutch settlers (there were two Dutch settlements near the site of present-day Philadelphia), and schouts were assigned to this area,

[37] I NEW JERSEY ARCHIVES FIRST SERIES 131-132 (1880-1949).

[38] THE BURLINGTON COURT BOOK. A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY. 1680-1709, 56 (Reed and Miller eds., 1944).

[39] *Id.* at xlii, n. 90.

[40] *Ibid.*

[41] *Id.* at xlii.

[42] Note the act of 1747 fixing a new set of court fees for the district attorney in prosecuting criminal cases, IX NEW JERSEY ARCHIVES FIRST SERIES 598.

[43] I MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 167 (1852-1853). The last few volumes of this series are entitled MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA.

[44] *Id.* at 170.

[45] *Ibid.*

the possibility that the English may have acquired the practice from them appears reasonable.[46]

In Delaware, as we have seen, Newcastle was the center for first the Dutch and then the English settlements in the Delaware Bay and River area. While there were schouts in other communities in the region (extending up into modern Pennsylvania and New Jersey) the schout at Newcastle acted as sort of a regional supervisor under both the Dutch and the English.[47] Of the schouts at Newcastle the most important seems to have been Edmund Cantwell who held the office under the English governors Lovelace and Andros. Both Lovelace and Andros refer to him as a schout in the records.[48] Intriguing is an ordinance issued by Andros and his council on September 22, 1676, to the schout-sheriff at Newcastle. It states, "But the Sheriffe to act as in England *and according to the now practice on Long Island, to act as a principall officer in the Execution of the Lawe. . . .*"[49] Here and there in the general colonial records is a court case and as late as May 13, 1675 we find a court record of the sheriff at Newcastle prosecuting one James Sandylands for murdering an Indian.[50] Thus, once again these scraps of evidence seem to indicate that the role of the schout as public prosecutor passed to the sheriff during the early years of the English rule in what was formerly New Netherland.

In Connecticut, the first public prosecutor appears to have been William Pitkin who was appointed in 1662 for the county of Hartford.[51] It will be recalled from the description of Dutch activities in Connecticut outlined above that the Connecticut River Valley (in which Hartford is located) had had Dutch settlers for some time, and was claimed as Dutch territory. Furthermore, western Connecticut was actually governed by the Dutch for the period after September, 1650. With this in mind it is of more than passing interest to examine the words of a historian, Professor John Farrell, who has written:

> The history of this officer [the county public prosecutor] presents nothing that should be strange. The concept of attorneyship was a familiar one to Connecticut courts in the seventeenth century, so that it was only natural that there should occasionally

[46] RECORD OF THE COURTS OF CHESTER COUNTY PENNSYLVANIA 1681-1697 (1910) show the sheriff appearing in court.

[47] Note the order of Governor Lovelace on May 17, 1672, XII DOCS. REL. HIST. ST. N.Y. 497. Also, "And the sd High Sheriff is to Enjoy in his sd Imployment all the Perquisite & Priviledges of a Schout. . . ." Letter dated August 2, 1672, by Governor Francis Lovelace, appointing Captain Edmond Cantwell to the office of High Sheriff at Newcastle, Delaware.

[48] *Ibid. passim.*

[49] *Id.* at 562. Italics inserted.

[50] *Id.* at 524.

[51] I THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT . . . 388.

> be found an attorney for the General Court. The first to act as such was William Pitkin. . . .[52]

Thus, when in May 1704 the Connecticut Assembly passed a law creating the office of public prosecutor on a province-wide basis,[53] Professor Farrell expresses no surprise.[54]

All this may not seem strange to Professor Farrell, but when we know the public prosecutor lies outside English procedural tradition and practice, and know the Dutch were in Connecticut, do not "strange" doubts come to mind as to the spontaneous origin of the public prosecutor there? Can it be that the contacts and experiences of those from the Connecticut River Valley and western Connecticut were suggestive to the representatives in formulating this statute of 1704?

Turning back from Connecticut at this point it may well be asked, why did the English allow the continuance of the Dutch method of criminal prosecution in those areas where the records indicate it continued (New York, New Jersey, Delaware, and Pennsylvania)? To answer this question, at least in part, it is necessary to turn back to 1664 when the English first seized New Netherland.

On many points the Duke's Laws were rather obscure and merely indicated that the law of England was to be the criterion in cases of doubt.[55] However, they did provide for a sheriff. Now the schout had also performed the functions of sheriff and, evidently, it had seemed natural to carry on criminal prosecutions with the sheriff acting as public prosecutor. After 1665 the records of New Amsterdam (New York) call the prosecutor the sheriff, and the same is true of the records pertaining to Delaware and New Jersey. Also it should be noted again that the sheriff at Philadelphia had been acting as a public prosecutor. So, during this period we may infer that the role of schout passed to the sheriff.

The transition did not take place without some confusion, for in 1676 two Justices evidently questioned the propriety of a sheriff

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[52] THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON 1772-1773, xxxix (Farrell ed. 1942).

[53] IV THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT . . . 468.

[54] See note 52 *supra*.

[55] I THE COLONIAL LAWS OF NEW YORK 44. Albert E. McKinley made a comparison of the Duke's Laws with the code of Massachusetts of 1660 and the code of New Haven of 1656 and showed the omission of New England features in the laws, the introduction of Dutch legal customs and the insertion of wholly new provisions. He concluded that the English intended to recognize and continue the political organization, the religious principles, the property rights, and the judicial procedure of the Dutch on a temporary basis; but some of the Dutch practices were retained. McKinley, *The Transition from Dutch to English Rule in New York*, VI AM. HIST. REV. 693-724 (1901).

acting as a public prosecutor. The Governor's Council issued a plainly-worded reply which stated that the sheriff was to put the law into execution, apprehend and *prosecute* violators.[56]

Though the Duke's Laws were vague enough to allow local courts much latitude in the matter of criminal prosecution, they might have made the acceptance of English legal practice more clear-cut had they been distributed. In 1677 Governor Andros promised the magistrates at Newcastle a copy of the laws,[57] and then failed to send them. It was necessary to send a Governor's order to the same magistrates in May 1679 in order to explain a legal point.[58] The Justices had written to Andros a month earlier complaining that they were unable to settle the case in question since no copy of the Duke's Laws had been issued to them.[59] Thus we might infer that frontier conditions, including poor communications, were largely responsible for the continuation of this non-common law procedural practice.

Summation and Distinctions

At this point we sum up the proffered fragments of evidence for our third hypothesis. The English did not employ a public prosecutor in their legal system until comparatively modern times (1879). The Dutch always used a public prosecutor and brought the institution to New Netherland. New Netherland covered an area which today embraces parts of Connecticut, New York, New Jersey, Pennsylvania, and Delaware. When the English took New Netherland in 1664 and 1674, the sheriff continued to perform the duties of public prosecutor which had been established by the Dutch, at least until well toward the end of the 17th century. In Connecticut, New York, New Jersey, and Pennsylvania there are indications of a public prosecutor in the 18th century.

Now, two obvious questions occur. First, just what was taking place in terms of criminal prosecution in the strictly "English" colonies in the 17th and 18th centuries? No complete study has been made in that area but one writer, who has investigated criminal justice in colonial Virginia, sums up his research as follows:

> . . . conclusions in the briefest possible form: Virginia procedure fundamentally resembled that of England, though it was on the whole less formal and more direct; as time went on it developed in the direction of greater conformity to the English practice.[60]

[56] XIII Docs. Rel. Col. Hist. St. N.Y. 498.
[57] V Pennsylvania Archives Second Series 697 (1874-1893).
[58] *Id.* at 712.
[59] *Ibid.*
[60] Scott, Criminal Law in Colonial Virginia 136 (1930).

This suggests that the office of district attorney, (a deviation from the established traditional pattern), which appeared in the Middle Atlantic colonies did not become entrenched in at least one "English" colony in the pre-Revolutionary period.

The second question is, what have scholars had to say about this procedural puzzle in our criminal law? Surprising is the paucity of research in this area. As we have noted, Professors Reed and Farrell, working in the records of two different colonies, seem to be unaware of the Dutch evidence and subscribe to the spontaneous hypothesis. Professors Goebel and Naughton, in their erudite study of criminal law in colonial New York, recognize the schout but find his influence to be somewhat enigmatic, and have preferred to remain non-committal until more research has been undertaken.[61] At the same time they mention possibilities of adaptations of known English procedural devices such as the Anglican churchwardens, the Attorney-General, revenue agents, and the like.[62] The latter suggestions remain in the realm of speculation; and in the absence of scholarly investigation, they would seem improbable since the English never modified any of these functionaries into a true public prosecutor. Nonetheless, they should not be excluded from the list of possibilities for research.[63]

In any event it seems difficult to ignore the evidence presented herein in any attempt to piece together the background of the American district attorney. It may well be that the office is a combination of several elements, including that of the schout. However, it is submitted that the anomalous figure of the public prosecutor in the United States stands out in our Anglo-American system of criminal law as a historical challenge to the interested research scholar.

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[61] Goebel and Naughton, Law Enforcement in Colonial New York c. 6, especially 328-330, 366 *et seq.* (1944).

[62] *Id.* at c. 6.

[63] Most interesting (and somewhat amusing) is the repetition by Esmein of the old French scholar Fournier's suggestions that the American States adopted the public prosecutor during the American Revolution from the current French model of the Old Regime! Esmein, *op. cit. supra* note 4, at 594, n. 2.