Journal of Criminal Law and Criminology

Volume 2 | Issue 5 Article 5

1912

Public Defender the Complement of the District Attorney

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THE PUBLIC DEFENDER: THE COMPLEMENT OF THE DISTRICT ATTORNEY.

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The height of a nation's civilization is in one way measured by the quality of its law. The very idea of society comprehends the idea of law. There is no institution to which more people are led or driven; there is no part of the machine of state with which more people become familiarized; there is no element of the social structure which, more than the law, colors people's opinions concerning the whole structure in which they live.

If the law is not as it might be, injustice is done, and the sooner evils are corrected the quicker shall we come to the ideal of justice. If, seeing the mote in the eye of law, we do not cry it from the housetops, we are recreant to our duty as citizens. If, knowing that the mote is there, we do not act the part of a good surgeon and wipe it out, we are unfit to govern ourselves.

Whatever defects exist in the criminal law are not easily seen, but they are the production of dire results to individuals and to the community. The criminal law should be the most tender part of the law and the most firm. It should allow no avenues of escape to the guilty and should erect no bars of obstruction to the innocent. The criminal law deals with the lives and the liberties of men and women, and there is no obligation resting upon a man that surpasses in weight and in honor that which rests upon the criminal lawyer, who strikes the shackles from the limbs of the innocent bondman. There is nothing unworthy in a profession that has within its intelligent and tender keeping the lives, the liberties and the reputatons of men and women. It is necessary for the orderly administration of criminal justice and necessary also because of the sacredness of personal liberties that there be some one to present the side of the accused person. "No one is to be deprived of life, liberty or property without due process of law." These are the solemn words of our National Constitution. Yet the defense of those accused of crime is often closely associated in the popular mind with questionable action. Wherein is the cause of this? It must be in the administration of law; it must be in the means adopted that fault is found.

What, then, are the objections to the present system of administering criminal law? These objections are: First, the flagrant miscarriages

of justice often witnessed. These miscarriages are usually caused by unscrupulous proceedings on the part of the lawyers for the prisoner and those associated with them. Secondly, the disparity between the justice measured out to the rich man and that measured out to the poor man. This disparity is due to the fact that poor men are ill represented. Thirdly, the delay entailed in bringing a case to trial. Bail cases are tried many months and sometimes even years after they first come to the attention of the authorities. Prison cases are brought into court from six to twelve weeks after coming to prison. Fourthly, the delay during the trial of a case. Fifthly, the shame of frequent and unmeritorious appeals. Sixthly, the injustice of the deprivation of appeal in worthy cases by reason of the impecuniousness of the prisoner. Seventhly, the cruelty of private lawyers in not giving advice, in proper cases, to plead guilty. Judges are lenient to self-confessed offenders in sentencing them because they save the time of the court and the necessary expenses entailed in the production of evidence. Eighthly, the frightful expense to the county flowing from the conditions mentioned.

These objections to the present system of administering criminal law can be met by the introduction of a new system. This new system need not be revolutionary in its method nor in its means. We have now a public prosecutor who is counsel for the state, which is the offended party, since a crime is committed, in theory of law, not against an individual but against the society of which he forms a part. And I now argue for a public defender who will be counsel for the accused. The state will not only gain in strength because of the respect of the people for its justice, but it will confer a boon also upon its unfortunate members who happen to be caught in its meshes, by giving them what the Constitution of the United States says is their due—a speedy trial, and what the reason of men demands as their due—an intelligent and square trial.

For years prisoners who have had means have received more than a fair trial; they have performed the difficult task of squaring the circle. Knowledge is power. Money is power. These two controlling powers are at the beck and call of the man of the jingling pence. One man spends vast sums and does mountains of labor and asks as recoupment and as remuneration, $90,000. The ways of this officer of the court—every lawyer is in theory an officer of the court—lead him far from the path that should be trod by such an officer, and the judge before whom he is developing his action for damages is compelled to refer the minutes of the trial to the district attorney. It is this state of affairs that gives point to such a remark as that made by Dick to Cade in Henry VI:

"The first thing we do, let's kill all the lawyers." "Laws," it has been aptly said, "are like spider webs: small flies are taken, while greater flies break in and out again."

This screwing of the law to the sticking point of supineness is in vivid and disgraceful contrast to the elasticity of the law when the prisoner changes clothes. Behold at the bar a poor, wretched, tattered derelict, scarred in body and in mind. His surroundings are strange. He has not smelt the fragrant breath of words of consolation and of hope. He lies there, cowering, the victim of circumstances, hard and and inexorable. This man's lawyer is either a bad lawyer or a competent one without means to collect legitimate evidence, because of the poverty of his client. He is usually the kind of lawyer now unfortunately so very frequently found in the criminal courts of New York county; uncultivated, uneducated, rustic, boorish to the last degree and withal ignorant of the true principles of the criminal law. He is skilled only in tricks, in subterfuges, in meaningless and pointless objections, in tactics of obstruction. He never rises to the dignity of a man warding off the dangers that encompass his client. The impression he leaves upon the listener is that of strenuous emptiness. After all he does his poor client is nearer than ever the bars of the prison.

The state constitutions, it is true, provide that prisoners shall be represented by counsel, so that when a man appears who has not been caught by the hanger-on about court, or the runner about town, he is assigned counsel by the judge. But who represents him? It is a misnomer to call his counsel a defender. The man who is assigned is usually some one of a dozen or twenty lawyers who have most business in court, and are, hence, most known to the judge. This individual is no better, though he may be worse, than the criminal lawyers I have attempted to describe. The judges are not wholly to be blamed for this situation. They are confronted by a condition and not a theory, and they must meet it as best they may. Those who get assignments don't want them because they get no pay for them unless they are murder cases. The judges do not ask others to take them because they don't want them, and because the judges know they would have difficulty in trying such cases.

Now, let us in imagination change the present system. Let us have a public defender and see what happens. Poor prisoners would be defended by men as good as their prosecutors are now. Being men of wide experience in the criminal field, they would be well grounded, not in the petty quibbles of their predecessors in practice in the criminal courts, but in the broad principles of the law. They would be alert, intelligent, capable of taking advantage of every honorable means to the

exculpation of their client. They would be, as the public prosecutors are now, quasi-judicial officers. They would owe a duty not only to their clients, but also to the state.

But that is not all the good the public defenders would do. The prisoner comes into court worn out, crumpled, withered—the shadow of his former self. He is not prepared for his defense. How can he be? Suppose now his temporary imprisonment has been unjust and he is freed by the jury? What are his feelings and lasting impressions about the system of administering the criminal law? And what if he is convicted and sentenced?

Those who are out on bail are at liberty, to be sure, but wouldn't it be a gain to the State and to these unfortunates if we could try their cases sooner? The long wait in many cases creates a hardened mental condition and an undue nervousness. Let us not lay the flattering unction to our souls that it is the madness of muckrakers that speaks and not our trespasses. If we had public defenders this long stay in dungeons need not be the lot of prisoners.

Now let us consider what happens when a case comes to trial. If the trials are intelligently conducted, if they take up only the necessary time, then we may leave the matter of changing such a system to driveling idiots. But see! The court is sitting and the prosecutor rises and opens with a statement of the facts of the case to the jury. "I object," interrupts the attorneys for the defendant. The public prosecutor has become so used to meaningless objections that he stops short, placid and inscrutable. "Your honor, I withdraw the objection," blurts out the lawyer for the defendant. The public prosecutor may now resume. In the meanwhile several minutes have been lost. That's breathing time, and more than that, it makes it hard for the jury to understand what it's all about. After a few more interruptions, the opening speech is ended and the first witness is called. The prosecution must prove its case. And it sets about doing so in a practical, businesslike way. It is thwarted at every turn, however, by senseless objections, the whole effect of which is to muddle the jury and kill time. At last the counsel for the defense begins his summing up. He attempts to kill the issue by misstatement, by misinterpretation, by abuse. He accuses the district attorney of framing up a case against his client, or of not being justified in bringing to trial a case with such flimsy evidence to support it, not justified in wasting the precious time of an august tribunal, not justified in bringing the distinguished jury of business men to the turbulent scenes of the courtroom to pass upon a perfectly evident case. Furthermore, has not the district attorney a firm conviction that the defendant is innnocent? If you could look deep down into the bottom of the district attorney's heart,

you would see writ there, large and clear, the patent facts of this case which tend in but one direction and that is toward the acquittal of the defendant. Is it not a proof of the fact that the public prosecutor wasn't certain of the guilt of the defendant—isn't it even proof that he is uncertain of what he is doing, and that he is urged on by the demon of hatred and malice toward this defendant since he attempts to damn him by the dragnet of four all-inclusive counts in the indictment? What can have been the object of the district attorney in drawing four counts in his indictment? None other than that of coralling this poor defendant into an abominable trap, the odiousness of which is equalled only by the malignity that spurs on the prosecution in this case. If one count doesn't fit, why, another will. The district attorney doesn't know why he is prosecuting this much ill-used man. He's trying to find out what the defendant has done, and he's made sure that whatever the evidence be that comes out he will catch him in one or another of his infernal octopus arms.

After this preliminary skirmishing, the jury is convinced of a conspiracy to railroad the defendant to prison. It is convinced also that the speaking oracle is a veritable embodiment of truth and goodness, and that the prosecution is an incarnation of the devil. "I've labored well and now let me reap my reward. But hold! I haven't finished my summing up. I haven't discussed the evidence. That must be done even if it be only for the sake of appearance."

Counsel sets up a man of straw. "The prosecution has attempted to show by the introduction of the testimony of John Doe that the defendant entered the rooms at 6 o'clock in the morning. I deny that. The witness on direct examination gave color to the belief that he had seen the clock hanging from the wall, and had at that moment heard the soft sound of a footstep on the carpeted floor; but on cross-examination he completely collapsed and reversed himself.—He testified he saw this defendant enter the room at 4 o'clock. I ask you, can you place any faith in the testimony of a witness who first says he heard footsteps at 6 o'clock in the morning, and then, when he is hard pressed, contradicts himself flatly and alleges he saw a form at 4 o'clock? Such a man you would not trust in your business. He cannot be placed in the category of human beings; he must be put in the class of jelly fishes. What do you think of a man who will insult you by denying on cross-examination what he said on direct examination? Will you let him fool you? Will you let him escape without penalizing him? Will you, after that, believe anything anybody for the prosecution says? His Honor will charge you: 'If you are convinced that any witness has consciously sworn falsely to

any material fact, you are at liberty to disregard all of his testimony and all of the testimony of any other witness on the same side.' "

This hero is not satisfied with the charge the judge will make to the jury. That may win his case, but he wants to make assurance doubly sure. "Now, gentlemen, let me direct your attention to the testimony of the policeman in this case. The police want to make a record. They are not concerned whether a man has committed a wrong, or is an innocent victim. What they want is a name for themselves. The more people they convict the better record they make. Promotion depends upon it. You see it every day. Those of us who practice continually in these courts have ample opportunities to watch the sneak methods and the base actions of these officers of the peace. Believe one of them? Not for all the gold in Paradise. He says he saw this innocent man jump over the fence in the rear of the building. Gentlemen, I ask you, in the name of all that is holy to you, could any man have seen this defendant, or any one else, for that matter, at the hour named on Sunday morning, the 15th of February? We showed you that at 11 o'clock it began to rain. Is it possible that at 4 or at 6 o'clock this officer of the peace—this framer of conspiracies—this bear in uniform who would tear to pieces the unstained body of this man and the pure heart of his aged mother and his dependent sister, is it possible, I say, that at 6 o'clock he could have seen this defendant jumping over the fence? Figments of the imagination! Dreams of the officer on post! Why, he was sleeping in the corner saloon, as I might have shown you, when it is alleged my client broke into the room."

Et sic semper in aeternum.

Appeals are now taken only by those who can afford several hundred dollars. And if a person can afford more he appeals over and over again till he reaches the highest court. Whether the appeal is meritorious or not, it is made just so long as the defendant has money to use for that purpose. But under the system I am advocating frequent and unmeritorious appeals would not be taken. The public defender would be a quasi-judicial officer, and as such would use his discretion in matters of appeal as in other matters pertaining to his office. An objection may be raised by those people who see in this discretion of the public defender a menace to the right of appeal. But the fear is groundless, even though the right to private appeal were taken away from the prisoner. "The discretion of the public defender would be elastic. Suppose he were prejudiced against someone; he would not appeal his case." True; but the same kind of reasoning may be used in respect to all public officials. Further, the fact on appeal is that the defendant has been found guilty by a jury of his peers. The defendant has been before his fellow men and

they have convicted him. If discretion were given to the public defender, in the first instance, arbitrarily and by force to enter a plea of guilty, this would be not only unconstitutional, but against common right. But the right to private appeal might not be taken away. It might still remain. And then whoever had the means and the inclination might as now prosecute his case to a higher court. In the progress of time, however, it is almost certain that private appeal would become little used, if used at all. People would become accustomed to relying upon the office of the public defender for appeals, as they now depend upon the office of the district attorney for prosecutions, and the action of the public defender would be, in almost all cases, considered final. The district attorney has power to prosecute or not to prosecute, as he thinks the one course or the other proper. Whatever we may say against the office of district attorney, surely we should not desire to abolish it, because the district attorney has the discretion of prosecuting or not prosecuting, a discretion which may become temporary arbitrary power, though subject, it must be noted, to revision and check by public opinion, and by a higher removing body or power. So, if the public defender should refuse to go forward to an appeal, when he ought to go forward, charges might be brought against him and the removing power might, after investigation, wield its cudgel by depriving him of his office. And behind all these powers lies the force of public opinion, which is the highest court of appeal.

This highest court demands not only that rich people shall get the benefit of appeal, but poor people as well. Under conditions which now obtain poor people cannot appeal. It costs a great deal and few prisoners have the means. There are cases in which an appeal would show that substantial injustice had been done, which might then be corrected. The spectacle the administration of criminal justice now affords of giving the state no right of appeal is bad enough. This should be remedied and the state as well as the prisoner should be given the opportunity of showing that the lower court has erred. We are too tender to the criminal in some respects and in others we are too cruel. There are flagrant miscarriages of justice which can be remedied only on appeal. And for lack of funds some people are doomed to darkness and despair.

A trial is an expensive proceeding, and judges are lenient to self-confessed offenders. It is exceedingly important for a prisoner not only to have a good lawyer to try his case, but to have a competent adviser before trial, who feels a disinterested personal concernment in him. There are certain cases that are sure to go against one. The indicted persons and their counsel have the right to interview the accusers of the prisoners. At any rate, a talk with the district attorney will show

whether the defendant has any chance of getting out of the mess or not. It is foolish to allow certain cases to come to trial. It is criminal on the part of the lawyer to permit others to come before a jury. At such times there is nothing but failure in store for a poor defendant, and there is nothing but a long prison sentence ahead of him—*a monstrum, horrendum, informe, ingens, cui lumen ademptum.* With a term at prison in sight, his bright summer days are gone. But the lawyer can't draw a quarter as much out of the relatives and friends of the defendant if he advises him to plead guilty. If he goes to trial he can make one or two hundred dollars. If he doesn't make a pathetic splurge before the judge and the jury his fees are cut down into insignificance.

What more natural, then, the character of leeches being what it is, than to perform the common operation of phlebotomy upon the plethoric or the anemic body of the defendant. The plethoric bodies of his relatives and of his friends become desiccated anatomies; the anemic bodies become skeletons. Can you imagine such a state of affairs to exist with a public defender in office? What inducement would there be for him to misadvise? His disinterestedness would be the salvation of the client.

The establishment of a public defender's office would bring about splendid results, humanitarian and financial. There would be less delay in the trial of a case; prisoners would remain in jail a shorter time, and out on bail during a shorter period of torture. This for the benefit of both guilty and innocent. But the innocent would regain their liberty sooner and the guilty would be convicted sooner. Both would get a fair trial, and the thousand and one complaints now heard would vanish into thin air. From the point of view of the community it would be advantageous because justice would be less expensive to measure out, since smaller delays, shorter trials would be the rule; and the expedition, the certainty and the fairness with which the law worked would breed a higher respect for law.

Humanity is growing. The world is becoming better and better. We may or may not believe with Matthew Arnold that there is a power, not ourselves, that makes for righteousness. But we must, as a practical matter, if for no other reason, believe there is a power, our very selves, that makes for righteousness. The good in every age, the progressive, the scorned, the ridiculed, the unrecognized geniuses are striving every moment for the attainment of a higher and a better life. These are they whose perpetual cry is "come unto us ye who are heavy laden and cannot help yourselves and we will give you rest." It has taken hundreds of years to come to the idea that the state should prosecute offenders against the person of its members and against its own dignity. The process was long and labored, but it has come to fruition in a system infinitely

better for the state and its members than the system of compelling every offended party to prosecute for himself. If the aggrieved party had no means, the prosecution necessarily failed. The offender offended with impunity, and society looked on complacently at the miscarriage of justice. All you had to do was to strike someone who had no physical means to protect himself against you and who had not ample funds to prosecute you—and the trick was done. The inhumanity of forcing an aggrieved party to ruin himself to get the redress he should have received at the hands of the state made its way gradually into the minds of a few powerful men and the change has brought the benefits which we now so generously enjoy. When shall we be favored with the idea that since our system of law assumes accused persons to be innocent and entitles every accused person to counsel, the dictates of humanity prescribe proper counsel for the accused. The proper counsel is a public defender to act as a quasi-judicial officer, as the present district attorney does. The burden of defending one's self should be taken from the shoulders of those unfortunates who are least able to bear it and distributed over the shoulders of the whole body politic. The conception of individual irresponsibility, and that of social responsibility for the failings of individuals, are pressing themselves more and more into the minds of thinking people; and the time is not far off when the multitude will assume as an axiom the protection of accused persons by the state.

Quetelet, the distinguished French sociologist, observes in his "Social Physics" "that statistics show, with the highest constancy, that in the same conditions of a given society the same crimes are committed, not only in equal numbers, but in the very same ways and with the very same means. This is true even of those crimes which are committed on the impulse of the moment, and which are denominated crimes of passion. This law is so constant that when the number of crimes changes it may be asserted, without fear of falling into error, that the social conditions have changed. Viewing the matter from one side, it may be said that it is society itself that places the dagger into the hands of the assassin and urges him on to crime. If from one point of view, this truth is discouraging because it seems to limit the freedom of the will, from another point of view, it heartens and comforts because it demonstrates that man may, by ameliorating social conditions, diminish crime and increase goodness."

Commenting upon this, Pasquale Villari, one of the foremost of Italian publicists of the nineteenth century, says: "There is, therefore, a great, a tremendous collective responsibility in everything that happens in society. When the assassin kills on the street, when mothers sell their children, when husbands beat their wives to death, those that look on and

deplore do not suspect that the blame in part rests upon themselves. Do not rebel against these logical conclusions of science, but accept them and improve your social conditions by them."

The state no longer requires the ruin of a man in prosecuting the one who has wronged him. Now, if a man strikes me and I strike in self-defense, I am justified in my assault and the law exculpates me. But the law doesn't see all things at all times, and I am arrested. The man who ought to have been arrested as the guilty party is converted by the magic hocus-pocus of the situation into the prosecutor. It is I who am to defend myself. The man who wronged me has the advantage of a lawyer who attends to all the details of the case and has the greater advantage of the power and the money of the state in the collection of evidence against me, while I have to shift as best I may to pay the fees of a lawyer. I come out of the scrape, if I come out at all, weighted by prejudice and crushed by expenditures. Should the state ruin me by putting me to my defense against a baseless attack?

Let us admit there are only about 30 per cent of acquittals. Is not that percentage enough to justify a system that would prevent the financial fall or serious financial crippling of multitudes? If the abstract presumption of innocence has no effect why should not this real practical result have its due weight? Why should not the state bear the expense of an unjust trial since it is the state under modern conditions that prosecutes? The state has put to an unjust expense an innocent individual. Why not compensate him, or better, why not take his case from the beginning and save him the indispensable outlay for his defense?

And now, even though a person is guilty, why should not the state assume his defense? It assumes the prosecution when the complainant is guilty, though, of course, the state does not know that he is. What reason can there be for not assuming the defense, when the defendant is not known to be guilty—indeed, when he is assumed to be innocent?

I am aware that the advent of the public defender would not do away with all the evils attendant upon the present administration of the criminal law. Rich people would employ their own lawyers, who would do their bidding, and who would find a thousand and one points of vantage from which to execute their designs, of taking advantage of every opportunity, technical or substantial, lawful or unlawful, to clear themselves. The coming of the public defender would not be very helpful to the community in such cases. But these cases would be few. People would come to rely upon the public defender to a larger and larger extent, till this reliance became universal. Of that we may be certain. And the rapidity of the adjustment would be in direct ratio to the efficiency of the public defender's office. For all practical purposes we should

have one defending attorney, just as now we have one prosecuting attorney.

But the burning questions are, "What shall we do to raise the tone of that part of the profession that practices criminal law and to insure speedy and fair treatment of the accused in every case regardless of his condition?" The answer to these questions is inextricably bound up with the matter of a public defender. The millennium will not come so easily, to be sure. Many other matters will have to be adjusted, many others still, abolished, and very many introduced. For one thing, we must have an elastic public opinion which will respond to our needs much more quickly and warmly than it does now. We must have a legislature which will answer to the touch of the needs of the times in a much heartier manner than it does now. We must keep pace with the advance of crime, if there be any advance, by bringing into existence a sufficient number of courts to deal rapidly and effectively with criminals, though, of course, I should like to see public opinion and the legislature so enlightened as to do that which would prevent the increase of crime. For still another thing, American judges should be like English judges in their power and ability to direct and control the course of trials. But the existence of a public defender would go far, very far, toward strangling many evils that now afflict us.

I said at the beginning that there were eight objections to the present mode of administering the criminal law. The public defender will eliminate the first objection, that of the flagrant miscarriages of justice, because there will be no incentive to unscrupulous proceedings on his part. He will wipe out the second objection, that of the disparity between the justice measured out to the well-to-do and that measured out to the poor, because both well-to-do people and poor people will be represented by the same person. He will obviate the fourth objection, that of delay during the trial of a case, because he will be more skilful, less futilely obstructive, more conscientious and upright than the lawyer who now represents prisoners. He will, as a necessary consequence of his existence, destroy the third objection, that of delay entailed in the coming to trial of a case, since the faster cases are disposed of the sooner are the cases on the calendar hastened off. He will abolish the delay caused by frequent and unmeritorious appeals, because such appeals will not be taken when unmeritorious. He will help the unjustly convicted in giving them the opportunity of appealing. There are at present few unjust convictions, and only in these cases will an appeal be taken by the public defender. And finally, he will decrease the expense to the county, since the saving of time by pleas of guilty, in proper cases, and by shorter trials will be a saving of money. The amount saved would, I am con-

fident, be sufficient to overbalance the expense of the public defender's office. But even if this were not so, the difference in cost could well be sustained by the state because of the advantages to the individual, to society, and to the law.