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ANALYSIS OF NEW YORK AND COUNTY BAR REPORTS ON THE PUBLIC DEFENDER.

ROBERT FERRARI.¹

The committees on the public defender of the New York City Bar Association and of the New York County Lawyers Association worked together, and they have produced almost identical reports. We may take the report of the County Lawyers Association, and, having disposed of that, we may deem the other report answered. Both committees have spoken with the tongues of authority. The City Bar Association's committee voted unanimously against the proposal of a public defender; the County Lawyers Association's committee voted 10 to 1 against it.

Let us analyze the reasoning:

The New York County Lawyers Association's Subcommittee to inquire into the advisability of instituting the office of public defender in New York County, sent to the County Judges, and the District Attorneys in the State of New York the following questions, which were answered in every instance in the negative:

1. Whether there had been any *substantial* failure of justice under existing procedure in the case of indigent persons charged with crime.

2. Whether there was any basis for the assertion that *ten per cent* of those sent to jail, after being defended by assigned counsel, were innocent.

3. Whether there was any basis for the statement that there was a *lamentable* failure of duty upon the part of counsel in any *substantial* proportion of those cases in which counsel had been assigned to defend the accused;" (Italics mine.)

Now it may be said *contra* that:

I. County judges and district attorneys, being human, could not, in the mass, be expected to admit their labors had been conducive to failures of justice, or that they did not prevent such failures. That not even one would answer, in the affirmative, questions

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The reports reviewed here may be found in full in *Bench and Bar*, November, 1914.

which would be nearer the facts of the case than these questions are would be surprising, since among a large number there is usually found someone with supreme courage to admit his error, and to want to set it right.

II. There is absolutely no wonder at all in the fact that all the judges and all the district attorneys answered *these* questions in the negative. No intelligent advocate of the public defender has ever made the charge that "*ten per cent* of those sent to jail were innocent;" nor that there was "any *substantial* failure of justice under existing procedure;" nor that "there was a *lamentable* failure of duty upon the part of counsel in any *substantial* proportion of those cases in which counsel had been assigned to defend the accused." And no man could have so condemned his office and himself as to admit that under the judge or district attorney regime there had been *lamentable* failures of justice, *lamentable* failures of duty, and convictions of innocent persons amounting to ten per cent of all cases.

"From the inception of each criminal act," continues the report, "on until it is terminated by the acquittal or conviction of the accused, nine different operations are employed, which subject the facts in the case to the careful scrutiny of forty-one individuals.

1. Upon the arraignment of a defendant in the Magistrate's Court, an inquiry into the facts is made by the assistant district attorney assigned to duty in that particular Court. If in his judgment sufficient basis for a complaint is disclosed, an information is laid before the magistrate.

II. Next comes a consideration of the information by the magistrate. If in his judgment, the facts charged do not constitute a crime, he may dismiss the complaint and discharge the defendant. If he decides that a crime is charged, the prisoner is entitled to an examination there, at the conclusion of which the magistrate may hold the defendant, or discharge him from custody.

III. In the event that the defendant is held to await the action of the Grand Jury, the facts are inquired into by the district attorney having charge of the Grand Jury. If in his judgment they are not sufficient to warrant the finding of an indictment, he so advises the Grand Jury and his recommendation is usually adopted by that body.

IV. In the absence of such recommendation, or in the event of their disregarding it, the Grand Jury hears the witnesses and determines for itself the question of finding an indictment, or dismissing the charge.

V. If an indictment is found, the case is sent to another assist-

ant district attorney to be prepared for trial. It is his duty to make inquiry into the facts and to determine therefrom whether the case should be tried, or whether for sufficient reason a recommendation to the Court to dismiss the indictment or discharge the defendant on his own recognizance should be made.

VI. If his investigation shows that the case should be tried, or if the Court refused in its discretion to accept the recommendation for dismissal or discharge, a trial is had before the Court and a jury.

VII. If before the case is finally submitted to the jury the Court decides that a case is not established, he may take the case from the consideration of the jury or direct an acquittal.

VIII. After all these processes have been exhausted, the case is submitted to the jury to determine—not whether the guilt or innocence of the defendant has been established, but merely whether the guilt of defendant has been established beyond a reasonable doubt.

IX. But even in the event of a verdict of guilty, the process of inquiry has not been completed. After the verdict is rendered, the prisoner is remanded for sentence, and a probation officer is directed to inquire into the previous history, environment and circumstances of the defendant, to the end that an intelligent judgment may be exercised by the Court in determining the question of punishment. The probation officer approaches the defendant in a friendly spirit. Every circumstance which will aid the unfortunate is laid before the Court by the probation officer.

To maintain that, notwithstanding the employment of this elaborate scheme of inquiry in *practically* every criminal case, *many* innocent persons are sent to prison because of a failure of duty somewhere along the line, is absolutely to challenge the integrity and the intelligence of all the persons concerned therein, whether officials, judges, or laymen.” (Italics mine.)

These nine steps in this elaborate procedure for the protection of a defendant look formidable. But,

1. Waiving other objections, theory does not always, if it does ever, correspond to practice. It is not the law that counts; it is the administration of it that determines its goodness or badness. The steps, themselves, therefore, and the alarming number of individuals concerned would not, *per se*, be indicative of proper safeguards.

2. Every individual of the 41, except the Judge and petty jury at the trial, hears only one side.

3. The number is not necessarily 41; for 12 instead of 23 Grand Jurors may indict.

4. Step number I is erroneous. Except in extremely rare

instances, no inquiry is made into the facts by the assistant district attorney assigned to duty in the Magistrate's Court. Only those who know nothing of the practice in those Courts could say that. There are many cases he does not try. Private lawyers still appear for complaining witnesses, and try their cases. But even in those cases which the assistant district attorney tries, he decidedly does not make "an inquiry into the facts." He is told, for instance, that A assaulted B. There is no cross-examination of B; or any attempt to find out the circumstances, except a bare statement of what happened, from the complainant's point of view. Even if there were cross-examination, how much in the circumstances could the assistant discover? It is hard enough to break down a clever liar after thorough preparation, and at a great trial; but how hard is it here with no preparation—since preparation for effective cross-examination is made by acquiring information, and knowledge of the other side—and no dramatic incentive and environment for effective examination.

The information, moreover, be it said for the delectation and the information of the makers of this extraordinary report, is not before the magistrate after even an examination of only one side of the case by the assistant district attorney. None but complaint clerks, in the majority of cases, hear the complaint and issue the summons. It is this summons which goes before the magistrate for his signature. In only rare instances, does the judge look over the information, or complaint. He signs. So that the clause of the second step which speaks of the consideration of the information by the magistrate, and the deciding by him whether a crime is charged, is based not on facts, nor on practice, but only on theory.

The examination of the defendant by the magistrate is almost always, in the cases most in need of attorneys, carried on without an attorney for the defendant. There is no provision of law for assigned counsel in the Magistrate's Court. The magistrate tries to find out the facts on both sides. But in many instances he fails—not through his fault, but through the combination of circumstances. First, the examination is hasty—many cases—as many as a hundred sometimes—always a great many—are on the calendar. Second, the environment is not conducive to the ascertainment of truth. The defendant is alone, and in danger. He is unused to Court, and can't put in a defense, though he may have it. Third, the magistrate, if the case is at all serious, and in a great many other cases besides, needs only a *prima facie* case to hold. Fourth, few magistrates care to assume the responsibility of a discharge, and so send the case to Special Sessions and throw the responsibility on the three judges there, or to General Sessions, and place it upon the judges of that Court.

Step III. Again, the "facts" are not inquired into. One side is heard. And the assistant presents that side to the Grand Jury. This body hears witnesses only against the prisoner. It is true that many cases are thrown out by the assistant in charge of the Grand Jury cases; but this shows how wasteful our procedure is, and how easily the magistrates hold, for reasons I have already given. But to say that he examines the facts on both sides is a mistake. The facts already presented in the Magistrate's Court and to the hand of the assistant are in a large number of cases insufficient to indict.

Step IV. This step is superfluous. I have heard of and read of the Grand Jury's disregarding the recommendation of the district attorney. But to elevate an exceedingly rare exception to the dignity of an everyday proceeding is to speak without rhyme or reason.

Steps V. and VI. The same vice attaches to these steps. This assistant does not study both sides, but gets the Grand Jury evidence, and the witnesses already presented. From these, he gets the "facts."

Step VII. How many cases are taken from the jury? Our Committee are lovers of statistics. What is the per cent? One, ten, one hundred? The tendency has been to strip the judges of more and more power. They are moderators, not judges. The per cent is microscopic.

Step IX. This step is a supererogation. The probation officer does not affect the conviction. He affects the sentence only. "Every circumstance" that the probation officer finds out which will aid the unfortunate is laid before the Court" by him, for the purpose of the sentence. What can the probation officer report concerning the crime. Suppose he reports the denial by the convict of the commission of the crime. It is well known that the denial will not be believed. And in many cases a man, forlorn and friendless, has only that defense. Evidence has been neglected; or it has been lost; or it could have been procured soon after the crime and was not procured for lack of funds and assistance. Though the probation officer often affects the quantum of punishment, he very rarely affects the conviction.

"What is to become of the unfortunate defendant who refused to be bound by the unerring judgment of the public defender? Who would defend him if he refuses to comply with the demand that he plead guilty?"

Who will demand a plea of guilty? Who will give the public defender that right? If he is lukewarm in his defense of a man whom he believes to be guilty, it is (1) no more than we get in a public prosecutor in cases he does not believe meritorious, and in which, nevertheless, he brings the prosecution—and (2) looking at

the third step indicated by the County Lawyers Association Committee's report, we see that "in the event that the defendant is held to await the action of the Grand Jury, the facts are inquired into by the Assistant District Attorney having charge of the Grand Jury; and looking at the fifth step, we see that "if an indictment is found, the case is sent to *another* assistant district attorney to be prepared for trial; and to the sixth step, where it is said "if his (the assistant district attorney's of step 5) investigation shows that the case should be tried, or if the Court refused in its discretion to accept the recommendation for dismissal or discharge, a trial is had before Court and jury; it is patent that the assistant district attorney who tries a case may be placed in a position analogous to that of the public defender when he believes a man is innocent, recommends dismissal, and is frustrated in his efforts to avoid a trial. What does he do? He acts as a sensible man; he acts as the law and his profession demand that he act. He prosecutes. He is not the judge, even though a quasi-judicial officer. It is the Court and the jury that are the final determiners, under the law, of a man's guilt. The public defender would, likewise act for the prisoner, even though he believed the latter to be guilty. He would not set himself up as judge and jury. He would present as strong a case for the prisoner, as could be made. It is his duty to do this. (See Boswell's Johnson, and Baron Parke's advice to Phillips.) It would then be the duty of the prosecutor to present all the evidence against the defendant, as it is not now in theory, but is so in fact; for he never, after the case goes to trial, presents evidence exculpatory, but only condemnatory. The Anglo-American mode of trial of opposing sides, and cross-examination, is, according to Stephen and Wigmore, the most effective mode yet invented. And these authorities seem to be right. Let the prosecutor adduce all the facts inculpatory, and let the defender adduce all the facts exonerative; and let the judge and the jury decide where the truth lies.

It is said that rich and poor are not on the same level, forsooth, but that those who are on a higher plane are the poor, and those on a lower plane the rich; for, indeed, "juries are prone to extend sympathy to defendants in cases where it appears that counsel has been assigned to defend them." This is rich and exceeding luxurious. Eleven experienced criminal practitioners make the report. Do they not know that the jury that tries a man knows no more whether he is being defended by a paid attorney, or by assigned counsel, than Caliban knew Shakespeare lived?

Or may be there are here springes to catch woodcocks. "Where it *appears* that counsel has been assigned to defend them." How

wily that clause is. It may be true that when it *appears* to the jury they may be sympathetic; but when does it appear?

“Furthermore, the one who would be the real victim in the event of a creation of this office, would be the unfortunate defendant, of little means, who would not, or could not make oath as to his financial ability to employ counsel.” No line should be drawn; no man should make oath to his financial ability to employ a minister of justice. Justice should be free. But, from a practical standpoint, it may be said that if it be true that those who have money to pay for private counsel are compelled to employ counsel, this ought not to prevent those who have no means from procuring free counsel.

Cases go to trial which would be dismissed if the district attorney knew the facts on the other side. The public defender need not divulge facts in his possession—he may be required by law to conceal them—although I see no reason why exonerating facts known to him, may not be revealed to the district attorney for the purpose of securing a dismissal of the case; though we know that in rare instances an unscrupulous district attorney might use the facts revealed, and manufacture others to meet them. But assuming a simple recommendation of dismissal on the part of the public defender, is it not natural that the district attorney should heed it, or consider it carefully, since the public defender is a public officer, paid by the State or the County to search out the truth, not paid to look out for the private interests of a private party; whereas, he would not consider any such recommendations by a private defender? So that the following is unsound: “There would be times of course in which the district attorney would move for the dismissal of indictments upon the recommendation of the public defender. But the same situation obtains now to all intents and purposes. If counsel for defendant are in possession of facts which would explain away the charge the district attorney is always ready to dismiss (indeed, is he?) if his own investigation supports the disclosures made to him by defendant’s counsel. (When does it support it? And when it doesn’t, what then?) And of course, the district attorney frequently recommends the dismissal of indictments or the discharge of defendants on his own motion, for good reasons shown. Therefore, no advantage is to be gained by the employment of a public defender at a large expense to do that which the district attorney as a quasi-judicial officer is obliged to do under the law.” (He is obliged; but the milk in the cocoanut is that he does not. And, further, the functions of a public defender would not coincide with those of a public prosecutor. Some cases will go to trial. Part of the public defender’s work lies on the trial.)

The assertion that it is contended that "*many* innocent persons are sent to prison" is unwarranted. The assertion that to maintain even that *many* innocent persons are sent to prison is "absolutely to challenge the integrity and the intelligence of all persons concerned therein (every criminal case), whether officials, judges, or laymen," is to speak nonsense. Neither the integrity, nor the intelligence of those engaged in administering "justice" need be questioned. It is the *system* they administer that is at fault. A change in the system will *presto* transform every one of these "unintelligent" and "dishonest" persons into paragons of wisdom, and of integrity.

The question of expense exercises the Committee, and some other worthy men. The cost of a public defender's office has been estimated by the Committee to be \$478,000 yearly, because, the district attorney's office costs that sum.

Then it is said that this enormous outlay would be for the benefit of only 600 persons; because,

1. Twelve thousand persons are arrested every year on felony charges.

2. Six hundred are convicted after a trial by jury.

"It is for the benefit of these individuals that this Utopian dream has been devised."

Contra:

1. No. It is not for these 600 who are convicted. We want not only those who are convicted to be represented properly, but also those who are acquitted. Some of the 600 convicted might have been proved to be innocent. We do not now say. But some of those who were acquitted, and who were defended by private lawyers, were certainly guilty. Any practicing lawyer knows how many scoundrels go scot free; and our opponents are constantly telling us how many safeguards that choke the law there are, and how hard it is, under our benign system, to convict. We want these rogues to be put where they belong. A public defender, it is useless to deny, could not, from the nature of his office, and his retainer, act so rabidly for the prisoner, as a private attorney usually—perfectly naturally, be it said—acts. The public defender's retainer is given him by the State.

How many are tried by jury the report does not state. The number is probably at least twice 600.

2. If it be true that the office is for 600 only, then why is the expense \$478,000?

Even if the public defender's office tries 1,200 cases, the amount indicated cannot be correct. Does it cost the same to handle 1,200 cases as it does to handle 12,000?

3. But the Committee is confused. It sometimes understands the public defender to act before the case comes to trial, and sometimes only at the actual trial.

The public defender would come into the case from the beginning—from the time of the arrest—just as the district attorney does. Our opponents say that out of 12,000 cases of felony only 600 are convicted, after trial in General Sessions (and we may safely infer that only about 1,200 come to actual trial before a petty jury; for if the district attorney cannot convict even one-half of those cases concerning which he has “inquired into the facts,” and “investigated,” then the breakdown of the system is complete. After all this sifting, and inquiry, and investigation of the facts, if the district attorney’s case is thrown out by the jury, then the sooner we get rid of the system the better.) So that over 10,000 cases are disposed of before trial. But the inference drawn from this decrease is erroneous. It is not due to the fairness of the district attorney, or his patient “investigation into the facts,” but is due primarily, as any one who runs may read in the reports of the Chief City Magistrate, to the unskillfulness, the ignorance of law, and the evidence required to convict, the general inefficiency of the police. These make uncalled for arrests, which obviously cannot be sustained.

Suppose, now a public defender at the first stage of the prisoner’s progress through the Courts. A man is arrested. He is brought to the Magistrate’s Court. The district attorney examines his side, the public defender examines his. There is a consultation, a conference, and a comparing of notes. This, we assume, is one of the 10,000 cases that will be thrown out of Court before trial. The error is corrected here. The man is set free. Or, suppose he is held by the magistrate for the Grand Jury. Before indictment there is an examination of the facts on each side by each public officer, by the district attorney, and by the public defender, respectively. There is here another chance to correct the error at the Magistrate’s Court. One of the 10,000 cases will come to a full stop now.

Have opponents reckoned the saving by such a proceeding? Fewer trials, shorter terms in jail awaiting trial, less machinery in operation. And how can they measure the good to the individuals—the 10,000 yearly—of quick and speedy justice; and the benefit to the State? Is it just for the State to prosecute these 10,000 and give no redress? But even if redress were given in money—the only redress after the injury—*cui bono?* How can you pay for damage to good name, and to mental ease?

The public defender ought to be in the Police Court; he ought

to be at the Police Station; he ought, in short, to be wherever the district attorney is. Absolute equality of privilege, and of power, should prevail.

Get a public defender, and (1) you can then abolish the Grand Jury. It is now superfluous. It has no function; it is a rudimentary organ, which is used only to make trouble, and to protect a weak and time serving district attorney. (2) You can have the barbarous third degree abolished. The sweat-box sprang from the helplessness of the law in the face of its own involved and involving technicalities and safeguards for the individual. Power had to be equalized. The administrators of the law found a way to that equalization. Since the prisoner could not be legally required to testify, the officers of the law made him testify illegally, in the seclusion of the police station, and in the chamber of horrors. The third degree you cannot abolish now. The public defender will make it unnecessary. For, with the equalization of the forces of the State and the individual, during the progress of a man from his arrest to his conviction, or acquittal, the right to stand mute will be no longer necessary for the individual's protection. He may give it up. Society, at least, will demand that it be given up. (3) Guilty persons will be in jeopardy of conviction. (4) Technicalities of various sorts will be brushed away. Some of the rubbish of the law will be swept into the dust-heap.