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Discussion

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Among the many excellent ideas embodied in President Hale's broad survey of the problems of criminology there is one which I would italicize. It is the distinction which he clearly draws between the two and diverse historic functions of the court in the role which it plays in the administration of criminal law. The first function is the determination of fact—whether an offense has been committed and whether the accused is the guilty person. This is all retrospective in character. The second function is prophetic. It involves a choice of sentence which will, in the opinion of the court, best avail to protect society against a repetition of the offense.

I submit that though a court be admirably organized and equipped to accomplish the first function, the second will nevertheless be one fraught with great uncertainty and danger.

The law provides a considerable range of choice for the judge in meting out sentences. The propriety of suspending sentence in many instances is quite universally recognized. If there be a fine or imprisonment the law usually leaves the judge considerable latitude in order that he may fix the punishment, not to fit the crime, but to fit the criminal. The development of the probation idea enlarges the scope and the responsibility of the judge and increases the difficulty of his choice and the possibility of mistake.

The question is—how will this particular human complex react to various kinds of punishment? No question could be more difficult than this. In recognition of its insuperable difficulty we have evolved the indeterminate sentence and the parole system. These tend to relieve judges of a function which they can never be certain of performing successfully by placing the duty on the shoulders of those who can observe from day to day over long periods of time the actual effect on the prisoner of his confinement, and so can make a decision finally with respect to the extent of his imprisonment which is not a guess or a prophecy, but a conclusion based upon substantial knowledge.

I believe that something will be gained in the pioneer science of criminology when it is generally accepted that courts, however well qualified to ascertain guilt, can never do more than guess as to the

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extent of punishment required to attain the best results. Let this latter function be taken over more and more by the administrative agents of the executive department of the state, so that they will more clearly realize a responsibiliy for this vastly important phase of the situation, and will organize more thoroughly and adopt all the aids to be rendered by the science of psychopathology. We have gone a considerable distance already along this line, but there is need for going further and with a more definite understanding of the division of labor between courts and prison officials.

I am not prepared to endorse so unreservedly as has our president the proposal to create the office of public defender, though entirely willing to concede the facts which he has presented. It is quite true, as he says, that "The public prosecutor is sworn to uphold the law, not to convict and hound the accused; but a short-sighed public measures the efficiency of the prosecutor by the number of notches on the stock of his official gun. His continuance in office depends upon his efficiency determined by this measure." This is unfortunately true in every state in the Union.

But is this necessary? Has anybody ever made a study of the office of prosecutor? I have never heard of any serious inquiry into this subject. Considered theoretically, can anything be more absurd than our traditional handling of this highly important matter of prosecuting? The laws are state laws; the work of enforcing them is a state function. But we have no state organization of prosecutors. Instead we have a thorough decentralization of this function. We make the office as thoroughly political as any office can be. The office calls for legal skill and knowledge of a high order; it calls for maturity of thought and experience; it requires long tenure and reasonable recompense. But the office as constituted has a minimum of these qualifications. No man can expect to hold the office of prosecutor long enough to become really effective, to acquire skill and experience and to pursue a policy long enough to prove its worth. Even if political conditions favored long tenure the low salary and unpleasant features of the work would make for frequent shifts.

Ordinarily the office of prosecutor is the one aspired to by the young and ambitious lawyer who needs experience and sees a chance to get it at the expense of the community. Having got it, he cannot quit the office quickly enough. In getting elected he necessarily becomes a party spokesman. He is a chief reliance of his party in its local campaigning. At the time he takes his first oath of office he must look forward to his re-election at an early date. He must take

into consideration all the time the voting strength of the forces of crime and disorder.

This does not mean that our prosecutors are corrupted. On the contrary, they are required to pile up convictions as proof that they are not in league with evil. And the greatest incentive of all, the acquiring of a professional reputation, is dependent upon working unreservedly for convictions.

The lack of state organization makes the administration of this office extremely personal and local. Only in slight measure is the office linked up with the state office of attorney-general. There is no broad state policy with respect to prosecutions. There is no interdependence as between the separate units in this field.

It is really wonderful that we get results as good as we do. I attribute our relative success to the fact that the office is in the hands of men with their professional reputation at stake, and to the considerable influence exerted upon the prosecutor by judges who possess the wider view and longer experience.

In this condition of defective organization the best we can expect of the prosecutor is loyalty and it is no wonder that this loyalty to prosecution becomes over-developed.

But I do not see that the creation of another office is indicated. Adding wheels and gears to a defective machine may make it run a little faster, but the machine is still defective. I do not understand that it is theoretically incompatible with the office of public prosecutor that that official should take care of the interests of the accused. Only by so taking care of the accused person's interest can the prosecutor discharge his full and real duty to the public.

If we differentiate these obligations and have one staff of officials to prosecute to the utmost and another to resist prosecution to the utmost—and that would seem in brief to be the logical outcome of the public defender proposal, for this official would also have a gun-stock to be notched—we are simply increasing the pressure upon the prosecutor to prosecute ruthlessly and with no sense of a broader responsibility, and that is the defect assigned as a reason for the proposed change.

I do not believe in making the machinery of criminal law more complex until we have first tried unity and co-ordination. Let us keep in mind the eternal need for singleness of responsibility. I would prefer to see our state, now so far in the lead in many political reforms, undertake to correct the weak points in its system of prosecution, and this appears to me to be really easier than to multiply offices. I would like to see every local prosecutor serving as the

appointed deputy of an attorney-general who is appointed by the governor. I would like to see prosecutors chosen from among the older members of the bar, men who have a long perspective in social relations. I would not care whether they were forensic orators or not. I would provide them with sufficient salary and the prospect of tenure during good behavior.

All this can be done with a substantial saving in salaries, because a prosecutor devoting all of his time to the work could serve more than one county. Such officials as I have in mind would know all about crime in their particular localities. They would keep statistics and make frequent reports to the state central office, which would publish annual reports of the greatest value to government. Such of them as possessed unusual forensic ability could specialize in difficult trials and be sent from one county to another to assist the local prosecutor during terms of court.

President Hale has very sensibly urged more intensive effort on the part of this institute. I would endorse this advice and suggest that forthwith a scheme for organizing the prosecuting force of the state into a wieldy and expert body, with an undivided responsibility, be formulated in readiness for a constitutional convention. A great deal of any such unified plan could be put into force by legislation in case there should be no convention. If the time is too brief to convince the public of this need before the next convention shall have completed its work, at least we could hope for constitutional provisions which would leave the door open for remedial legislation in the future.

There is one other present opportunity for accomplishing reform of the greatest import which lays an obligation upon this society. I refer to the grand jury. In twenty-three states the grand jury has been entirely abolished or has been restricted to its proper role of inquisition. As a means for bringing ordinary criminals to trial it is entirely unsuited to modern conditions.

The most valid charge against our judicial system in respect to criminal law procedure is the delay which exists between the first complaint and the day of trial. There should be no procedural step which does not contribute affirmatively to the results sought. We are now obliged to resort to grand jury procedure in every case of felony. In ninety-nine out of one hundred cases it is a perfectly senseless and useless procedure. The accused can never derive any deserved benefit from the grand jury. If his defense is valid the grand jury affords him no opportunity to save his reputation, for he is not permitted to appear before it or to present his evidence. It is wholly ex parte.

But if, on the other hand, the accused is guilty, he derives in many instances a great deal of assistance from the grand jury. Every successive step affords him some possible loophole. Every step postpones retribution. Every step helps to wear out the state's witnesses, to make prosecutions more difficult, more involved and technical, more costly and less certain.

The grand jury can do one kind of work admirably. When there is a public scandal and need for ex parte investigations with no continuing responsibility on the part of the investigators, the grand jury, capably assisted by the prosecutor and the trial court, can accomplish something. But in the ordinary run of felony cases it cannot possibly contribute anything affirmatively to the interests either of state or accused, but may seriously add to the difficulty of administering justice.

The farce of the grand jury investigation is thoroughly exposed by the growing reliance upon the preliminary examination before a judicial officer. Arrest is based upon a sworn complaint authorized by the prosecutor or the court. Then comes the public hearing to determine whether the offense has been committed and whether there is probable cause for believing that the accused is guilty. If there is a good defense it can be submitted here and the accused gets the full benefit of it. Great weight attaches to the finding of the magistrate if in favor of the accused. If probable guilt is found the next step should be trial as speedily as possible in the criminal court.

But under the curse of the present grand jury system we have a hurdle interposed between examination and trial. Speaking for Cook County I can say on the authority of undisputed statistics that the grand jury prolongs criminal procedure, wears out the state's witnesses, offers practical and technical loopholes for the accused, and is in every way a profound detriment to the administration of justice.

This is one of the things which must be altered by a constitutional convention. It narrowly escaped reform in the convention held forty-five years ago. The need now is one hundredfold greater than then.

This opportunity would seem to suggest an assured field for effort in the coming months on the part of the institute.