

Fall 1926

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Recommended Citation

Walter M. Pickett, Office of Prosecutor in Connecticut, The, 17 *Am. Inst. Crim. L. & Criminology* 348 (1926-1927)

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III

THE OFFICE OF PROSECUTOR IN CONNECTICUT

WALTER M. PICKETT*

"The primary duty of a lawyer exercising the office of public prosecutor is not to convict but to see that justice is done."

Thus it is written in the Connecticut Code of Ethics (Code of Ethics, 82 Conn., 705 par. 6) and upon this principle is the system of law enforcement there founded.

At the outset of this sketch of the mode of prosecution in Connecticut, it is desired to emphasize the canon cited not alone because the "mode" in Connecticut is apparently unique among the states but as well to challenge that concept of the "public prosecutor" the nation over, so assiduously advanced by the fiction writer, playwright and scenarist.

In fiction, upon the stage and in the "movie" it is seldom that the public prosecutor is portrayed in any light other than that of a blood-thirsty, brutal, and more or less unscrupulous monster, chiefly eager to gain conviction at any hazard, glorying in the scalps at his belt and evermore seeking to pander to powerful interests that his own ambitions may be served.

Occasionally to serve the exigencies of poetic license he appears as a knight in shining armor, a crusader against the monstrous iniquities of the capitalistic octopus.

These portrayals would be amusingly harmless were it not for that imponderable credulity which often defrauds intelligence and betrays honorable people into intellectual slander.

Neither picture is characteristically accurate and sad indeed would be the social lot if either were true.

Our social order is in the nature of a compact, an agreement to abide by certain rules deemed for the best advantage of all.

These rules originate in the "decalogue", have been expanded by accepted experience and find expression in either the "common" or "customary law" or legislative enactment.

A proportion of these rules are penal; they have their penal sanctions. For the enforcement of these rules and the exaction of their

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sanctions, society has appointed its agents; among them the public prosecutor.

Often it seems that society having endorsed the rules and provided the agency of enforcement turns away to self-serving and washes hands of further responsibility.

Habitually we expect to go our way unmolested. We take for granted that our homes are secure from intrusion, our womankind from outrage, the fruits of our labors from rapine and our lives from wanton destruction.

A predominant percentage of our fellow men abide by the social order and justify such expectation; a lesser, but dangerous percentage are prepared to defy the rule and rob, rape or murder.

To the prosecutor we of necessity trust for protection against that antisocial element who either cannot or will not adjust themselves to the social order.

The prosecutor then, is the social agent, charged with the difficult, often somber, duty of assuring social security on the one hand and justice upon the other.

Without that great system called the "police power" of which the prosecutor is an essential factor, every man would perforce be the guardian of his own.

It needs little imagination to picture the social atavism involved in such a situation. Freed by the social compact and secured by the police power man may with reasonable assurance turn his thoughts to the tasks of civilization and the conquest of his soul. Bound by the need to secure his own skin he can achieve no more than he can physically defend and he abides no more than a body to be warmed and a belly to be fed.

Intelligence, education and religion point the wisdom of obedience to a social compact; but when intelligence, education and religion fail to persuade the individual to that obedience, coercion, the sanctions of the law must intervene to compel where perception and persuasion fail.

So it is that the prosecutor takes up the task where the educator and the theologian have exhausted their resources.

His problem is difficult and twofold.

First, he must determine whether or not the law has been violated. This involves two elements. Is the accused in fact guilty? Is there evidence at hand that justly establishes his guilt?

If convinced of the foregoing, duty demands that he use every honorable and fair means to establish the fact of guilt.

"His conduct and language in the trial of cases in which human life and liberty are at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused be guilty, he should none the less be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe." *State v. Ferrone*, 96 Conn., 160, 168.

Guilt being established, a different problem arises—what to do with the offender?

Here we have a guilty man, who, despite the systems of education and religion, has incurred the sanctions of law.

Some of the methods provided by society must now be invoked to coerce obedience where persuasion has failed. Probation, jail, reformatory, prison—these are the instrumentalities ordinarily available. Which of these will best serve the purpose of the given case, at once protecting society and checking the criminal inclination of the subject?

Frequently, if not generally, the prosecutor finds his most oppressing responsibility in the investigation of this phase of his cases, for of necessity the court must and does rely largely on the recommendations of the prosecutor as to appropriate penalty, or, at any rate, upon the information which the prosecutor supplies as to the character, antecedents, environment, history and probable responsiveness of the subject.

With these observations in mind, let us turn to a consideration of the mode of prosecution in Connecticut.

Differences sometimes amount to distinctions, sometimes only to similarities in disguise.

The mode of prosecution in Connecticut is characterized by such a paradox.

As the slap-stick comedian will everlastingly have it, "she's just like all the others—she's so different."

Connecticut is not a "code" state. Neither is she a "common law" state in the strict sense of "English Common law."

"The foundation of our common law in respect to crimes was laid at the establishment of our commonwealth in 1639. The English common law as then existing was not adopted here."

Brown's Appeal, 72 Conn., 148, 151.

Rookey v. State, 70 Conn., 104, 109, 38 Atl. 911.

Reference to colonial records and other original sources, will disclose that the Connecticut founders considered that the English com-

mon law was not suited in many instances to the conditions and situation of the new land.

"When the 'Jurisdiction of Connecticut' was organized in 1639, the law of the land, as recognized by the settlers, consisted in the orders of the General Court, and, in case of defect of a law, in the word of God."

Brown's Appeal, 72 Conn., 148, 151, 44 Atl. 22.

Having made a fresh start on the basis indicated, our Connecticut ancestors developed a criminal jurisprudence of their own, adapting and adopting so much of the English common law as suited their ideas and conditions and disregarding what they deemed undesirable. The influence of English common law is, however, plainly manifest.

Without elaborating this interesting subject further, it will suffice that as the Connecticut Criminal Procedure differs from that of other states it is a characteristic difference, deliberately evolved and consistently followed.

(See *State v. Schleifer*, 99 Conn., 432, 445, where the Supreme Court asserts (1923) . . . it has the right to ascertain and declare the common law, no less the criminal than the civil law.")

Prosecutions in Connecticut can be commenced in four ways and by four classes of officers.

The "four laws" are complaint, "information," "indictment" and "presentment."

The classes of officers are "grand jurors," prosecuting attorneys of city, town, borough or police courts, the state's attorneys and the grand jury.

A brief description of the several classes of officers may be helpful.

A distinction should be noted between "grand jurors" and the grand jury.

The "grand jurors" are sworn officers elected annually in the towns and charged generally with the duty to enquire after and make due presentment of all crimes and misdemeanors that come to their knowledge. Their presentments are commonly made to a justice of the peace in the town where offense was committed, may be made by a single grand juror and are called "complaints." Upon such a "complaint" being exhibited before him, the Justice of the Peace issues the warrant of arrest, upon which the alleged offender is taken and brought up for trial. At such trial the "grand juror" commonly acts as prosecutor, although as grand jurors are frequently laymen, they often employ an attorney to represent the state, especially if the accused has employed counsel.

In cities, towns and boroughs having regularly established local courts, prosecuting attorneys appointed by the judges of the court, exercise the same authority and prerogatives as "grand jurors," as well as some more extended powers. These powers are derived from the special laws creating the respective courts.

There is a "State's Attorney" in each county, in the larger counties two. These officers are appointed by the judges of the Superior Court. Their term of office is two years, but by custom they are re-appointed so that continuous service of from ten to twenty years has been the rule.

The powers and functions of the State's Attorneys are historic and important. Virtually they derive their powers from the common law of Connecticut, although of course, statutes have been passed from time to time effecting them.

Historically, the office of State's Attorney traces back to the King's or Queen's attorney of colonial days. The late Justice Hammersley in the case of *State v. Kenna*, 64 Conn., 212, gives an interesting chronology in which he writes: "The powers and duties of a State's Attorney have never been defined by statute law; they are (except in certain particulars specifically enumerated in the statutes) the necessary incidents of the office, by force of the common law of this state. The language used in relation to the office has not materially changed since it was first formally established. In 1704 the "attorney" for the Queen is required to "prosecute and implead in the law all criminal offenders, and do all things necessary or convenient as an attorney to suppress vice and immorallities." 4 Colonial Records, 468. In 1730 this act was passed; "In each county there shall be one King's attorney, who shall plead and manage, in the county where such attorney is appointed, in all matters proper, in behalf of our sovereign lord, the King." 7 Colonial Records, 280.

"In 1764 apparently to remove any doubt that the representative of the crown also represented the sovereignty of the colony, the King's attorneys in the several counties were empowered" to appear in behalf of the governor and company of the colony in all cases concerning them or brought for or against them in any of the said counties." 12 Colonial Records, 258. In 1784 it was enacted that—"In each county in this state, there shall be one state attorney, who shall prosecute, manage and plead in the county where such attorney is appointed, in all matters proper for and in behalf of the state. Statutes 1786, p. 11"—and thus to the present day the office has been continued and maintained under the broad and general duty so described.

Justice Hammersley in the same opinion continues:

"It has been uniformly held since 1730 that the office then established, carried with it the duty to conduct all criminal prosecutions in the Superior Courts, and the power to institute and carry on in every court having criminal jurisdiction (unless restrained by some statute) any criminal prosecution within the jurisdiction of the court, and also the power and duty to exercise the common law powers appertaining to the office of Attorney General, so far as applicable to our system of jurisprudence."

"The power of the State's Attorney to file in the Superior Courts an original information exists by reason of his being invested with the common law power of Attorney General, which in this state is greatly enlarged, because we early adopted the policy of filing an information in cases of felonies as well as misdemeanors; and since the adoption of our constitution, an information may be filed for every crime not punishable by death or imprisonment for life. It is then the common law of this state that authorizes the State's Attorney to file information in the Superior Court. . . ."

It appears from the foregoing that the State's Attorney is the chief prosecuting officer in Connecticut and that each in his own county is charged generally with the enforcement of law within his county and the management and prosecution of all criminal cases coming before the Superior Court therein.

Reference is made in this opinion to the power of the State's Attorney to file "information." The "information" is a formal allegation or pleading supported by the oath of office of the State's Attorney, charging an offender with crime, to which he is required to plead and upon which he is tried.

The State's Attorney may exhibit his "information" before any court or Justice of the Peace within his county, having cognizance of the offense charged therein, but he customarily limits his activity to the Superior Court.

The "information" of the State's Attorney can in Connecticut and customarily does take the place of grand jury indictment, for all offenses except those involving punishment by death or life imprisonment.

The Connecticut constitution, adopted September 15, 1818, provides in Article 1, Section 9, . . . and no person shall beholden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or an indictment of a grand jury. . . ."

The same section 9 guarantees the accused "in all prosecutions by *indictment or information*, a speedy public trial by an impartial jury."

Thus the constitution impliedly sanctions prosecution by information as well as indictment, and as "indictment" is only made a prerequisite in cases involving punishment by either death or life imprisonment we find that in Connecticut all crimes save only murder and treason can now be prosecuted without the intervention of a grand jury.

State v. Danforth, 3 Conn., 112.

State v. Kenna, 64 Conn., 212 et seq.

The universal and accepted practice in Connecticut has been for more than a century to proceed by "information" in all cases where indictment is not required, the oath of an attorney for the state taking the place of the oath of the grand jury, his "information" taking the place of their "indictment."

It is interesting to note, however, that in Swift's Digest, Vol. II, Pg. 370, Judge Swift then writing not later than 1823, after defining "indictment" says, "This is the usual mode of prosecution in England, and in most of the states in the union, and it *might be practiced for every species of crimes in this state, if the courts thought proper.*

. . . As this statute requires an indictment by a grand jury only in cases where the crime is punishable with death or imprisonment for life, the practice has been to summon a grand jury in such cases only; and in all other cases to proceed to trial on the complaint of a single grand juror, or the information of an attorney for the state."

The practice in vogue in 1823 is the practice of today. That it has proven a satisfactory practice is perhaps sufficiently demonstrated by the fact that it has endured.

Earlier in this discussion the statement appears that the State's Attorney customarily limits his activity to the Superior Court. The Superior Court is the highest trial court in the state, and now has jurisdiction over virtually all crimes.

The Superior Court acquires jurisdiction of an offender either by power of its own warrant issued upon application of the State's Attorney or by binding-over process from the justices of the peace or city, town, borough or police courts.

However the case reaches the Superior Court, the State's Attorney prosecutes it. Whatever may have been the charge in the lower court, the State's Attorney may change it to some other, better fitting the facts.

If he finds that one individual has committed several crimes in various towns in the county, he may within certain limitations join these in one information.

In short, by the system of informations the State's Attorney may make his pleadings fit the facts, amending if necessary at almost any stage of trial, provided no substantial unfair prejudice results to the accused thereby.

It will be observed that the method of prosecution on information is elastic, inexpensive, convenient and far less cumbersome and slow than the grand jury system.

Probably in states where the grand jury system obtains, the power vested in an individual to inform against a man and set him to trial will be thought dangerous.

More than one hundred years of experience in Connecticut has not found it so.

The safeguards seem to be, first, the high ideal of service, and the high type of man customarily found in the State's Attorney's office, and, second, the substantial freedom from political influences which the method of appointment assures.

By way of practical safeguard is a statutory provision empowering the court as follows:

"The Superior Court having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time upon motion by the defendant, dismiss any information and order such defendant discharged, if in the opinion of the court there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

Acts 1921, Chpt. 267, S. 3.

The existence of this power enables the trial judge to stop unwarrantable proceedings and the power of removal or refusal to reappoint vested in the judges would be an obvious restraint upon abuse of office.

It has been noted that the indictments may be had for "all species of crimes," as Judge Swift states it.

A curious feature of the grand jury procedure in Connecticut is that the State's Attorney is not allowed to attend in the grand jury room even for the purpose of examining witnesses or in any way assisting the grand jury. He may submit to the grand jury a list of witnesses with an annexed summary of what these witnesses may be expected to testify, and may also lay before the grand jury such proposed indictments as he deems proper, but having done these things he is debarred from further intervention. With this notable exception, the grand jury procedure in Connecticut is substantially similar to that of other states.

"Presentment" is mentioned in the constitution and also in the forefront of this discussion as one of the methods of commencing criminal action.

Judge Swift writes of "a presentment by a grand jury which differs from an indictment only in being made by the grand jury of some offense within their own knowledge, and into which they are bound to inquire," and says, "after such presentment is delivered to the court, an indictment is framed upon it by the proper officers of the court; for it is regarded merely as instructions to an indictment to which the party must answer." Swift's Digest, Vol II, 372.

In practice "presentments" seem to have been unknown in Connecticut, though the power to make them exists.

An interesting example of the modern use of an ancient power is presented by the empanelling in Hartford County about a year ago of a so-called "extra-ordinary grand jury" which was summoned to and did investigate the "Medical Diploma Mill Scandal" as it was described in the press.

So far as the writer can learn, no grand jury had ever before been empanelled and "turned loose" as it were, on a general investigation of that character in this state, although such practice seems fairly common elsewhere. The findings of fact by that grand jury were in the nature of "presentments."

The charge delivered by Judge William M. Maltbie, then of the Superior Court, to that grand jury is a most interesting document and is probably unique in Connecticut jurisprudence.

A somewhat recent innovation in Connecticut criminal practice is a statute permitting an accused person to waive jury trial and elect instead to be tried before the court without a jury.

Acts 1921, Chapter 267, Sect. 2.

It was originally supposed that this act would be rarely evoked and then only in cases where the circumstances might be supposed to arouse resentment in the minds of jurors.

In practice, the system has proven astonishingly and increasingly popular, if the number electing court trials can be taken as criterion.

Certainly much time is saved by the court trial, and it would seem that valid defences receive more intelligent consideration from trained judges than from untrained jurors.

As an amusing sidelight, lawyers with dubious defences still claim jury trials.

In all criminal cases in Connecticut "the state" is the prosecutor. The offenses are against "the state." The victim of the offense is not

a "party" to the prosecution nor does he occupy any relation to it other than that of a "witness," an interested witness mayhap but none the less only a witness.

It is not necessary that the injured party make complaint, nor is he required to give bond to prosecute; he is in no sense a "relator." He cannot in any way control the prosecution and whether reluctant or no, he can be compelled like any other witness to appear and testify.

As expressed in the case of *Malley v. Lane*, 97 Conn., 132, 138; "The peace is that state and sense of safety which is necessary to the comfort and happiness of every citizen, and which government is instituted to secure"—thus crime in Connecticut is considered an offense against society in the aggregate—the state—and is punished by the social agency—the government—in the discharge of a duty.

That this theory is not followed in all our states at least as to some grades of offense is, of course, well known.

This brief sketch of "The Mode of Prosecution in Connecticut" may perhaps serve not alone to indicate the unique features of that system, which after a century or more of usage have been found excellent, but will, it is hoped, emphasize the high quality of public service which the "Prosecutor" is called upon to render.

Possessed as he is of vast powers, they carry a commensurate responsibility.

Clothed with a wide discretion, he must be deeply sensible of the gravity of his decisions.

Ever must he be mindful of that mandate of the code of ethics "to see that justice is done."

To his office come the powerful and the weak, the wealthy and the impoverished.

Of the evil nature of mankind he sees much, but in the worst he discovers some "toad's jewel," whether of loyalty, love, generosity or courage.

Ever and ever must he find his heart torn by that ever present fact that punishment of the guilty descends with graver force and hardship upon the innocent dependents of the culprit. The sinner may go to prison but the heart-sick wife is driven to the sweat shop, and the innocent babe to the foundling asylum, or the gray-haired mother in sorrow to her grave.

Constantly he is reminded that human nature, in whatever habiliments and panoply concealed is the same today as last week and in the banker as in the beggar.

Not fiction nor romance contains a half the strange reactions that

life itself reveals, nor is human motive ever to be discovered by rule and rote.

To approach human frailty with intelligent sympathy and understanding; to adjust the needs of society for protection, to the vagaries of human waywardness; to accomplish the purpose of a great social experiment with the often crude agencies that society supplies; to be justly stern, but ever just; to yield to no hysteria, whether of heartless clamor or flacid sentimentality; to know no favorites and fear no reprisals; to forge steadily on with such courage, sincerity and fidelity as God gives him and the wisdom of experience supplies; these needs must the prosecutor attempt with the knowledge that at the end his fidelities will be often deemed brutalities, his sincerity given sinister interpretation and his courage seldom credited.