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CRIMINAL JUSTICE AND THE POOR

SAMUEL RUBIN

There has been much discussion in recent years relative to the inefficiency of the criminal law, not only in its ineffectiveness in the stamping out of high handed criminality, but in its failure to deal out justice to that submerged class who as a result of poverty or ignorance and poverty, are in a forlorn and helpless situation when charged with a criminal offense.

Throughout the country the cry is raised that there is one law for the rich and another for the poor. This assertion is made not only by people without influence, but also by leaders in their respective fields including judges, lawyers and social workers, and they back up their contentions by citing cases constantly occurring. Regardless of one's personal views upon this question there can be little doubt that there are many people, who through ignorance or poverty are constantly being denied justice in our courts.

In theory, it is true, the law is no respecter of persons, the rich and the poor being supposed to be upon an equal plane. In practice, however, the inequality between the two is so glaring, that the idea has spread that the courts exist not for the good of all regardless of wealth or power, but for the benefit of the fortunate few as against the many. "There is a widespread belief among thoughtful observers" says the Cleveland Foundation Report, "that grave defects exist in the administration of criminal justice in the United States, and it is the opinion of the overwhelming majority of American Judges and lawyers that this belief is founded upon fact."

To meet the handicap under which the poor man is placed in defending himself when charged with crime the idea of Public Defenders was conceived. The theory of the public defender idea is based upon poverty, and only in a small degree upon innocence, although the defender idea offers adequate protection to the innocent, as well as preventing unjust and vindictive punishment to the guilty. Cases are constantly coming to light, in all sections of the country, in which it is apparent that had adequate counsel and full investigations been made in the first instance the result might have been different, and possibly a miscarriage of justice avoided. I go further and state that not only is this true in the cases of indigents who are not represented by counsel, but it is occasionally equally true where legal representation has been adequate, and in a few instances where

the accused has been unusually well represented, such as for instance in the Mooney-Billings case. To my mind this only makes the case of adequate representation and full investigations all the more necessary in those cases where the accused is too poor to obtain counsel, the theory being that where the defendant has means at his disposal he is in a position to secure adequate representation, whereas where he has no means he is unable to avail himself of such so-called legal safeguards as the law provides, and is at the mercy of chance. One or two instances of miscarriages of justice (even with counsel) should suffice. There are undoubtedly many similar cases which never come to light.

In Michigan, in 1922, Leo Sauerman was convicted of first degree murder for the killing of Alex. Dombrowski, a farmer, who was also an alleged whiskey runner. He was killed in a raid by four men, Melvin Brown, Homer Noel, Leo Pakizer and a fourth man. The three men named were arrested first and charged with murder. A little later Sauerman, the fourth man was also arrested and charged with the same offense. Sauerman was identified by four witnesses, the dead man's wife, his son and two other persons, all of whom testified that Sauerman was the man who grappled with and shot Dombrowski. It was upon their direct testimony that he was convicted. Brown and Noel pleaded guilty to second degree murder and were sentenced to serve from 15 to 25 years in prison. Pakizer was acquitted. Throughout his two years in prison Sauerman maintained he had been convicted through physical resemblance to the real murderer. Finally a man named Harry Hill was arrested in Chicago. Hill was convicted largely through the testimony of his landlady, who stated he had confessed the murder to her. Governor Alexander Grosbeck of Michigan immediately issued a pardon for Sauerman.

In another case a "man named Caldwell had a young son named Norris (called "R"), who on his way to medical school at Nashville, Ark., stopped at Mammoth Springs. While there he bought his ticket for Nashville, checked his trunk, and retired for the night. That night a heavy snow fell. The next morning "R" missed his trunk, and it was concluded that it had been stolen from the track of the station platform. Investigation showed that behind a string of box cars were many piles of railroad ties, and back of these was discovered the missing trunk, and as luck would have it the supposed thief (whose name was also Norris), examining them and throwing back what he did not care for. Norris, the accused, denied stealing the trunk or knowing anything about it being brought there.

He however was brought to trial in the Fulton Criminal Court and was sent to the penitentiary. The prisoner appeared dazed and absent minded during the trial, and seldom spoke to anyone and asked few if any questions. His attitude was that of one bewildered or lost in the sea of helplessness and indecision. The prosecution stated that there was no circumstantial evidence to weaken one's belief that they had the guilty person, as the prisoner was caught in the act.

"While awaiting in jail at Salem for the sheriff to convey him to the penitentiary, the prisoner went violently insane. He was incarcerated in the penitentiary at Little Rock, and later was sent to a hospital, and confined in a padded cell for the remainder of his life.

"During this time citizens of Missouri were missing their live stock, and suspected a member of a bridge gang named Tow. Several Missourians marched boldly across the Arkansas line and boldly carried Tow over the State line into Missouri, and placed him securely in jail at Alton. Tow laughed at their efforts and defied the Missourians, boastingly saying that he was too shrewd for them to keep him in jail.

"One night the father of "R" received a package from Tow, with a note saying that as he ("R's" father) assisted in sending to the penitentiary an innocent man for stealing "R's" trunk, he might soothe his conscience a little by forwarding the package to his son. The package contained articles belonging to R. Tow explained how he stole the trunk, hid it behind the ties, supplied himself leisurely with the choicest articles therefrom, leaving it where it was found. The convicted man had merely noticed the trunk setting out in the snow, and through sheer curiosity had walked up to it and was looking at its contents when arrested. Caldwell was about to go to Alton to obtain a full confession from Tow, but heard Tow had escaped from jail that night. In the meantime the convicted man had become a mental and physical wreck, and a little later died in a mad house."¹

These two cases, while not showing that a Public Defender would have changed the result, do nevertheless show the need for carefulness and a thorough investigation of the facts.

The contention has been made that it is inconsistent for the State to both prosecute and defend. This objection however, can have but little weight, for if it is consistent for the State to appoint counsel with pay in capital cases, it is equally consistent to provide Public Defenders to defend indigents in the general run of cases. Said Samuel Untermyer, the distinguished New York lawyer: "If the State has its public prosecutor why not its Public Defender to

¹For verification see "Case and Comment" Vol. 24, fol. 71.

take care of those who are unable to take care of themselves? It is as much to the interest of the State to rescue the innocent as to punish the guilty. The most helpless and unfortunate of our citizens should not be forced to go virtually undefended."²

"The study of social infirmities and deformities" said Victor Hugo, "with a view to their cure, is a sacred duty. . . . It is deeper, and a more arduous task to penetrate beneath the surface, to lay bare the foundations upon which the social structure has been reared, to tell of those who labor, and who wait; of womanhood staggering under burdens too heavy to be borne; of womanhood in its young agony; of the silent, secret conflict which alienate men from their kind; of prejudices, the intrenched injustice, the subterranean reactions of the law . . . of the formless shuddering of the masses of the starved, the half clad, the disinherited, the fatherless, the unfortunate . . . that wander in the dark. He who would lay bare the mysterious springs of human actions must descend . . . into those easements where crawl in confusion those who bleed and those who strike, those who weep and those who curse, those who fast and those who devour, the wronged and their oppressors. . . . Is the underworld of civilization, because it is deeper, more gloomy, less real and important than the upper? Can we know the mountain if we know nothing of the cavern?"

From the moment of his arrest—regardless of whether he is innocent or guilty—until his acquittal or conviction, the poor man is under a severe handicap in defending himself. He is almost certain upon his arrest to be put through a severe grilling which often takes the form of the so-called 'third-degree' which in spite of police denials exists throughout the United States. Actual cases are constantly being referred to the higher courts for decision. A reading of these decisions shows police brutality which can only be compared with the methods used by the Inquisition. The accused is questioned, bulldozed, put in the sweat-box, slugged and beaten with a rubber hose. He is sometimes taken to the morgue to view a dead body, or told that his wife or friend has confessed to a crime, and implicated him.

Mr. Oswald Garrison Villard³ quotes Theodore Dreisser, the novelist, who once asked an Italian boy in the death house at Sing Sing how he came to confess? The boy replied: "Easy to ask, hard to answer." "You've never been grilled by a mob of detectives?"

²Address delivered before the American Academy of Political and Social Science, Philadelphia, April 9, 1910, and printed in Chicago Legal News Vol. 42 page 323.

³Editor of New York Nation.

"They had me in the room thirty hours. • There were twenty-one detectives, I think. As fast as one finished another jumped on me. They hammered, hammered. I got tired and faint. Pretty soon I would have sworn to anything, to assassination, just to rest." "So you caved in and said 'Yes' to everything?" "That's right. I just wilted and yessed everything."⁴

Not so long ago the United States Supreme Court decided a case the facts being as follows:

"A young Chinaman, suspected of being implicated in the murder of three of his countrymen in Washington, D. C., was apprehended in New York City and taken, while sick, to Washington. He accompanied the officers voluntarily, and was not put formally under arrest. On reaching Washington he was taken to a secluded room, where he was subjected to questioning for five or six hours by police officers, and later was taken to a hotel bedroom, where he was detained for a week. During most of this time he was confined to bed with sickness. Members of the police force were on guard day and night. He was subjected to persistent lengthy and repeated cross-examination. On the eighth day the accusatory questioning became excruciating. He was taken to the scene of the crime, where continuously for ten hours he was made to answer questions and give explanations, and every supposed fact ascertained by the detectives in their investigations was related to him. He saw the places where the dead men were discovered; the revolver with the blood stains and finger prints, bullet holes in the wall; empty cartridge shells found upon the floor; blood stains on the floor; bloody handkerchief, etc. The examination continued until the examiners were exhausted and returned to their homes or fell asleep. No sleep was allowed the Chinaman, however. The next day he was formally placed under arrest, and at the police station the questioning was resumed. The tenth day he was again taken to the scene of the crime, where the whole thing was again talked of and enacted. On the eleventh day there was a formal interrogation by the detectives in the presence of a stenographer. On the twelfth day a signed confession. He was convicted and sentenced to be hanged. The conviction was affirmed by the Court of Appeals of the District of Columbia, but the U. S. Supreme Court reversed the judgment, it being held that the confession was not voluntary, being obtained by compulsion."⁵

I do not at all question that many confessions obtained in this

⁴Quoted in Harper's Monthly—October 1927—Article entitled "Official Lawlessness."

⁵See case of *Ziang Sung Wan v. U. S.* 45 Supreme Court Reporter (N. S.) p. 248.

manner are from guilty people; nor do I think that the "third degree" is reserved only for the innocent. A confession obtained in this way, however, is legally void, and the fact that the defendant is guilty is no excuse for such measures. Whether the defendant is guilty or innocent brutality against a person who is entirely helpless is unwarranted, and ought not to be tolerated in a civilized society.

That such methods are not at all necessary can be shown by the English system, where the third degree apparently does not exist; In England the police are unarmed, yet they handle crime in a far more efficient manner than we do in this country, where the only place a person is not protected by law is in the police department.

To have a Public Defender means that there will be a sworn public official of experience and ability available who will always be ready to take hold of a case where the accused indigent is unrepresented. The Public Defender idea is simply an extension of the system of appointed attorneys, retaining its best features and adding others. The idea is based upon the theory that indigents shall have free defense in criminal proceedings by making available to him an attorney who shall be paid by the State for his services and who shall be responsible for the defense of indigents charged with crime. The essence of the idea is that it is the duty of the State to shield the innocent or if not innocent to obtain justice and equity for the accused, even though guilty, and that it is also the duty of the State to provide the means for obtaining such defense, where the accused is too poor to do so. The defender is to the person charged with crime what the legal aid organizations are to the same persons in small civil cases.

In some states the court, at the request of the prisoner, will appoint an attorney to defend the accused. In most States, however, there is either no compensation to the attorney upon the ground that it is his duty, or the compensation is inadequate, except in very serious cases such as murder. The result is an indifferent defense, which in some instances is worse than no defense at all. This lends color to the statement sometimes made that a pettifogging criminal lawyer or an inadequate or inefficient defense may hurt rather than help the accused. The lawyers appointed in this way are often more interested in what is to be gotten out of the case than in the preparation of a proper defense. "Twenty-four states have no statutory provision for the payment of counsel. . . . In these states the accused must rely entirely on the mercy of the court in assigning counsel and the willingness and ability of the assigned lawyer to make a defense. Twenty-four states make provision to pay coun-

sel. . . . Six of these last states have laws providing for a Public Defender. In felony cases (not capital) eighteen states pay counsel. In six of these the Public Defender handles the work. In ten states counsel assigned in misdemeanor cases may by statute receive compensation."⁶

The need for counsel is well stated in a report of a special committee of the American Bar Association, in which it states that "no meritorious case, whether civil or criminal, that is cognizable in the courts of the country, ought to be denied the services of an able, courageous and loyal advocate. . . And no man or women, however humble, ought to be able to say in any American community that justice is too expensive for the poor. We therefore urge that in every community the members of this association volunteer to aid, without fee, the worthy poor who are being oppressed, defrauded or otherwise wronged, and who have not the means to employ counsel."⁷

In every trial—the proceedings being legal proceedings—the parties require men trained in the law to guide and protect them. To employ lawyers however costs money. If the parties have no money, and the need being urgent, they are indeed in a serious position if they are unable to secure the aid of counsel. People who have money always will prefer their own paid attorneys. It is the helpless individual, entirely without funds, who seeks public defense.

As an idea of the extent of the poverty of the people of the United States as indicative of their inability to pay for the services of counsel it should be remembered that four-fifths of the American People (or more than Ninety millions of them) according to Irving Fisher (Professor of Economics at Yale University), earn little over their expenses. "They can lay up little, if anything, for a rainy day. More than ninety-three million people out of one hundred and seventeen million living in the United States in 1926 had only about \$500.00 income each."⁸

"In theory" states the Legal Aid Committee report (1926) of the Pennsylvania State Bar Association, "all people receive legal protection, because when a man becomes a lawyer in Pennsylvania he takes an oath which ends with the promise that he will not 'delay any man's cause for lucre or malice.' In a less thickly settled community than we have today it is probably true that the theory works in a great many cases. Undoubtedly every lawyer has performed

⁶Legal Aid Committee of Pennsylvania State Bar Association Report 1926.

⁷See report of Special Committee on law enforcement of American Bar Association, Sept. 11, 1922.

⁸Article titled "How Prosperous Is America"?—in "Public Affairs" for January 1926.

this professional service in his own law office. The problem arises when the multitude of poor persons, unable to pay a fee, becomes so great that the individual lawyer cannot afford to give more time to them. In the modern law office there is a definite limit to the amount of aid of this sort which can be given. The result is that many poor defendants appear before the criminal courts without a lawyer. Anyone who appears in our criminal courts today will see that there are many people who do not have the assistance of honorable counsel. No blame for this should attach to the courts or the bar. Both are doing their professional duty. Economic and social conditions have produced a situation which calls for remedy. The constitutional right to have counsel is of no avail unless there is a way to put it into practice. At present there is no adequate machinery. The result is (a) A practical deprivation of constitutional right; (b) Uncertainty and inexactness in trying cases; (c) Expense to the county in having to try cases which turn out to be improper accusations against the accused; (d) Lack of facilities to the innocent defendant who cannot pay a fee; and (e) a tendency to set up a class of unethical criminal lawyers.

"The cardinal point we have sought to stress is that the administration of justice must make some provision for poor persons accused of serious crimes. If all the states provided paid counsel, this chapter need never have been written. But most of the states either assign counsel without pay, which we consider an inadequate plan, or make no provision at all for the general run of cases. Most of the states should undertake reforms in this field, and the best solution, we consider, is the Public Defender."⁹

BENEFITS

The following are some of the benefits claimed for the public defender idea:

- a—The poor and the rich will be put upon a more equitable footing, and unfair discrimination between different classes of prisoners will in a large measure be eliminated.
- b—The truth in criminal cases will more readily be ascertained, because the accused will speak more freely to a public official than to private counsel; also the defender would have greater resources, as well as be more skillful, competent, and conscientious than appointed counsel who usually serve.
- c—Causes will be more honestly and ably presented, and perjury will be lessened.
- d—Pleas of guilty where the facts justify the plea will be increased; but where the facts do not justify the plea, they will be decreased.

⁹U. S. Labor Department Bulletin No. 398 (p. 57).

- e—Guilty prisoners will not receive excessive punishment, because the defender would present all the facts and show all the mitigating circumstances, thus to some extent rectifying the present inequality of sentences, and insuring the defendant a square deal.
- f—Technicalities and delays will be reduced to a minimum.
- g—A certain undesirable type of criminal lawyer will be eliminated.
- h—The constitutional and legal safeguards to which the accused is entitled will be rendered more effective.
- i—There will be less indictments of a trivial nature.
- j—It will save time and money.
- k—The office will be an aid to the court, as well as lessen the work of the court.
- l—There will be centralization of office force; investigators will make intelligent investigations BEFORE trial. There will be a recognized standing of the defender in the community comparable to that of the prosecuting attorney.
- m—Criminal courts will be uplifted, and confidence and respect for the law will be increased.
- n—The defender will be alert to correct injustice whether it be in the courtroom, by the offering of advice, or by advocating legislative enactments.

There are now, either public or private defenders, in Los Angeles, San Francisco, New York (Manhattan), Chicago, Pittsburgh, Cincinnati, Columbus, Minneapolis, Omaha, Youngstown, Memphis, Rochester, N. Y., Hartford, Bridgeport, New Haven and more than half dozen smaller cities of Connecticut.

Chicago has both a public as well as a private defender organization, the latter in some features resembling the Voluntary Defender's Committee of New York. The private defender organization was created about four or five years ago, and is a co-operative arrangement between the Northwestern University School of law, the Chicago Bar Association and the United Charities. The Chicago Bar Association provides the volunteer lawyers, the Northwestern University School of law the assistants to the lawyers, and the United Charities the social worker. This arrangement, known as "the Chicago Plan," was brought about as the result of a gift from Anna Louise Raymond. Dean John H. Wigmore and others of the faculty of the Northwestern University Law School desired to have the income from this fund used in connection with work in the criminal courts, and as a result the "Chicago Plan" was evolved.

About October 1, 1930, however, a Public Defender organization was also created, it being brought about through the suggestion of the Advisory Judiciary Council of Cook County (of which the City of Chicago is a part) to the Board of County Commissioners that such an office be created because of the fact that there were a

large number of indigents being tried in Chicago who had not the means of obtaining competent counsel. It was asserted that appointed counsel, without remuneration, frequently neglected their clients, that the system was pregnant with grave injustice to indigents charged with crime, and that the failure to remunerate counsel in the general run of cases had developed the temptation of counsel to delay trials while endeavoring to get some compensation out of friends or the family of the accused. In capital cases it was asserted the fee allowed was greater than the services frequently warranted.

The board of County Commissioners acted favorably upon the Council's suggestion, and as a result the then Chief Judge of the Criminal Court, Hon. John P. McGoorty, with the advice and consent of the Judicial Advisory Council was authorized to appoint a Public Defender and the necessary staff. Benjamin C. Bachrach, an able and well known Chicago Criminal lawyer was appointed Public Defender at a salary of \$7,500.00 per annum, and at the same time five assistants, three at \$3,600.00, one at \$3,000.00 and one at \$2,400.00 were also appointed.

During the three remaining months of 1930 the Public Defender disposed of 465 cases, but these do not include 72 cases from which the Public Defender withdrew as counsel owing to the fact that the accused had secured private counsel.

The Public Defender of Chicago has fitted into the Criminal Court machinery of Chicago smoothly, and those in a position to know state that the defender organization is earnestly endeavoring to give to the work it is doing its best efforts. The Criminal Courts Branch of the Legal Aid Clinic of the Raymond Foundation, the private defender organization, has co-operated most effectively with the newly organized Public Defender, and much commendation is due the Raymond Foundation for its assistance.

About the same time that the Public Defender was inaugurated, there was promulgated a rule by which (as in the State of Maryland), defendants in criminal cases are permitted to waive jury trials and be tried instead by the court with a jury. This rule, together with the newly created Public Defender, has saved the city of Chicago an enormous amount of time and money in the conduct of its criminal courts. Many judges have been released from duty in these courts, and have been assigned to the civil courts instead. Judges who were formerly called into Chicago to assist in clearing the assignment dockets in criminal cases are not now required. The congestion of the trial calendars in the criminal courts, once deservedly criticized, is a thing of the past.¹⁰

¹⁰Report of Judicial Advisory Council of Cook County, January, 1931,

"Apart from the direct benefits accruing from the office of Public Defender, the presence in the court room of this officer and his assistants has had a very appreciable indirect effect upon criminal trials in general. It is already apparent that the manner in which defenses are conducted by these gentlemen has set a standard which has strongly impressed other defending lawyers, and that as a result the tone and dignity of criminal trials in general have been greatly raised."

Just as the defense of indigents by the Criminal Courts Branch of the Legal Aid Clinic of the Raymond Foundation resulted in the approval and co-operation of the judges of the criminal courts, the State's Attorney and other responsible officials connected with the criminal machinery of the City of Chicago. Just so is this success being duplicated and increased by the newly created Public Defender and his staff.

Boston has recently created a voluntary defender.

Philadelphia has appointed a committee to organize a voluntary defender association.

California, Connecticut, Minnesota and Nebraska have statewide Public Defender laws, as has Virginia also, although no Public Defender has been appointed under its law due to the fact that adequate salaries were not provided.

As to whether a Public Defender as in Los Angeles and San Francisco, or private defenders as in New York or Cincinnati are preferable, is a matter of individual opinion, and depends upon the peculiar conditions prevailing in the particular community. The Public Defender "possesses the undoubted advantage that the position is official, and from its financial support which is definite and assured in contrast with the support of the private organization which is voluntary, more or less fluctuating, and therefore uncertain."¹¹

There is no false sentimentality in the idea of a public defender. It is simply an effort to obtain and give fair play. The proper duty of the prosecuting attorney is not to secure a conviction, but to convict only after a fair and impartial trial. Upon the same principle it is not the duty of the Public Defender to secure acquittals of guilty persons, but to endeavor to ascertain the true facts and to go to trial upon these facts. The aim of both officials would be to work in harmony to bring out a just administration of the law so that no innocent man may suffer for want of an adequate defense, and no guilty man escape.

¹¹U. S. Labor Department Bulletin No. 398.