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# Public Defense in Criminal Trials

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# PUBLIC DEFENSE IN CRIMINAL TRIALS.

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The functions of criminal procedure are two—one positive, the other negative. Its positive function is to apprehend every criminal; its negative function is to prevent as far as possible the prosecution and certainly the condemnation of any innocent person. The ideal procedure, therefore, would be too firm to permit the escape of a single criminal and yet sufficiently flexible to prevent the prosecution, and especially the condemnation, of any innocent person. But this is difficult to accomplish in criminal procedure because of the opposition of social and individual interests. It is always difficult to preserve the balance between the rights of the individual and of society, but perhaps nowhere more so than in criminal procedure, because a crime is one of the most flagrant violations of this balance between social and individual rights. Social defense against crime requires strict measures of investigation and prosecution which may sometimes result in the prosecution of an innocent person. On the other hand, individual liberty must be defended and conserved. The condemnation of an innocent person, when discovered, is a great shock to public sentiment, not only as a violation of justice but also because each person imagines himself in the place of the victim and realizes in what jeopardy everyone is placed when such judicial errors are possible.

Let us see how well this balance between social and individual rights is preserved in the system of criminal procedure which prevails in this country. It is an axiom of the law that a person charged with crime is presumed to be innocent until found guilty; and yet society does all it can to convict him, but almost nothing to secure for him an adequate defense. In a criminal trial the prosecution is conducted by a public prosecutor, employed by the state; but the defendant at the bar is forced to provide for his own defense. He, a single individual, must defend himself against the state, representing many individuals. If he has plenty of money at his command all may be well with him. If not, his position is a pitiable one indeed. It is true that the public prosecutor is charged in theory with the conservation of the interests of the de-

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fendant as well as with the duty of prosecuting him. But it is a notorious fact that in practice the public prosecutor is almost invariably bent on securing a conviction regardless of the interests of the defendant. It is true also that when the defendant is unable to employ counsel the court will assign counsel for the defense; but we shall see a little later that such official defense is little better than a farce.

It is evident that the present system of *public* prosecution coupled with *private* defense in our criminal procedure does not maintain the balance between social and individual rights and places rich and poor upon a very unequal standing before the law. Let us review a few of the facts as to how the present system has come into being.

The two fundamental types of criminal procedure are the procedure of accusation and the procedure of investigation, or inquisitorial procedure.[2] Upon these two types are based existing systems of criminal procedure. The procedure of accusation is, in all probability, the older of the two types. It evolved out of vengeance inflicted by one individual on another for an injury suffered. Such acts of vengeance created a state of private war between individuals. But as social and political conditions grew more stable it became very detrimental to have this private war constantly going on; consequently the procedure of accusation was developed to satisfy private grievances by peaceful legal means. The original theory of the procedure of accusation was that the trial was a combat between two individuals. It was only a legal means of securing vengeance. This is indicated by the early forms of punishment, such as composition, *wergeld*, and so forth. It was not until later that punishment was inflicted for the injury done to society. The only interest of society at first was that the dispute should be decided and reparation gained by peaceful means.

As the social importance of criminal procedure increased the procedure of accusation began to vary from its original form. When criminal acts came to be regarded as injurious to society as well as to the individual against whom they were committed, it became essential that all criminals should be prosecuted. But there was danger of impunity to many criminals under the procedure of accusation on account of apathy on the part of the accuser. In

[2]A. Le Poittevin: in *The Penal Codes of France, Germany, Belgium and Japan,* edited by S. J. Barrows, Washington, 1901, pp. 44-46.

order to start a process against a criminal it was necessary that the injured party should make an accusation. If this accusation was not made the criminal went unpunished. To remedy this, the popular accusation was developed, according to which any person could bring an accusation for a crime committed, even though he was not the injured party.[3] But even this measure did not prove sufficient, and it became necessary for the procedure of accusation to introduce public prosecution or prosecution by an agent of the state, which, as we shall see, was derived in part from the procedure of investigation.

The procedure of investigation, or inquisitorial procedure, originated in the Roman law and was greatly developed by the Catholic Church in its canonical law. The fundamental theory of this type of procedure is that the pursuit and punishment of criminals is of great importance to society. Consequently society has the right to commence a criminal process. This it may do, not necessarily by accusing someone of crime, but by making an investigation to determine whether a crime has been committed or whether a certain person has committed a crime. Strictly speaking, there is no such thing as prosecution in the procedure of investigation, since the judge is simply conducting an inquiry into the facts. But in practice it is his tendency, because he is the representative of social interests, to regard the prisoner as guilty and therefore to prosecute him. To remedy this, official or public prosecution is introduced into this form of procedure. Public prosecution is a combination of the two forms of procedure. It is prosecution by a person other than the judge, as in the procedure of accusation, but it is prosecution by a representative of society in the interest of society, and therefore harmonizes with the theory of the procedure of investigation.

We have seen that in the pure form of the procedure of accusation both prosecution and defense were private. Then gradually, through the influence of the procedure of investigation, prosecution became public, but the defense has remained private. In England, as late as 1836, no person prosecuted for any felony, except treason, had even the right to employ counsel. The helplessness of the defendant in the face of an organized prosecution carried on by trained prosecutors was so evident that in the English courts the judges began to watch over the interest of the accused

[3] C. Beccaria: *Traité des Délits et Peines,* Chap. XV.

and became to a certain extent counsel for the defense.[4] The palpable injustice of this system led, in the first half of the nineteenth century, to the extension of this privilege of securing counsel to all those prosecuted for crime and for matters of fact as well as of law. So that if a defendant has the means to employ counsel as able as that employed by the prosecution he is likely to obtain justice in the trial. If, however, a defendant is poor, as is frequently the case, he is unable to procure the assistance of counsel, so that this system is unjust to the poor defendant.

We have already noted that under such circumstances a form of official defense is provided which, however, is, as a rule, far from adequate. When a defendant is unable to employ counsel it becomes the duty of the judge to assign a lawyer practicing in his court to take charge of the defense. As a rule this lawyer is of no great experience and receives no compensation from the court for performing this service. The usual result is that the lawyer endeavors to ascertain the financial resources of the defendant in order to determine whether there is any possibility of securing a fee. If there is no such possibility, his wish is to dispose of the case with as little trouble as possible. It is evident that under such conditions the defense will be quite inadequate. It even happens sometimes that the defender will try, first of all, to persuade the defendant to plead guilty, regardless of whether or not he is guilty. If he succeeds he is relieved from the necessity of spending time and trouble in defending the case. The defendant may, however, protest his innocence and insist upon a trial. The lawyer will then give to the preparation of the case as little time as possible. He gives to the defendant a poor and weak defense in opposition to the carefully prepared prosecution of the public prosecutor. This is great injustice to the defendant, who is so unfortunate as to be unable to employ counsel, and such defendants sometimes plead guilty rather than be tried with so inefficient a defense.

It is evident that in order to remove this evil it is necessary to take the next step, which is also the final one, in this historical evolution which has been bringing the efficiency of the defense up to the level of that of the prosecution. This is the establishment of a system of public defense, which would, I believe, be the most important reform in the present system of procedure, and would, furthermore, be of the greatest significance for the development of

[4]Blackstone: *Commentaries,* Bk. IV, Chap. 25.

a new system of criminal procedure based upon the data and inductions of the modern science of criminology.

The present system of procedure can be improved in several ways by the introduction of public defense. In the first place, it is evident that the standing of rich and poor before the law would be equalized, for the poor would then have as efficient a defense as the rich. But still more would be accomplished by this reform. Society now claims the right to prosecute but does little or nothing to defend. And yet no one, not even a rich person, ought to be forced to provide his own defense. Especially is this true of the innocent victims of public prosecution. They have suffered the humiliation of being prosecuted, have been forced to face the possibility of being convicted, and have lost time and money in being tried for crimes of which they are ultimately acquitted. For such suffering and loss they ought to be indemnified by the State, as is now being done in certain cases in Germany.[5] Certainly the least that society can do for them is to provide them with adequate defense. And yet they are left entirely to their own resources to secure this defense. If they lack such resources they are given the existing form of official defense which, as we have seen, is an utter failure.

Furthermore, public defense would almost entirely eliminate the disreputable lawyers so frequently found in criminal practice. The existence of these so-called "shyster" lawyers is favored on the one hand by professional criminals, who need the services of unscrupulous counsel, and on the other hand by poor and ignorant defendants, whose precarious situation makes them the easy prey of such lawyers. With public defense, however, all the cases of professional criminals and of these poor and ignorant defendants would be in the hands of the public defender, so that the field of action of the disreputable lawyer would be destroyed. This public defense would tend to purify the legal profession.

The public defender could do much more effective work than the probation officer. This officer exists in certain of the courts in states where probation or parole laws have been passed. Part of his work is to prevent some of the abuses which have been described. As a rule he can have nothing to do with a case until the defendant has been convicted or has pleaded guilty. He is then directed by the judge to investigate the case. Having gathered as much information as possible, he reports to the judge. He may also make

[5] A. Romen: in the *Bulletin de l'Union Internationale de Droit Penal*, 1905.

some recommendation as to the best method of disposing of the case. Where the prisoner seems to have been convicted unjustly, or where leniency seems desirable, he recommends leniency. He may thus prevent to a very small extent some of these abuses. But he is greatly limited in his powers and opportunities. His work is done in a more or less haphazard and incidental manner, and his success depends largely upon the judges under whom he is working. He is usually unable to influence a case until after the greatest injury has been done, and is then able to alleviate only to a slight degree the effects of the injury. The public defender, on the contrary, would have charge of a case from the very beginning and could prevent all of the abuses which have been described. He would not allow a defendant to plead guilty unintentionally. The conviction of innocent persons caused by the lack of efficient defense by lawyers appointed by the judge would no longer be possible. The work of investigating the past record of prisoners about to be sentenced, now done by probation officers, could be done as well or better by the public defender. In most cases he would already have made this investigation while conducting the trial. The public defender would thus become to a large extent the logical successor of the probation officer.

Some of the principal evils in the administration of law to-day arise out of long delay in bringing cases to trial. These delays in criminal cases are frequently caused by the public prosecutor, who is looking for evidence of guilt. The public defender would in the meantime be searching for evidence of innocence and would demand a trial as soon as he had obtained his evidence. The delay in bringing a case to trial is a great injustice to the defendant, especially if he is unable to give bail and is forced to wait in prison. The public defender, by securing proof of innocence, could in many cases prevent such delay.

Public defense in criminal trials would make it much easier to abolish the present vicious method of allowing defendants to plead guilty. This does not exist in Continental systems of procedure,[6] and has resulted in a number of very grave abuses in Anglo-American procedure. Pleading guilty is permitted in order to expedite the business of the court. A defendant in a criminal trial is brought before the bar and asked whether he wishes to plead guilty. Many defendants, through ignorance of court procedure, or, in the case

[6]Oliver E. Bodington: *An Outline of the French Law of Evidence*, London, 1904.

of immigrants, of the English language, are incapable of understanding this question. It frequently happens that one of these, who is not represented by counsel, will answer affirmatively to this question. He will plead guilty unwittingly, and frequently without intending to do so. This glaring miscarriage of justice can happen because the defendant does not have adequate representation in court, a contingency which would never occur under a system of public defense.

On the other hand, experienced criminals when charged with crime frequently take advantage of this opportunity to plead guilty. They will plead guilty with the utmost alacrity in order to secure the benefit of the leniency shown by the law and by judges as a reward. It often happens that a first offender who has stood trial and been convicted will receive a longer sentence than an old offender who has pleaded guilty to the same crime. Such grotesque mistakes as these would rarely happen if a trial were held in each case. In the course of the trial the past record of each defendant would be thoroughly exposed, and it would be possible to judge according to the character and past record of the criminal. Public defense would make it much more feasible to have a trial in every case, because the public defender would be ready to prepare carefully the defense and guarantee to each defendant a fair trial.

This feature of our present criminal procedure tempts a public prosecutor to urge a defendant to plead guilty in order to save himself the time and trouble of prosecuting the case. He may threaten the defendant with unusually severe punishment if he insists upon a trial. He may offer to allow him to plead guilty to a lesser crime than the one with which he is charged. Or he may offer to ask the judge for leniency if the defendant will plead guilty. As a result poor and ignorant defendants are frequently frightened or forced to plead guilty. No defendant should be made to feel that he is jeopardizing his interests by insisting upon a trial. The public defender could shield the innocent defendant from the threats of the public prosecutor.

It may be contended that the abolition of the plea of guilty from our procedure would increase very greatly, and to a considerable extent unnecessarily, the work of our criminal courts. In the first place, the increase would not be nearly as great as might be supposed, because the statement of the defendant that he is guilty would be taken as testimony, as in Continental procedure, and would greatly shorten and simplify the trial. Then in some

cases the trial would prove that this testimony is not true. Insanity or a delusion of some sort makes some defendants think themselves guilty when they are innocent. Sometimes a defendant will for some hidden motive testify that he is guilty when he knows that he is innocent. Men have been known to plead guilty to crimes of which they were innocent in order to shield the reputation of women whom they loved. A trial in most of these cases would reveal the falsity of this testimony and would prevent the punishment of an innocent person, while in all cases a trial would furnish a better basis for the individualization of penal treatment by revealing more fully the character and past record of the criminal.

Public defense would, in all probability, prevent most of the exploitation of sensational cases caused by both prosecuting attorneys and counsel for the defense who are endeavoring to advertise themselves rather than to secure a speedy administration of justice. Thus an unhealthy public interest in crime is stimulated and the administration of justice is diverted from its important social function.

The introduction of this system of public defense would probably meet opposition from some members of the bar. And yet the bar associations, which are constantly striving to raise the standard of the legal profession, should favor this reform, because it would tend to purify the profession by eliminating the disreputable lawyers, as has already been described. Furthermore, many positions as public defenders would be created which would go to the better class of lawyers and a certain amount of the better kind of criminal practice might still remain. Public defense would not necessarily destroy all private criminal practice at once. Defendants might still have the privilege of employing private counsel if they so desire. It is impossible to determine at present whether it would ever be well for the public defender to allow a case to go entirely out of his hands. It might be well for him to have supervision in every case, and in course of time he would probably be given complete control of every criminal case. But for a time, at any rate, private counsel would co-operate with him in defending cases. Thus public defense would leave a large field for honorable and dignified practice either as a public defender or as a private counselor.

Again, public defense would destroy much of the opposition which some lawyers now make to the reform of criminal procedure. This opposition grows in large part out of the fear that these

reforms will limit their field of practice. Since this one reform of public defense would fully realize this fear, they would no longer have much interest in opposing other reforms. Thus one great obstacle in the way of the reform of criminal procedure would be removed.

So far we have been discussing public defense as a reform of the present system of criminal procedure. It is evident that as such its principal effect will be to render much less likely the conviction of innocent persons. It may be contended by some that it would also result in the acquittal of more guilty persons. If this were true it would be a serious objection to public defense, for we do not wish to make procedure any less effective in securing the conviction of the guilty. But this criticism is not true, for, in the first place, the introduction of public defense would make public prosecution no less effective. In the second place, in many trials to-day professional criminals are able to employ for their defense counsel much more able than the public prosecutor, thus greatly increasing the chances for their acquittal. If public defense was made the rule so that defendants in criminal cases could not employ private counsel the defense would be on an equality as to ability with the prosecution so that professional criminals would be unable to secure an acquittal by employing counsel superior to the prosecution.

But public defense is also of the greatest significance for the development of a new system of criminal procedure in which it will not only safeguard the innocent from conviction but will also influence very materially the disposition of the cases of the convicted.[7] A fundamental principle of this new procedure will be the individualization of punishment. That is to say, the treatment given to those convicted of crime will be determined by their personal characteristics and past history rather than by the character of their crime. In order, therefore, to individualize penal treatment wisely it is necessary that those who conduct criminal procedure shall be able to estimate at their true value the data which are accumulated with regard to the criminals. It is absolutely essential that the

[7]Parmelee: *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure,* The Macmillan Co., New York, 1908, Chaps. VIII and XI. In this book the writer has outlined such a new system of criminal procedure and has discussed in greater detail most of the subjects touched upon in this article. So far as he knows, this book contains the most extended discussion of public defense in criminal trials in existence.

prosecutor and defender who accumulate and present the evidence shall recognize the data which are significant and shall present them most effectively, thus making the trial a basis for individualization. To accomplish this it is necessary that they should have training in criminal anthropology and sociology, psychiatry and penology. So long as private defense exists it will be impossible to require this training of the defenders, for with private defense it is possible to retain any lawyer for the defense, even one who usually practises in the civil court. But with public defense it would be possible to give both prosecutors and defenders a thorough training. This training would begin with the study of the sciences named above, in addition to the usual legal training, by those who wish to fit themselves for criminal practice. Already in a number of Continental law schools such courses have been introduced for those who expect to specialize in criminal practice, and it is only necessary to make these courses obligatory, which would be possible if public defense existed. The theoretical study in the law school would be supplemented by practical study, first in connection with the police, where the student would become acquainted with the methods of pursuing the criminal, and would assist in the work of gathering and classifying evidence. Next the student would spend some time in the prisons in the study of penolological methods and of the criminals themselves. After this clinical study he would be ready to enter criminal practice either as a public prosecutor or as a public defender. It would probably be better, in order to avoid any possible bias against the defendant, that the young advocate's first duties should be as a defender. But a period of service as defender would be followed by a similar period as prosecutor, and this alternation between the two offices would be continued. This interchange between the personnel of the prosecution and that of the defense would give a wide experience to all the members of the crimnal bar and would prevent the bias which now tends to develop either for or against the defendant through exclusive work either for the defense or for the prosecution.

But this special training for criminal practice which would be made feasible by the introduction of public defense is of still greater importance, for from the ranks of the public prosecutors and defenders would be recruited the judges for the criminal bench. These judges would be much better prepared to perform their important social functions than the members of the criminal bench of to-day. By the study of law and of social science they would

appreciate much better the relation between society and the criminal and would understand the significance of crime in the social economy. By the study of the scientific methods of gathering evidence, the psychology of testimony, the law of evidence and the technical rules of procedure they would be much more competent to judge as to the commission of crime. By the study of the social and anthropological causes of crime and the scientific methods of penal treatment they would be able to prescribe treatment for the criminal much more wisely. This preliminary theoretical education would be supplemented, as we have seen, by an extensive and varied practical experience in connection with the police, in the prisons, and in the different branches of criminal procedure.

These judges would be able to gather a great deal of anthropological and sociological data which the judges of to-day are incapable of doing. These data will be of the greatest value in developing the science of criminology and increasing its application to procedure. Upon the decisions of judges will be based a system of jurisprudence which, though it can never be as exact as a jurisprudence based on a penal code, will yet increase the wisdom and certainty of decisions as time goes by.

It is evident that in this new system of procedure it will no longer be possible to elect to office public prosecutors and criminal judges. In the old days when the power of kings and of the aristocratic class was still great the election of judges was an important guarantee of popular rights. But in our modern democracies such a guarantee is no longer necessary. If the criminal bar and bench is to become a special profession, it is essential that the tenure of office should be more or less permanent. Sufficient control over this profession could be exercised in most cases by a board of discipline composed of high executive, legislative and judicial officials. On account of its composite character as representing all branches of the government this board would be impartial when exercising its power over the judiciary. Public impeachment could be used as a control in extreme cases.

We can now see that public defense would make possible the development of a new system of criminal procedure in which the criminal bar and bench would receive special training and would be appointed according to a merit system and in which the largest use would be made of the data and inductions of criminological science, thus making the trial a much better basis for the individualization of penal treatment. It is impossible for us to discuss here

all the details of this new procedure, while many of its features will have to be worked out in practice.

It may be contended that if both prosecution and defense are to be conducted by public officials this opposition between two sides might as well be abolished and the procedure be conducted by one group of officials who will judge impartially. It is true that public prosecution and public defense are both of them social functions and represent the same social interests. But for practical reasons the partisan feature of criminal procedure would have to be retained, for a time at any rate. The partisan trial is useful for the presentation and exposition of evidence and for arriving at a practical conclusion.[8] It is hardly possible for a single mind to go over all the data of a case and arrive at a definite conclusion when these data are very complex and are not sufficiently complete to afford scientific accuracy, as is the case in most criminal trials. It is, therefore, necessary to have the evidence on each side presented in as striking a manner as possible to the unbiased mind of the judge, in order that he may weigh the evidence quickly and come to a definite decision. By making the opposing sides in the partisan trial equal in ability, as would be the case with public prosecution and defense, the tendency of advocates to be biased would be neutralized. But if a better method of presenting evidence and of arriving at a decision than the partisan trial is devised, it may be possible to abolish the partisan trial and with it prosecution and defense from criminal procedure.

Before ending this article I wish to speak of another subject which, though not coming under the head of public defense, is yet closely related to it. The logical sequel to public defense would, I believe, be free civil justice; that is to say, the employment of attorneys by the public for the pleading and defense of civil cases. There is no more equality before the law for rich and poor in the civil courts than there is in the criminal court, for the possibility of winning his case, however much in the right he may be, for the plaintiff or defendant in a civil suit depends very largely upon his ability to secure efficient counsel. There will not be justice for all until both criminal and civil procedure is made free. It will, of course, be contended that free civil justice would stimulate an excessive amount of litigation. This is probably true, but measures

[8]E. Ferri: *La Sociologie Criminelle,* Paris, 1905, p. 524. Faustin Hélie: *Traité de l'Instruction Criminelle.*

can and will be devised for preventing unnecessary litigation by imposing certain penalties upon the losing side in civil suits, as, for example, the payment of costs, and by other means. In the long run, free civil justice would probably cause less work for the court than the present system, because much time would be saved which is now wasted by private counsel over technicalities in order to increase the size of their fees. Free civil justice would prevent a good deal of crime which is now caused by the lack of financial resources for the bringing of civil suits and by the slow administration of justice in the civil courts.

And finally it will be contended that public defense and free civil justice will require a large expenditure on the part of the state. But such expenditure will certainly be justified by the equalization of justice for rich and poor and by the socialization of criminal and civil procedure. Furthermore, in all probability the state will be more than recompensed in the long run for this expenditure by the marked diminution in the amount of crime which will certainly result from public defense and free civil justice.