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## In Defense of the Public Defender

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## IN DEFENSE OF THE PUBLIC DEFENDER.

ABRAM E. ADELMAN.<sup>1</sup>

The necessity of creating the office of "Public Defender," now established in Los Angeles and in Houston, Texas, is being urged for the county of New York by Mayer C. Goldman, of the New York bar, in an able paper, partly quoted in *Bench and Bar* for June, 1914, and commented upon in both that number and the issue for July, 1914. The demand for this office is a reasonable one upon both philosophic and practical grounds. It would not be contended that the basis of the prosecution of crime by the state is the satisfaction of the desire for revenge by the community in general, or the friends and kinsmen of the victim in particular, against the criminal. Nor does the state prosecute crime, primarily to punish the violator of its criminal code. The state itself prosecutes crime because private reprisal by the injured party and his friends against the criminal and the latter's counter reprisal would destroy all order, though, in this maintenance of order, the state does, incidentally, satisfy private vengeance. But on this theory, it is just as important for the state to defend the accused as to prosecute him, lest the first reprisal against the accuser or the state itself come from one who thinks he has been, or perhaps has really been unjustly punished on account of the power of the state having been lent to the prosecution alone. There is as much danger of the destruction of public order from the use by the state of its resources to prosecute only, as there would be in its use of its resources only to defend those charged with crime. Thus, public order can, in the long run, rest only upon an even handed system of justice which defends, theoretically and practically, as efficiently as it prosecutes, those charged with crime. Every student of law knows that theoretically, it is as much the duty of the State's Attorney and the court to attempt to confirm the claims of those who are charged with crime that they are innocent; as to confirm the charges of their guilt. Legal history shows that in state trials as far down as two hundred and fifty years ago, the accused was not permitted to have counsel to represent him, and had not the right to compel the attendance of witnesses in his behalf by subpoena, because it was said by the court and prosecutors, "We will protect you better than your own counsel, and will ourselves bring in the witnesses to prove your innocence"—a rather anomalous practice—human nature being what it is—of a good enough theory.

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In counties of sparse population, the state's lawyer may perform the double function of prosecutor and defender properly. There are not sufficient "cases" (every one of which concerns a human being, by the way) to require a huge machine of the law to deal with crime. Hence, each case can be given all the attention it deserves from the viewpoint of both guilt and innocence. Furthermore, in such communities, the population is usually familiar with the person concerned, his reputation and his past conduct, and as much of the nature and details of the offense as it can be given an outsider to know, and so the State's Attorney is to some extent held to an even and impartial discharge of his duty as a punisher of guilt as well as a defender of innocence, by an intimate public opinion, yet is prevented from becoming only a prosecutor through routine or inertia, to vent his personal animus, or to make a record; though a stranger in a small community, unfortunate enough to be charged with a serious crime, does not get the benefit of these forces and often fares worse than in a center of large population. But in such centers, the "cases" are so numerous and concern those who are poor and obscure to such an extent, that it would seem expedient, for the sake of efficiency alone, to commit the duties of prosecutor and defender to separate public officers.

As for the judge, either in a small or large community, he is, under our system of law, only a referee between two contending lawyers in those criminal cases, where even a guilty defendant has able and high priced counsel to "save the record;" while in the case of a friendless and innocent, but perhaps bewildered defendant, caught in the machinery of the law, he may work his will, colored by the point of view of the State's Attorney, who has necessarily taken his point of view from the reports of many cogs in a large machine, whose chief function, at least, is to prosecute guilt and not to unearth innocence.

It is true that large daily newspapers produce to an extent, the same effect of giving the public information of crimes, in great centers of population, that the personal contact of small communities produces. But this information does not cover the great numbers of cases in which the poor and obscure are charged with and tried for crimes and misdemeanors—cases which do not happen in small communities.

The institution of the "Public Defender" is simply the systemizing of the double function of the state in dealing with crime, made necessary by conditions in large centers of population; and like any process in which there is a division of labor, the work in each department comes to be performed with greater efficiency and precision, and with less waste and at smaller cost. The work of each division co-operates into a whole process such as is never produced without a division of labor.

It is logical to suppose that with the institution of the Public Defender, the prosecutor's office would require but half of the working force, which it now needs. For, on the argument of the defenders of the present system, half of the prosecutor's energy is presumably used to establish the innocence of those charged with crime. Thus it would seem that the plan of the public defender would not only not cost the public more than the present system, but on account of the saving through the division of labor, would tend to cost the state less to deal with crime.

Of course, the change would chiefly affect the needy, the weak, the lowly and all that class which is usually submerged in centers thickly populated, but society owes a duty to these because it is chiefly responsible for their existence. At the present time, it is thought that this duty is discharged when the court appoints a lawyer to defend the person accused of crime who cannot hire his own counsel. There may be exceptions, but it is undeniable that as a rule such work is given to young and inexperienced lawyers, who hurt the cases they defend, as often as they help them. But whatever the result of such practice is, it is unfair either to able practitioners or to inexperienced and incompetent ones alike, to require them to give their services for nothing, as long as the present system of the privately paid trial bar exists in the profession of the law.

Changed economic and social conditions have made businesses of all activities, usually called professions and particularly so of the law. The law business consists in turning as many matters into fees as possible. As long as the lawyer does this in the course of practice in his office, the public is not directly concerned, but when the lawyer comes with the case of his client into a court, maintained at public expense and there at the expense of the people, maneuvers and conducts a battle with the opposing side, for the purpose of winning his client's case, the absurdity and evils of the present system of a privately paid trial bar are apparent. Suppose that the scientists were paid to determine the laws of medicine, or chemistry or mathematics or any other science according to the interests of the men who paid them. How far would the human race have traveled along the path of progress on which science has led it? Nothing but a trial conducted in the spirit of the scientific investigator and not the spirit of the hired fighter is to the interest of the public, which pays the bill in the long run. In no department of the administration of the law are the evils of the present system of a privately paid trial bar more manifest than in the administration of the criminal law. Under the system of the public defender, as well as the public prosecutor, both sides would be operating under a

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system tending to elucidate the truth, whichever side it hurt or benefited and not to win the case. The fact that the defendants who were unable to hire private counsel would be the chief beneficiaries of such a system, while the evils of the present system would still obtain in the cases of those who could hire private counsel, is no argument against this reform, but rather an argument in its favor. It seems to the writer that an innocent man charged with crime, would rather be represented by the public defender with his organization at the service of his case than by private counsel, even if he could afford such counsel. If all defendants in criminal cases cannot be compelled to resort to the public defender for constitutional reasons, so much the worse for these constitutional reasons, rather than for a system which would sweep away some of the obvious evils of the administration of our criminal law.