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Defender in Criminal Cases Recommended in Cleveland

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DEFENDER IN CRIMINAL CASES RECOMMENDED IN CLEVELAND[1]

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A careful study of the entire administration of the criminal law in Cleveland has just been completed. The results of the study are to be made public in a series of six reports dealing with the various functional parts of the system as a whole. The first of these reports, that dealing with the courts, was published on September 4, 1921.[3] This undertaking is of more than local interest because in certain respects it is a unique contribution to a more intelligent understanding of how our judicial institutions actually work.

The entire work was under the supervision of Roscoe Pound, Dean of the Harvard Law School, who was assisted by Professor Felix Frankfurter, also of the Harvard Law School. As men who are familiar with modern currents of legal thought are aware, Dean Pound's great contribution to legal thought in this country has been his insistence on examining legal principles and court systems on the basis of the *results* which they obtained. This inductive method of reasoning from the facts is almost the exact opposite of the method of the earlier school of jurisprudence whose disciples tended always to seek for eternal principles of right and justice and then to deduce everything else from those main principles. It was inevitable, therefore, that the Cleveland study should be a search for facts. Thousands and thousands of criminal cases were analyzed step by step as they proceeded from arrest, through the prosecutor's office, and through the courts. From these facts the picture of existing conditions in Cleveland was drawn and on the basis of these facts concrete recommendations were made.

This rather tedious introduction is made not alone because it is essential to a correct understanding of what follows but because the philosophy back of it contains a fundamental idea which all of us who are interested in the public defender movement need to keep steadily in mind.

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[1]Read by title at the thirteenth annual meeting of the American Institute of Criminal Law and Criminology, in Cincinnati, Ohio, November 19, 1921.

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[3]"The Criminal Courts," published by the Cleveland Foundation, Cleveland, Ohio.

There are three main reasons why the public defender idea does not make more rapid headway. The first of these is that the word "public" connotes to many lawyers a new elected public official and in cities where municipal politics are unwholesome the idea opens new vistas of graft, corruption, and incompetence. This is a very practical question which apparently must be met now and in the immediate future by an opportunist and experimental policy. If in California the civil service system works well, then to have the public defender a civil service official may meet the difficulty; in Connecticut, where the judiciary is held in the highest respect, the method of having public defenders appointed by the judges is obviously an excellent system; in New York City where politics are troublesome the Voluntary Defenders' Committee, a private organization, is probably the wisest solution.

The second difficulty comes from a confusion of thought. There is a widespread feeling, as evidenced by Mr. Kavanaugh's able address before the American Bar Association in August, that we have been betrayed by a false sentimentality and have "slopped over" in our treatment of criminals, and that it is high time to retrace our steps and to insist on crime being punished. The crime wave has intensified the feeling that we should do more *to* criminals and less *for* them. By a non sequitur in reasoning the conclusion is reached that the public defender is undesirable. The confusion of thought is obvious. More severe treatment of men *after they have been found guilty* of crime may be necessary. That has nothing to do with the public defender. His function is so to coöperate with other agencies of criminal justice that the guilty shall be found guilty and the innocent shall be acquitted. His task exists *prior to the finding of guilt or innocence* by the jury. Because proven criminals should be repressed more sternly is no argument for being careless about whether or not we convict the right man.

The third difficulty, and I believe the most obstinate difficulty, arises from the mental attitude of sincere, capable lawyers who are out of sympathy with the whole idea. It is here that we must keep the philosophy of the situation clear if we are to progress. These gentlemen were trained in the analytical school of thought which held undisputed sway in the nineteenth century and still today very largely dominates legal thinking. Such lawyers are just as anxious as we are that justice should operate equally and impartially. They study our statutes and find them in the main adequate and entirely impartial. They see the vast machinery of justice which we have erected and support and they draw the not unnatural conclusion that we have done

all we need to do, that with a big administrative machine to enforce an adequate body of substantive law we have enough. This mode of thought dominated all legal thinking until Dean Pound's address before the American Bar Association in 1906 on "Cause of Popular Dissatisfaction with the Administration of Justice," in which he made as his test the actual operation of the law in actual cases. His whole emphasis was on the need for relating law to life. He contended that even if a system looked perfect on paper or in law books that was not enough, that we must see how the system *works,* how it affects human beings, how far it measures up to the needs of the community.

It is only by following this method that we can satisfy the bar that there is a genuine need for the public defender. This, I think, we have failed to do. We have inclined to meet theory with theory. Of course it is difficult to get all the facts. Such a procedure is expensive and time-consuming. But the Cleveland study was precisely such an investigation of facts at first hand. As the report based on this study recommended a defender in criminal cases for Cleveland it is a valuable addition to the science of the subject of the public defender.

In thinking of the public defender in national terms we must remember that in different states the situation is radically different. There are three situations.

The first is exemplified by Massachusetts where (except in capital cases) counsel are not assigned. The defendant hires a lawyer or goes without. Here the argument for the defender is that such a situation is unfair; that our system of justice is predicated on the principle of a fair trial before a jury in which both parties are represented by counsel. When *in fact* one party is deprived of counsel the theory of an impartial administration of justice is vitiated.

The second is exemplified by New York where counsel are assigned but not paid. Here the argument is that, although the system in form guarantees a fair trial in substance, it fails to do so because the burden put on the assigned lawyer is palpably unfair. It is unjust to expect any man who must work for his living to give largely of his time without remuneration and further to expect him to pay out of his pocket the necessary expenses incidental to any thoroughgoing trial. To consider such a system as adequate is to refuse to face the facts.

The third situation is exemplified in Cleveland where counsel are regularly assigned and are paid at least an honorarium from the county treasury. In other words, in Cleveland the assignment system has a fair chance to operate successfully. As will be seen later it does

operate well. Here the argument appears in its most interesting form, for it is the assignment system at its best versus the public defender. This is of special importance to us because if this argument can be fairly won then our case is complete. Walton Wood made the first careful attempt to do this when he studied and compared the results of the Los Angeles Public Defender with the assigned counsel system in Milwaukee where counsel are paid. In a sense this is the crux of our whole contention. We might, for example, convince Massachusetts and New York and states with similar systems that their machinery was inadequate, but we might be met with the point that they would establish the paid assigned counsel system. The case for the public defender fails unless it can be demonstrated that it is a method superior even to paid assigned counsel. The Cleveland facts are an interesting contribution on this exact point.

The Cleveland report in summarizing the assigned counsel system said this:

"In Cleveland assigned counsel play a large part, quantitatively, in the administration of justice. Counsel appointed to defend an indigent person receives $10 for preparation of the case, and $10 per day in court up to $50. A larger sum is allowed in capital cases. In 1920 assigned counsel were paid the sum of $32,500. This may be compared with $41,072.76 allowed the prosecutor's office for salaries in the same year. The prosecutor's office is responsible for at least six times at many cases as the assigned counsel, in addition to handling the civil business of the county.)

"There is no fixed policy with respect to appointing counsel. At the opening of the term, lawyers desiring such practice give their cards to the judge. Formerly the prosecuting attorney recommended lawyers, but under Samuel Doerfler an order was issued prohibiting this practice. As a rule, very young attorneys or incompetent older men are appointed, because successful lawyers do not seek the business. In important cases the judges seek to appoint abler men, and some eminent lawyers have served on such appointments from a spirit of professional duty. In the usual run of cases, however, the appointing of counsel is not taken very seriously. 'It doesn't make much difference,' remarks one judge, 'the defendants are usually guilty anyway.'

"It is apparent that such appointments must to some extent become a reward to habitues of the courtroom. Among the 1919 cases, exclusive of instances in which more than one counsel appeared, 114 were appointed once, 31 twice, 25 three times, 14 four times, 9 five times, 7 six times, 3 seven times, 2 eight times and 1 nine times. One hundred and seventy appointed lawyers appeared a total of 251 times, compared with 36 who appeared a total of 189 times."

Aside from the difficulty that the assignment of counsel tends to become a hum-drum matter of routine performed without especial pains (a failing from which no organization, not even a public de-

fender organization, is wholly immune) the facts seem to be that the assigned counsel have done creditable work in the Common Pleas Court.

On this matter it is easy for the skeptical to vitiate all figures by raising the question of the actual guilt or innocence of the defendants in the cases from which the figures are drawn. By saying that even if assigned counsel acquitted as large a proportion as paid counsel that proves nothing because perhaps all the assigned counsel's clients were innocent and all the paid counsel's clients were guilty one raises a doubt which can be resolved by no earthly tribunal. But I think it is reasonable to argue that in a reasonably large group of cases the chances all are that both types of counsel have to deal with approximately the same material. Certainly no one would claim that merely because one accused man was poorer than his fellow he was more probably guilty; nor would anybody claim the converse. While poverty may lead to crime, poverty does not raise a presumption of crime.

The Cleveland figures are valuable because they cover 2,539 cases, which is, I think, a larger number than has ever been analyzed before. And they have the further interest in that they yield three sets of figures, one showing the work of assigned counsel, one showing the work of the ordinary privately paid attorneys, and one showing the work of that particular group of men who practice so much in the criminal courts that they become designated as "professional" criminal lawyers. In defining this last group in Cleveland, lawyers who had more than ten cases begun in 1919 in the Common Pleas Court and who were generally reputed to have political standing or affiliations were included.

The figures as to the disposition secured by each group in their cases up to the point of sentence are contained in the following table. They are based on the records of cases begun in the Common Pleas Court in 1919.

DISPOSITION OF CASES SECURED BY ASSIGNED COUNSEL, PRIVATELY RETAINED COUNSEL, AND "PROFESSIONAL" CRIMINAL LAWYERS

Disposition	All Cases	Per Cent	Counsel Assigned	Per Cent	Counsel Retained	Per Cent	"Prof." Criminal	Per Cent	Exact Status Unknown
Total Cases	2,539	100	527	100	846	100	412	100	754
Pleas									
Original pleas of guilty	428	17	2	.3	23	2	10	2	393

Disposition	All Cases	Per Cent	Counsel Assigned	Per Cent	Counsel Retained	Per Cent	"Prof." Criminal	Per Cent	Exact Status Unknown
Not guilty changed to guilty	550	22	142	27	266	32	101	25	41
Not guilty changed to guilty of misdemeanor	193	7	68	13	84	10	33	8	8
Other pleas	44	2	4	.7	5	1	3	1	32
Total pleas of guilty	1,215	48	216	41	378	45	147	36	474
Trial									
Guilty of felony.....	293	11	118	22	104	12	60	15	11
Guilty of misdemeanor.	74	3	18	3	36	5	17	4	3
Not guilty of felony...	215	8	57	11	104	12	50	12	4
Not guilty of misdemeanor	8	1	0	0	8	1	0	0	0
Total tried	590	23	193	36	252	30	127	31	18
Nol-Pros									
"Nolled" on all counts.	399	15	61	12	151	18	104	25	83
All other dispositions...	335	14	57	11	65	7	34	8	179

Glancing the eye over the above basic table, it is obvious that no sharp discrepancy unfavorable to the work of assigned counsel appears. Their work measured against the general average of "all cases" is normal or better; compared to "counsel retained" it is again certainly not markedly inferior. Apparently the clients of the "professional" criminal lawyer fared better than the indigent defendants, but they also fared better than the clients of the average private lawyer, the non-professional criminal lawyer. The only marked lesson to be drawn from this table is that specialization seems to pay.

This table is, of course, only half the picture. What happens after sentence is almost as important to the individual defendant as the jury verdict. For practical purposes it is better to be found guilty of a felony and paroled than to be found guilty of a misdemeanor and sent to jail.

DISPOSITION OF SENTENCES OBTAINED BY ASSIGNED COUNSEL, PRIVATELY RETAINED COUNSEL, AND "PROFESSIONAL" CRIMINAL LAWYERS

Disposition	All Cases	Per Cent	Counsel Assigned	Per Cent	Counsel Retained	Per Cent	"Prof." Criminal	Per Cent	Exact Status Unknown
Total Cases	2,539	100	527	100	846	100	412	100	754

Disposition	All Cases	Per Cent	Counsel Assigned	Per Cent	Counsel Retained	Per Cent	"Prof." Criminal	Per Cent	Exact Status Unknown
No sentence stated.....	937	36	170	32	325	38	182	44	260
Total sentenced	1,602	64	357	68	521	62	230	56	494
Sentence suspended	351	14	60	11	112	13	58	14	121
Sentence executed	1,251	50	297	56	409	49	172	42	373
Felonies									
Sentence suspended	241	9	47	9	77	9	38	9	79
Sentence executed	663	26	199	38	176	21	86	21	202
Misdemeanors									
Sentence suspended	110	4	14	3	35	4	20	5	41
Sentence executed	588	23	97	18	232	28	86	21	173
Fine only	297	12	15	3	125	15	40	10	117

Here again, in my judgment, the figures do not show any gross inefficiency on the part of assigned counsel. The figures again show, however, that the clients of the "professional" criminal lawyer on the whole fare the best.

In the preceding two tables the complete figures have been given so that they might be available for persons who might desire to use them in other connections, and the percentage figures given are in each case the percentage of each item to the total cases in each column. This has been done in order to afford the general view of the conduct of the work as a whole by each type of attorney.

For our particular purposes it is possible to simplify these figures and to present them in the following way.

The first task the defendants' lawyer has is to get the case dismissed in some way if he can, as by nol-pros, quashing the indictment, lack of prosecution, etc. In every jurisdiction many cases are disposed of in this way.

The figures in Cleveland are:

	Assigned Counsel	Counsel Retained	Professional Crim. Counsel
Nol-prossed and other dispositions...	23%	25%	33%

Failing such disposition, counsel must then plead guilty or try the case. And the figures are:

	Assigned Counsel	Counsel Retained	Professional Crim. Counsel
Clients pleaded guilty.....	41%	45%	36%

The remaining cases went to trial and the results of trial were:

	Assigned Counsel	Counsel Retained	Professional Crim. Counsel
Guilty	70%	56%	60%
Not guilty	30%	44%	40%

We can combine these figures into two groups: first, those discharged or acquitted; second, those held for sentence either through a finding of guilty or a plea of guilty:

	Assigned Counsel	Counsel Retained	Professional Crim. Counsel
Held for sentences	67%	62%	55%
Released	33%	38%	45%

After defendants have been sentenced there is still one more thing for counsel to do and that is to try to secure a suspension of the sentence. Of the cases where the records are clear so that the dispositions are accurately known these are the results:

	Assigned Counsel	Counsel Retained	Professional Crim. Counsel
Sentence suspended	17%	21%	25%
Sentence executed	83%	79%	75%

I submit that in the face of such facts the need for the public defender in Cleveland could not be proved by using the conventional argument. It simply is not true to say that in Cleveland the assigned counsel system is a failure or that poor persons accused of crime do not have a fair trial.

Yet the report on the Criminal Courts advocates the substitution of the defender plan for the assignment plan and in its recommendation indicates its reasons, as follows:

"The assigned counsel system should give way to the more modern, more efficient, more economical 'public defender' system. The greater success attending the assignment of all cases of all accused poor persons to one central responsible agency has been demonstrated in Los Angeles. The legislature of California, in its last session, made provision for extending this system throughout the state. Because of the generally upset conditions in Cleveland it is recommended that, for the time being at least, this work be entrusted to quasi-public, rather than public, hands. The precedent of the New York Voluntary Defenders' Committee is applicable. To accomplish this improvement neither a statute nor an appropriation is required. The work of representing poor persons in criminal cases is so closely analogous to the work of representing poor persons in civil cases, now undertaken by the Legal Aid Society, that the two functions should be combined in one agency, as has been done in New York. This one legal aid organization should be created, supervised, and controlled by a special committee of the Bar Association which is the properly responsible body. Having available such an organization, the courts could, and, if the organization merited confidence, would assign to its attorney, in charge

of its criminal work, all the cases now entrusted to assigned counsel. In view of the general experience throughout the country it would be surprising if a budget of $32,500 (the cost of assigned counsel in 1920) did not enable such an organization to handle 528 cases, of which only 194 required trial, more efficiently and justly than they are now handled. To this quasi-public defender office the Municipal Court judges could refer cases when, in their opinion, the defendants needed counsel for a fair trial. This office would, in co-operation with the probation staff, be of material assistance in securing that information which the court needs to arrive at a just sentence. Finally, such an organization, through its constant contact with the criminal work of the courts and through its reports, would be the sort of guardian and watcher which is essential if the public is to be kept intelligently informed of what goes on in its legal institutions."

The Cleveland situation helps to indicate two reasons for the superiority of the defender plan—efficiency and service—which are, in my opinion, stressed too little in the literature of the public defender idea.

In these days of high costs efficiency of organization which produces economy is given heed. It is logical to suppose that where all the cases of poor persons are centralized in one office instead of spread around in a large number of offices there is a resulting efficiency which reduces cost. The figures confirm this. In 1920, assigned counsel in Cleveland handled 528 cases at a cost to the county treasury of $32,500. For several years the Los Angeles Public Defender has had about as many criminal cases (522 in 1917), has in addition cared for several thousand civil cases (8,000 in 1916), at a cost to the county treasury of from $20,000 to $25,000.

The efficiency resulting from specialization is a factor which needs no explanation to any practicing lawyer. Earlier tables have indicated the extreme skill gained through intense specialization by the "professional" criminal lawyer. Indeed one reason why the assigned counsel system has in fact done so well in Cleveland is because there has been a certain specialization among the assigned counsel; they had their private criminal practice and received several assignments; thus one received nine assignments, two received eight, three received seven, seven received six, nine received five, and fourteen received four assignments, and so on.

The defender's office can and should render a distinct public service which no assigned counsel system can render. With the growing complexity of society and with the increasing difficulty of solving its problems wisely it is becoming daily more obvious that we cannot

afford to waste any first-hand information about our institutions. Elihu Root has stated this general proposition in these words:

> "The creation of institutions which, in an orderly way, may crystallize and present and preserve the opinions of men who are especially competent to form them in each field and branch of public affairs, is a necessary part of the process of free self-government."

The public defender's office itself becomes an institution crystallizing experience, collecting facts, formulating opinions, and interpreting to the public one vital aspect of one of society's most vital institutions—the enforcement of the criminal law in the courts. Five hundred cases a year intelligently studied and followed through the courts can be made to yield a wealth of information if those cases pass through one office. But when they are dissipated through 114 offices (as in Cleveland) the lessons of experience are lost.

We have no bureaus of justice in this country, as in France, but the public defender offices can be bureaus of justice within their own fields. The criminal law cries aloud for reform. There is no ideal code ready at hand. Progress is to come only by the method of trial and error.

In this process the defender's offices can well become the leaders. They are in the thick of it. They know. They can prove their conclusions by first-hand evidence. They can render a unique public service, a service of which society stands in great need.

The defender plan thus stands superior to the assigned counsel plan, first, because it guarantees an equal administration of the criminal law and does so more efficiently and economically than the assigned counsel method even at its best, and second, because as a central responsible agency it can render a valuable public service, which the assigned counsel method cannot, in exercising a watchful vigilance, in informing public opinion, and in contributing to the reform of criminal procedure.