

COMMENT AND CASE NOTES

WHAT STATE DEFENSE IN CRIMINAL PROCEDURE PRESUPPOSES

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The basic pattern of criminal procedure, characterized by its distribution of the court drama among three protagonists—the prosecutor, the defender, and the judge—is a deep-rooted possession of all civilized peoples. The old inquisitorial process which, uniting the roles of the prosecutor and the judge, ignored the figure of the defender, has been abolished in all parts of Europe for more than a century. Its crude spiritual replica from America's pioneer front, the justice of Judge Lynch, has almost disappeared. Occasional relapses arise mostly from the dismal swamp of racial barbarism. Even those special courts that wield their sham justice in times of purposeful mass hysteria, cling generally to the pretense of the basic tripartition. We need, for an example, only to point to certain Axis tribunals.

Yet, in spite of world-wide acceptance of this and other fundamentals of criminal procedure and of their unscathed survival against the corrosion of time, hardly any human institution gives a more acute feeling of inadequacy than our procedure for the determination of criminal guilt. It excels in conveying this painful impression, probably because it occupies such a vital area of social life. Here, more than anywhere else, a reasonable optimum is imperative.

With this in view it may not seem altogether unjustified to devote some critical attention to the idea of state defense, as advocated so zealously for many years by the late Mayer S. Goldman. According to Mr. Goldman's plan¹ the public defender is meant to replace not only the assigned defense counsel and the voluntary defender, but also the private attorney of what he calls the "rich criminal." The office of the public defender is thus visualized by him as an integral part of the *public* function of administering justice. Accordingly, the office is to extend defense not only to the poor and those who wish to avail themselves of its service, but, as a

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¹ Public Defenders in criminal cases, in *Annals of the Am. Acad. of Pol. and Social Sci.*, Sept., 1939, pp. 16-23.

matter of compulsion, to all defendants, including the monied "criminals." Just as a suspect cannot choose his district attorney, he should not be permitted to choose his lawyer, but should be defended automatically, publicly, and compulsively by the defense department of the court.

Through the public defender plan the innocent are amply protected, while the vicious and dangerous criminals are not over-defended. In fact, the professional crook or gangster prefers private counsel, for obvious reasons. The one thing which such a criminal does *not* want is justice. Under the public defender plan the guilty get only what they are entitled to—a fair trial—and no more.²

In these words Mr. Goldman discloses a second feature of the plan. The public defender is visualized as an officer of the court to the extent of no longer taking sides with the accused human being, but of *promoting justice*.

With this conception, the plan strides unconcernedly over a fundamental problem of legal ethics. Should the lawyer conceive of himself, in criminal cases, as one whose unrestricted obligation it is to put the fullness of his legal knowledge, wits, imagination, astuteness, psychology, and eloquence at the defendant's disposition? Is the attorney, in other words, to supply the defendant with improved mental tools for his defense, which remains *his*, the defendant's defense? Or may the lawyer, in contrast to such a clear course, set himself up as a kind of preliminary court? No doubt, it is this that the quotation suggests. May he examine and adjudge the case for himself, and then decide which of three alternatives he will choose?

He may defend the accused wholeheartedly and unrestrictedly. He may drop him and his cause. Or he may defend him restrictedly, within the limits of "guilty" pronounced in the "preliminary court," before the *court* has examined the case. There is, of course, also the possibility that the client has confessed to the lawyer. But even in this case it is necessary to distinguish, whether or not the client has reached that significant and rare preparedness to accept whatever society will inflict upon him. Only such a qualified confession can form an indisputable authorization for the lawyer to plead within the confines of "guilty."

This whole problem has, so far, defied a truly profound answer that would be accepted and acted upon by a solid majority of lawyers. Not only are different lawyers likely to solve it for themselves differently, but even the same lawyer will, by implication and action, solve it differently in different cases. Lawyers reserve, in fact, the freedom to decide upon the nature of each case for either full defense, rejection, or restricted defense.

² *Ibid.*, p. 20.

This last alternative is the actually questionable point. It amounts, most generally, to defense *at variance with the intentions of the defended*.

The brevity of this article bars, of course, any attempt to advance into the maze of this difficult problem of legal ethics. By pointing to the lack of its solution I do not, on the other hand, endeavor to block Mr. Goldman's path completely. This much, however, is self-evident: the call for a public defender, who would be expected to refrain from "over-defending," demands categorically to be balanced by another call. Opposite a public defender so conceived we must expect to see a public prosecutor who, likewise, views the promotion of justice as his only goal. And it should be said clearly that justice and the achieving of convictions are not always identical—far less so than is dreamed of in the philosophy of most lawyers. If the public defender is supposed to operate on the principle of self-control and self-restraint, then the public prosecutor, too, would have to function on this principle. He would have to consult his conscience more than his ambition or that of his superiors. He would have to be prepared to drop his accusation willingly, if the facts warranted. And he would have to be considerably more scrupulous about the means of establishing the defendant's guilt than certain current practices suggest. Mr. Goldman's resentment at criminals, who do not want justice and therefore prefer a private lawyer to state defense, is out of place. As long as our courts teem with district attorneys who, imbued with and moulded by their professional suspicion, are bent on achieving convictions—convictions for greater crimes than committed—it will not be surprising if the accused prefer private lawyers to state defense with a "clipped" defense program. They will be justified in so choosing, whether they are guilty or not.

It may be presumed that those who approve of the public defender styled after Mr. Goldman's ideas, would not find much difficulty in conceding this demand and in saying: "Well then, let's also have public prosecutors who are animated by the desire to find the truth, to accomplish justice. Let's have men who will not indulge in *over-accusing*, and occasionally will even become the best defenders of the accused, when truth and justice so demand. Let's have idealistic, progressive district attorneys, even if some people might contend that there is, *just now*, a dearth of such men."

Such anticipated compliance gives cause to weigh another ensuing question. If the public prosecutor and the public defender are equally to strive for justice, why do we need both of them, in addition to the judge? Why can the public prosecutor not also harbor in his body the public defender? Why do we not have simply a referee, whose public office it is to

prepare the trial from both viewpoints. This referee would sound in one case, according to its merits, more like a prosecutor, in another more like a defender, and in either somewhat like both. Not only decreased expenditure but ideological progress would be the result.

Little deliberation is needed to realize that the creation of such a unified agency, in place of the present team of antagonistic agencies, could not work out to satisfaction. Not yet, to say the least. Men are not ideal, and never will be. Controls and counter-controls for their restraint and help are necessary. The "division of powers," which is the principle of controls and counter-controls, is one of the fundamentals of constitutionalism, and springs from the recognition of human fallibility. It is sound realism not to rely on the inner conflict of two opposing principles in one man, but to bring this conflict into the open by placing each of the two untrammelled principles in different promoters. The separation of the prosecuting from the defending agency is in keeping with living facts. It will stay in keeping with them until entirely new concepts of criminology, an entirely new reaction of society to noxious behavior of individuals, will reshape criminal law and procedure completely.

And so back to Mr. Goldman's plan of the public defender. The basic tenet that it is a *public* concern to supply defense for poor accused or those who wish to be defended publicly, as much as it is a public concern to provide prosecution, admits of no denial. It is constructive and points into the future. If the additional feature of imposing upon the public defender, however, professional ethics different from those now acted upon by private lawyers is to deserve consideration at all, it presupposes a thorough reform of public prosecution. To replace private defense completely by state defense, instead of combining the two as elective, is open to momentous criticism.

Everyone will admit that defense at the hand of a highly qualified and specialized private attorney is, in general, more effective than the defense of an employed attorney within the framework of a public defender's office. The numerous cases handled by such an attorney cannot conceivably arouse in him, even if the merits of a particular case warrant it, that outstanding, ultimate effort of which a private lawyer is capable. Priceless goods—reputation, liberty, freedom from mental agony, even life itself—are at stake in the criminal courts. How can one justify preventing a man of sufficient means from securing for himself the best of chances to protect these goods? It would be devious to refer to such men, as Mr. Goldman does, as "rich criminals." Only the end of a trial may furnish a reasonable certainty that an accused can justly be called a criminal. Before this rea-

sonable certainty has been reached, he cannot be treated as a criminal and, accordingly, cannot be prevented from moving heaven and earth to prove his innocence or circumstances that diminish his guilt. The regrettable fact that a poor man may not be able to do as much for himself, is no sound reason for reducing the better chances of the monied.

Finally, just as medical science stands behind and beyond the health of present patients, there exists something like the cause of justice itself. What would we think of a country that failed to advance medical science because it concentrated attention on a fully equalized health service for all? And who would wish to forego the stimulation to medical research provided by the ultimate efforts of private doctors in behalf of patients who can reward them generously? These implications are valid for the development of criminal law and procedure. If it is true that the endeavors of outstanding private defenders have been responsible for some progress in the substance of criminal law and in its administration—and there can be little doubt that they have been—then it would be a disservice to society to curtail those endeavors by choking some of the forces that engender them. Even the poor would realize that the vanishing of the great defender, who can grow to his full stature only on the soil of individualism, would be a loss. Although unable to obtain his assistance except when sensational circumstances attend their plight, they, too, look to him as the potential protector of justice and, hence, of their own freedom.

FREEHOLD APPEALS—A PROPOSAL FOR PRE-TRIAL

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Our Civil Practice Act has removed most procedural questions from the field of appellate review.¹ Professor Edson R. Sunderland, the draftsman of the act, says:² "The purpose of the Civil Practice Act has been to eliminate all procedural distinctions, restrictions and requirements of a technical nature which served no substantially useful purpose."

Despite the obvious wisdom of minimizing litigation on questions having no important relation to the merits, we still have a mandatory requirement that "appeals shall be taken directly to the Supreme Court in all

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¹ See list of changes in 18 Jones Ill. Stats. Ann. 19. See also 1 Univ. Chi. L. Rev. 49 (1933) and bibliographies in 18 Jones Ill. Stats. Ann. pp. 32 and 430 (1935).

² 18 Jones Ill. Stats. Ann. 19 (1935).