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WHY NOT APPOINTED COUNSEL IN CIVIL CASES? THE SWISS APPROACH

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The author points out that the Swiss Constitution, unlike its American counterpart, guarantees the right to counsel in civil but not criminal cases. His analysis of the Swiss approach challenges basic assumptions underlying recent Supreme Court cases like Miranda v. Arizona. It also suggests lines of future development in the American concept of the right to counsel.

Americans often brag that no matter how guilty a man may be, the courts of the United States are scrupulous in guaranteeing him all his constitutional rights.

This is a brave boast but not an empty one. The Supreme Court has recently ruled that even a suspect has a right to a state-paid lawyer in every step of a case, even before police pose a single query.[1] This, argue the Justices, is the only practical method of assuring that the arrested person will not be deprived of rights embedded in the Constitution.

There is, however, no such requirement in civil cases, that is, in suits between private persons where *no* crime whatsoever has been committed. One may thus properly ask if the Court's solicitude is not misplaced. In so far as civil cases are concerned, is not the Court saying in effect, no matter how *innocent* a man may be it's not our concern whether he needs counsel to receive justice?

NO LAWYER AT TIME OF ARREST

At least one other well-known democracy has given thought to the problem herein posed and has come up with an entirely different solution from that provided in America. Before speaking of this solution, however, a word should first be said about certain aspects of its criminal law.

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[1] Miranda v. Arizona, 380 U.S. (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 206 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

In Switzerland an arrested suspect is never allowed to consult a lawyer prior to the preliminary questioning by the police. In most instances, depending upon state law,[2] he may consult one after a magistrate has decided that there are sufficient grounds for locking him up.[3] An arrested person has a right to be heard by a magistrate usually within 24 hours, although the period in some cantons (states) is 48 hours or even three days.[4]

Investigation begins immediately.[5] It is at this point that the suspect may ask for appointed counsel,[6] but his request will generally be honored only if circumstances or the importance of the case demands it.[7] Generally, a person held in "preventive detention" may consult with his lawyer,[8] but in certain cases where secrecy is of the outmost importance this may be forbidden.[9] Such would be the case if police were rounding up other members of the gang or searching for additional evidence. An untimely warning from the jailed suspect through intermediaries might easily lead to the destruction of the evidence or the flight of his accomplices. Hence the investigating magistrate—*le juge instructeur* or *d'instruction*—is permitted to pull a veil of secrecy over some criminal prosecutions and keep it there for several days.

During the period of investigation, which may last for weeks, the interrogation of the suspect is naturally the most important function of the judge. Procedures vary in the different cantons, but generally

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2 Since Switzerland is a federal state, there is a different procedure for each of the twenty-five cantons (states) plus that for the national government. Hence, the references below will generally be to provisions which seem fairly representative. But since 1942 Switzerland has had only one penal code for the whole country which defines crimes and specifies penalties. It is applied by each canton following its own procedure.

3 This right seems to be general, but it can be restricted, as will become clear below.

4 Const. de Neuchâtel, art. 7. This is the maximum.

5 The investigation is held before a *juge instructeur*. In practically every jurisdiction, the recorder is the only other person present besides the accused. *Infra* notes 8 and 9.

6 Art. 35 of the Procédure Fédérale reads: "The accused has, in every stage of the case, the right to provide himself with counsel. The judge is to inform him of this at the first questioning." This does not mean, however, that he has the right to have his lawyer present whenever he is questioned. The contrary is the case almost universally in Switzerland.

7 Art. 36 of the Procédure Fédérale lists "inexperience" or "tender age" as reasons which may justify appointing counsel. But see *infra* note 16.

8 Code de Procédure Pénale de Vaud, art. 203. This provision is fairly representative of provisions in other cantons.

9 Code de Procédure Pénale de Vaud, arts. 205, 206. Thus, for six days and possibly longer, even the lawyer is forbidden to see the person *mis au secret*. In the Canton of Valaise, *la mise au secret* "in general . . . is not to be extended beyond 14 days." Code de Procédure Pénale du Valais, art. 73. This practice, like that in France, is often criticized by lawyers in Switzerland.

speaking, the investigating judge and a stenographer are the only persons present during the questioning of suspect or witnesses. Article 118 of the Code of Federal Procedure says that the *juge d'instruction* "may permit" the suspect's lawyer to be present if he thinks it compatible with an orderly enquiry. But the cantons are absolutely free in the matter.[10] Only in Geneva is such a right extended to defense counsel.[11]

Article 41 of the Federal Procedure forbids the investigating judge from using "any force, threat, promise, any false information, or any captious question," especially "as a means for producing a confession." Many of the cantons place the same injunction upon their investigating officials.[12] But with only a stenographer present, it would be difficult to prove a violation. And even if a confession were obtained by a forbidden means, it would never be excluded as evidence during the trial, unless the avowal itself was suspect as being not true.

Once the investigation has been completed and the *chambre d'accusation* composed usually of three judges without a jury has returned an indictment, the accused may then freely consult his lawyer, even in cantons where such is denied during the investigation. But state-paid counsel need be provided only for serious crimes or if the person cannot defend himself because of his youth, his inexperience or for other reasons.[13] In some instances, however, a lawyer is obligatory even against the wishes of the accused.[14]

Rights of Accused

In contrast to the American Constitution, the federal Constitution of Switzerland mentions practically no procedural guarantees in criminal cases. Article 112 provides for a trial by jury in a very limited number of federal crimes. Article 58, which binds the cantons as well

[10] By contrast, art. 112 of Vaud's procedure explicitly denies this right. In Fribourg, the lawyer may communicate with the accused "from the moment of the conclusion of the investigation." Code de Procédure Pénale de Fribourg, art. 22, para 2. In other words, a person held in jail has no right to consult a lawyer at any time during the days or weeks when he is being questioned. In other cantons, he can consult a lawyer to prepare himself for interrogation and to decide upon a line of defense at the trial, but he is on his own before the interrogating official.

[11] Code de Procédure Pénale de Genève, arts. 64, 65. Geneva's liberal approach dates from 1849. See Loi du Canton de Genéve de 23 avril 1849, art. 10.

[12] See for instance, Const. de Fribourg, art. 6 which referring to an arrested person says, "Toute rigueur inutile . . . et tout moyen de violence pour obtenir son aveu sont interdits." See also Code de Procédure Pénale du Valais, art. 62.

[13] But see *infra* note 19 and *supra* notes 7 and 8. Likewise see Code de Procédure Pénale du Valais, art. 49, Par. 3, for provisions that are similar to those in most cantonal codes.

[14] Procédure Fédérale, art. 36, par. 3.

as the federal government, reads: "No one may be deprived of his lawful judge. Consequently, no extraordinary judicial tribunals may be set up." Practically no other guarantee is mentioned.

Even the constitutions of many cantons, where most crimes are tried, are surprisingly silent on the matter of penal procedures.[15] "Immediate interrogation" by a judge after arrest—generally within 24 hours, but some places longer—is a guarantee found in only ten of the 25 cantonal constitutions. The use of force to produce a confession finds a constitutional ban in eight constitutions. Article 6 of the Constitution of Fribourg, for instance, reads: "All unnecessary severity at the time of arrest and throughout detention of an individual, and any form of violence to obtain his confession are prohibited."

As for the right to counsel, only six constitutions make reference to such a guarantee.[16] However, the right to be defended by a lawyer is written into the Code of Penal Procedure of practically every canton. Even state-paid attorneys are provided in certain cases, as noted above. But in no case is this guarantee as ample as that now demanded in the United States by reason of recent Supreme Court rulings.[17]

RIGHTS OF THE INNOCENT

Before rushing to the conclusion that the Swiss are less concerned about an individual's rights in judicial proceedings, one must pause and give thought to the practice in a civil case. In such a case, one private person sues another private person for a private wrong. A man carelessly allows his garden hose to run all night and the water ruins a valuable painting in a neighbor's basement. No crime has been committed, no law broken; but the fact of negligence is sufficient grounds for bringing a damage suit in court. A divorce is another example of a civil action for which a state court provides the forum. Again, no crime is involved: according to different state laws, adultery, mental

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[15] For an excellent canvas of the cantonal constitutions in this area, see Clerc, "Etat de droit et procédure pénale dans les constitutions cantonales," Strafprozess Und Rechtstaat (1956). The guarantees, however, are found in the codes of penal procedure.

[16] Nor does the Swiss federal constitution mention this right. By contrast, the sixth amendment of the American constitution contains such a guarantee "in all criminal prosecutions," originally only in federal cases, now even in state criminal cases.

[17] As explained above, a lawyer is appointed for an indigent in every felony-criminal case in America, not only during the trial but even at the moment when the police begin to question him. *Supra* note 1. In Switzerland no arrested person is so privileged at this preliminary stage. State appointed counsel is provided in most cantons only if circumstances call for such. Moreover, except in Geneva, all questioning prior to the trial takes place without allowing a lawyer to be present.

cruelty, or mere incompatibility will provide grounds for the desired legal remedy.

There is no law in America and no mandate from the courts which demands that the state provide a lawyer for the parties in civil cases even if the parties themselves cannot afford one. It is quite the contrary in Switzerland. Article 4 of the Swiss Constitution reads that "all Swiss are equal before the law." In elaborating upon this principle, the Supreme Court—*le Tribunal fédéral*—has ruled that it guarantees the basic right to all "to be heard in court," and, that, to make this right meaningful, the cantons must provide a lawyer in *civil* cases, though not necessarily in *criminal* ones.[18]

The words of the Swiss Court in the leading case, decided in 1937 are as follows:

> The principle of *égalité* before the law does not impose upon the cantons the obligation to provide a lawyer except in those cases where, lacking one, a party could not normally assert his rights in proceedings. Thus free judicial assistance ought to be granted liberally in a civil matter where the handling of the trial demands knowledge of the law; it is otherwise in a penal affaire, where the enquiry is carried out officially. Cantonal legislation may prescribe that a lawyer will be provided an accused only in serious cases . . . , [such as] where the penalty anticipated is a rather long deprivation of liberty.[19]

It will be interesting to explore more deeply into the Court's reasoning. In a Swiss criminal trial, the judge participates much more actively than does his American counterpart.[20] During the preliminary investigations and hearings, the *juge d'instruction* is in complete charge.[21] According to the inquisitorial system—in America the accusatorial system prevails—he assumes the position of a neutral investigator actively inquiring into what actually took place. He not only hears the testimony of complainants but he personally seeks out evidence and witnesses that could exonerate the accused. If doctors, psy-

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18 Schefer-Heer contre Conseil d'Etat d'Appenzell Rhodes-Extérieures, 8 Oct. 1937, Arrêts du Tribunal Fédéral, 63, I, 209.

19 *Ibid.* In actual practice most of the cantons go far beyond this requirement of the Court as well as the limited demands of their own laws. Even in minor cases, nearly every indigent person will be granted counsel if he desires.

20 The same is true of the French trials and in every continental country where the inquisitorial system prevails. See Graven, "Les droits de l'accusé dans le procès pénal," 71 Rev. de Procédure Pénale 126 (1956).

21 For an example of the amplitude of his powers, see Code de Procédure Pénale du Valais, art. 61-113. What one expert has written about the French *juge d'instruction* might be applicable in Switzerland. "No one has power comparable to his." Graven, "Les droits de l'accusé dans le procès pénal," 71 Rev. de Procédure Pénale 126 (1956).

chiatrists, or other experts are needed, it is he not the defense counsel who is obliged to make the summons.

During the actual trial, the president of the court,[22] who heads a panel generally of three or five judges, is equally active. The lawyers play relatively minor roles. It is the presiding judge who arranges for the calling of witnesses and experts and decides on the order of their appearance.[23] This prevents either side from turning the trial into a *pièce de théâtre* by presenting surprise star witnesses and scheduling their appearances so as to produce the desired dramatic effect upon the jury.

It is also the judge who poses the majority of questions. Even the lawyers present most of their queries through the judge as intermediary.[24] This practically eliminates cross-questioning and with it the badgering of witnesses. Perhaps lawyers are thus obliged to sacrifice a valuable weapon for testing the truth of a witness' story. On the other hand, one is relieved to observe that the witnesses and the accused are permitted to tell their tales at length without constant interruptions and harrassments and without being bludgeoned to register statements practically against their will as a result of the persistent hammering of a lawyer.

The basic principle governing a federal case, found in Article 146 of *Procédure Fédérale* reads: "The president and the court are obligated to see that the truth is brought out by all legal means." Article 157 allows the president to demand new evidence at any time.

Article 241 of the *Code de Procédure Pénale de Genève* lays this injunction upon the presiding judge:

> The President is invested with a discretionary power in virtue of which he may take any measure which he believes useful for discovering the truth. The law obliges his honor and his conscience to employ every effort to promote its disclosure.

Article 242 is more specific, allowing him power to order the appearance of new witnesses and the introduction of all additional

22 Rarely is he the same person as the *juge d'instruction.*

23 For instance, art. 323 of Code de Procédure Pénale de Vaud reads: "The president questions, in the order which to him appears proper, the plaintiff, the civil party, the witnesses and the experts." Likewise art. 130, Code de Procédure Pénale du Valais.

24 Art. 131, par. 1, Code de Procédure Pénale du Valais says that "the parties have the right to put questions to witnesses and experts, through the president . . . The president may authorize them to pose these questions directly."

In Geneva, the president first interrogates the witnesses after which they may be directly questioned by the accused or his lawyer. Code de Procédure Pénale de Genève, art. 296. But it is the exception in Switzerland to allow such questioning without the president's intermediation. Federal practice conforms with the generally followed procedure. Procédure Fédérale, art. 158, 159.

evidence which he thinks necessary. Thus, he is by no means circumscribed by what the lawyers present in court.

The above is sufficient to explain what the Swiss Supreme Court meant when it stated that in a criminal case the process moves along automatically, a proper investigation is assured, and the procedural rights of the accused are guaranteed even when he has no lawyer.

Quite the contrary in a civil case. Nothing moves unless the parties initiate action and then nourish the motion by their own persistent intervention. There is no *juge d'instruction* to do the probings, to call witnesses, to gather evidence, and to see that the full story is laid before the Court. Moreover, since rules of civil procedure are frequently complicated, a layman may be incapable of ever moving his case before the proper tribunal, let alone exploiting all his procedural privileges during the trial. Thus without a lawyer, his legal and constitutional right to a civil trial may be no more significant than a magnificent bequest in the will of a pauper.

THE CANTONS PROVIDE

In accordance with the high Court's interpretation of the federal constitution, all the cantons provide state paid lawyers in civil cases. Since the ruling of the tribunal was in very general terms, the cantons have a fairly large measure of liberty in drawing up laws to implement it. That of Vaud, however, probably contains features fairly common to all.

In this canton,[25] requests for a state-paid lawyer are filed with the *Bureau de l'Assistance Judiciaire Gratuite* composed of four members: the Head of the Department of Justice and Police; a judge of the state court; the attorney-general or one of his assistants; and a lawyer designated by the Order of Advocates.

This panel bases its decision on answers to three questions:[26] (1) Is the petitioner too poor to engage a lawyer at his own expense? (2) Are his claims so poorly founded that he has no hope of a favorable court decision? (3) Is it clear that the lawsuit would not be engaged in by a "reasonable" litigant at his own expense?

The one requesting aid must, accordingly, furnish information on his financial status as well as material or documents to prove that his case is well grounded. The Bureau in giving its answers to questions two and three fulfills at no expense a most useful service for a prospective litigant. If it responds negatively on the merits of the case, the petitioner may, of course, undertake the lawsuit personally or with

[25] Loi sur L'assistance Judiciaire Gratuite en Matière Civil, 2 déc. 1947, arts. 4, 5.
[26] *Id.*, art. 6.

a lawyer engaged at his own expense. But a prudent person would probably decide to abandon his case, thus saving himself a risky gamble of money, time, and effort. One wonders why *all* people contemplating legal action do not *first* request free judicial aid *simply* to elicit this valuable gratuitous advice from a panel of legal experts. If a lawyer were consulted for this purpose, he would not only charge but might well encourage a hopeless case should it promise some financial returns to him personally.

The panel also performs an appreciated service for judges whose dockets might be heavily overloaded. If vexatious clients can be dissuaded from bringing their fantastic claims to courts for settlement, the tribunals will have time for cases that really merit judicial consideration.

The guiding principle for such panels has been articulated by the Supreme Court as follows:[27] they may not conclude that a cause is doomed to fail "unless the clear wording of the law or the constant precedent of the federal Tribunal leads them to such certitude or unless they are honestly in a position to determine that no one could hold an opinion other than their own." Their judgment has been challenged and sometimes reversed by the Supreme Court.[28]

The legal aid allotted includes lawyer's fees, witnesses' expenses, funds for inspections of property involved in the suit, and funds for the hiring of specialists called in for consultation.[29] Lawyers appointed for any case are always assured some remuneration. This is, indeed, essential because members of the bar are quite frequently called to aid indigents according to a rotation system which makes service obliga-

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[27] Schweiz contre Basel-Stadt, 23 Jan. 1926, Arrêts du Tribunal Fédéral, 52, I, 105; Erbem Prochorow contre Obergericht Zurich, 26 Oct. 1929, Arrêts du Tribunal Fédéral, 55, I, 291.

[28] Luthi conte Dame Wehrle, 19 sept. 1946, Arrêts du Tribunal Fédéral, 72, II, 145 (ruling that Zurich had violated the "equality before the law" clause when in a divorce case the state refused a free lawyer to a man on the grounds that he was not really indigent since his wife was rich in her own right); Wâhren contre Tribunal Supérieur, Soleure, 9 juillet 1952, Arrêts du Tribunal Féedéral, 78, I, 193 (ruling that the "equality" clause was violated by the state's arbitrary decision that there were no grounds for predicting a successful outcome of a man's suit); Corbelli contre Tribunal Cantonal de Soleure, 4 fév. 1959, Arrêts du Tribunal Fédéral, 85, I, 192 (ordering a review of the evidence for indigency).

[29] This is the universal practice in Switzerland. Moreover, if the state appoints an attorney, he is generally forbidden by law from receiving any other stipend than that provided by the state. See *supra* note 25, art. 8, 15, for the law of one canton. Lawyers who accept supplementary fees or who refuse to act as a court appointed counsel are liable to disciplinary punishment. See, *e.g.*, Code de Procédure Pénale de Fribourg (éd. annotée, 1945), art. 22.

tory. Some cantons are less generous than others and often lawyers' stipends hardly cover expenses. But even so, the system would seem to place a considerable financial burden upon the state. It should be noted, however, that in many cases the state merely advances funds for legal expenses which are recoverable from the losing party. If the latter is indigent, the lawyer would, of course, not be required to wait upon a possible amelioration of his financial condition, and so the state provides immediate remuneration.

The Swiss system goes far towards guaranteeing meaningful "equality before the law" in civil cases. The indigent is, of course, not made perfectly equal to his more affluent adversary. The latter is able to choose freely from among the most talented of the bar. The indigent not being allowed this right, may discover that the rotation system has turned up for him a lawyer with quite limited legal competency. But it is difficult to conceive of any system that could level every possible inequality. To allow every client freedom of choice would result in a great injustice to the superior lawyers in each canton who, overwhelmed by court appointments, might be forced virtually to renounce their own private practice.

Swiss and American Equality

In America there are legal aid programs sponsored by private groups that perform similar functions. Moreover many lawyers are happy to take civil cases upon a contingent fee, assuring them of a whopping 33 percent of the amount awarded by the court.[30] But if a particular litigant cannot so arrange, he has no right to state aid. No government in America furnishes a lawyer free of charge in a civil case.

This is strange. The American Constitution has an "equality before the law" clause almost identical to the Swiss "equality" provision which, according to the Swiss Supreme Court, imposes a constitutional obligation upon the cantons to extend such aid.

The American Constitution also forbids the taking of property "without due process of law." Yet procedure is so technical in civil cases, that many litigants, pleading without counsel, could never guarantee for themselves all the process legally due them. The result is usually a poorly presented case—perhaps so poorly that the court judgment is against them; thus property is indeed taken "without due process of law." In addition, if the other party can afford counsel, or is a lawyer himself, the contest may be so unfair that the "equal protection of the law" clause is put to visible torture.

[30] In Switzerland such a practice is illegal and fairly definite guide-lines are set down in the law for the setting of fees. Statut et Usage de l'Ordre, Arts. 25, 26.

In many instances, a plaintiff with an excellent case, simply forgoes bringing a most justifiable suit merely because of legal problems beyond his own competency to handle. For such a person the guarantees of the fifth and fourteenth amendments of the Federal Constitution—not to mention the guarantees of state constitutions—are indeed meaningless.

Someone may retort that it is not the *state* but another private person or merely unfortunate personal circumstances that might inflict the damage. But the government cannot easily wash its hands. In the "restricted covenant" cases of several years ago, the Supreme Court ruled that the legal machinery of the state could not be used by private persons to promote their brand of racial discrimination even in private housing.[31] This, said the Court, would virtually be a *state* violation of the equal protection clause of the fourteenth amendment.

But doesn't the state also violate this clause and the due process clause as well when a court rules against a poor person without counsel who couldn't properly present his own case? A judge or a jury renders a decision only upon the facts they hear in court. They may be convinced that the stammering litigant probably has a good case, but if he is so overwhelmed by a clever lawyer, they may have no choice but to rule against him. In such a case, one party is unable to obtain due process of law and to assert his right to be heard. He is deprived of his day in court.

The state becomes even more involved in the injustice when the constable appears to seize a defendant's property and to sell it in public auction, or when state officials forcefully take away children after an unfair divorce settlement.

The so-called neutral, hands-off policy assumed by the government, even while its courts and functionaries are actively participating in unjust activities like those mentioned above, is hardly consistent with the principles laid down by the Supreme Court for criminal cases:[32] since a suspect or an accused can assert his rights only if he knows them, he is entitled to a state-paid counsel from the moment of arrest until the courts have completely disposed of his case.

JUSTICE FOR JACKSON

The following fictitious case will help to underscore the points made above. Henry Jackson, a resident of Ann Arbor, Michigan,

[31] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). The Court thus reversed its own ruling set down in Corrigan v. Buckley, 271 U.S. 323 (1926).

[32] *Supra* note 1.

travels to Bloomington for the Indiana-Michigan football game. After the contest he is badly injured by a speeding motor-cycle driven by a young Chicago business man, Earl Smith.

After nine months of hospitalization, Jackson decides to sue. He wants no more than medical expenses plus compensation for loss of pay for his after-school job. He scrupulously calculates the sum and settles on a figure of 9,400 dollars. Smith could pay this out of his own earnings over a four or five year period, but he has no liability insurance covering accidents with the borrowed motorcycle. Thus it would be useless to sue for any huge sum. Moreover, although Jackson still walks with a slight limp, he is not disposed to turn this into a legacy by demanding an astronomical figure which might be a ruinous burden for Smith, who has just married and just launched himself into business.

Since the suit involves such a small amount, there are no lawyers willing to take the case upon a contingency fee, and Jackson is too poor to hire one except on the basis that he will pay his lawyer only if he wins. Since Smith is determined to fight the case, most lawyers figure that the gamble is too great.

Jackson is completely ignorant of legal procedure and thus would have the greatest of difficulties even putting the judicial machinery into motion. The first question is where to bring the suit: Michigan, Indiana, Illinois? A summons from the court of any of the three would be proper. Michigan would be the most convenient place for the trial from Jackson's standpoint, but the summons from the Michigan court must be served within the state. Earl Smith at irregular times visits Detroit and Ann Arbor on short business trips, and Jackson could gamble upon his being found and served. But if he waits too long, the statute of limitations might run out and his claim would be extinguished.

Indiana could be another place. Since the accident took place there, a summons served even outside its borders would have the same effect as one served locally. Finally, there is the possibility of Illinois, Smith's home state.

Jackson probably will not know that he could bring his suit in a federal court rather than in a state court if he simply added a small sum to the amount of his claim. Suits involving more than 10,000 dollars between citizens of two states can be placed under federal jurisdiction. There might possibly be advantages here. The jurors for the Illinois state court would be picked from the city of Chicago, those for the federal court from the federal district, a somewhat larger area. Since Smith has been very active in civil rights movements, he may

have a distinct advantage if several Negroes are on the jury. This possibility may suggest to Jackson that he opt for the federal court since there the percentage of potential colored jurors would be less. Or maybe Jackson would be better off in Indiana where the court probably would not be made a forum for race questions.

Next, in order to make a well-thought-out choice, Jackson ought to know something about the personalities of the judges and the conditions of the calendars in the different tribunals. A court may be so behind in its work that he would have to wait years before his case comes to trial.

Each jurisdiction uses its own procedural rules and this fact might also be significant for Jackson. A victim in a personal injury case often feels safer with a jury, so given a choice, he makes sure that a jury is guaranteed by the code of civil procedure in the state he selects. Jackson's case is clearly entitled to trial by jury in a federal court and probably in most state courts. It could be, however, that he would waive this right if Chicago becomes the trial site, for reasons stated above. But if he desires one, he must register his demand during the pleading stage of the case. Neglect to do so constitutes a waiver, and, unless Smith insists, the judge might try the case without a jury.

WHERE THE INNOCENT SUFFER

Most of the above choices are based on constitutional provisions, but how many people know that they exist or are able to assert them without a lawyer's assistance?[33] In Switzerland the state is obliged, precisely because of the complexities involved, to furnish counsel to help an indigent litigant in these civil cases. In the United States this obligation exists only for criminal cases. Indeed, the accused in America may demand that he have at his right hand his state-appointed lawyer for any questioning from the moment of arrest until the final disposition of his case. This is to protect him from making statements that could lead to an admission of guilt. But there is no such solicitude for parties in civil proceedings. And yet the chances are at least as great that an unrepresented litigant will destroy his whole defense by one unguarded remark. For instance, the law of contributory negligence in personal injury cases is so vague and complicated that an

[33] This was precisely the central point in the criminal cases cited above: the enjoyment of constitutional rights should never be dependent upon a person's financial condition.

In the fictitious case, Jackson, who seems to have a most justifiable case, might easily fail to assert these rights without a lawyer, and thus possibly lose his case. But one might imagine the injustice that could easily be done to an innocent defendant who cannot afford a lawyer in a similar case.

astute lawyer could easily elicit from such a person admissions that end all hope of a favorable judgment. It should be remembered that in civil cases parties have no privilege against taking the witness stand as in criminal cases.

One can appreciate the repugnance felt by Americans against sending an innocent man to prison. But why are their sensibilities so dull when innocent people are made to suffer by unjust decisions in civil cases? It is rare that the former injustice is perpetrated. Indeed, the percentage is infinitesimal compared to the staggering number of dubious rulings in divorce and personal injury cases.

Perhaps a criminal is sentenced to a year in jail, whereas, if defended by a clever lawyer, he might have gotten only six months. The public conscience twitches. But why are there no similar twitchings when the court rules in favor of a vindictive wife against her innocent husband who for the rest of his life must suffer the deprivation of his children plus the payment of oppressive alimony each month? Why, finally, are there no probings of the public conscience over the fact that many people completely forego employing their legal and constitutional rights to a civil trial of any kind simply because they cannot afford a lawyer?

In Switzerland state-paid lawyers are freely provided to plaintiffs in divorce cases and to injured parties lacking funds to initiate proceedings. The same provision applies to indigent defendants. The latter may have particular need of such legal assistance in instances when the plaintiff, rich in her or in his own right, comes to the court supported by a lawyer and a string of partisan witnesses. The problem is of equal proportions in a paternity suit when a disappointed woman turns vindictive and goes to court solely to damage the future of an innocent man. He might well be helpless against such a designing female and her battery of lawyers. Swiss law recognizes the situation and provides such a person free counsel if he is indigent.

In a criminal case, the Swiss judge would already have before him a huge dossier of information gathered by the *juge d'instruction* which presents both sides.[34] Thus he is not dependent on what the parties or their lawyers tell him in court. But in a paternity or a divorce case, or other civil affairs, he is almost completely at the mercy of lawyer and witnesses.[35]

[34] All the information gathered by the investigating magistrate must be presented in open court by the presiding judge at the trial.

[35] Note, for instance, the following rule which governs Swiss civil procedure in a federal case. "The judge may not go beyond the conclusions of the parties, nor base his judgment on other facts than those which have been alleged in the suit." Loi Fédérale de Procédure Civile Fédérale (déc. 1947), art. 3.

It should be recalled that an attorney is, of course, not pledged to pursue blind-folded justice and to seek only the *real* good of the children and of *both* parties. He is getting paid to promote victory on his client's terms:[36] custody of the children and as much alimony as the indigent defendant might ever be able to sustain. In the course of his investigations, he may discover that the wife is a tramp and that the husband is an honorable man. But it would represent extraordinary self-immolation for the lawyer to drop the case or to inform the judge that it would be harmful to let the children stay with his client!

Quite the contrary in a criminal proceeding. The judge himself is already well acquainted with all parties and thus he is a knowledgeable public defender for an accused person who may not be represented by counsel. Moreover, the prosecuting attorney, unlike the lawyer in a civil case, is not getting paid to persuade judge or jury to return a verdict against every defendant. Neither he nor the judge is interested in seeing the innocent punished. If in the course of the trial he comes in possession of evidence exonerating the accused, surely he will reveal this to the judge and ask that charges be dropped.

Better the Nine

In justification of the large number of safeguards granted to accused persons, Americans frequently utter such statements as "better to let nine guilty men go free than to condemn one innocent man." Such a remark is only a rhetorical way of saying that "we are very careful not to punish the innocent." All civilized governments profess and practice like solicitude. But if the statement is taken to mean anything more, then it is rather foolish and quite unfair—much like the question "when are you going to stop beating your wife?" It seems to offer only two alternatives. But it would be the most inefficient judicial system imaginable which had to release 90 percent of all criminals to make sure that no innocent person is punished!

As a matter of fact, it is not necessary to accept either of the painful alternatives. It would be much wiser to dispense with the unfortunate piece of rhetoric and to say simply and candidly, as all enlightened nations do, that we are very careful not to punish the innocent and equally careful not to let the guilty go free.

Expounders of the "nine go free" doctrine completely forget another important factor. In nearly every criminal case there is at least one innocent person who has suffered unjust harm at the hands

[36] In Switzerland where the "contingency fee" practice does not prevail, a state-appointed lawyer would feel much less restricted for he is paid regardless of the decision.

of the malefactor. It may be a widow, a mother, or a large family whose bread-winner has been murdered or incapacitated by a criminal's revolver. These parties have a clear right to financial compensation from the aggressor for their great loss. How pitiless to tell 90 percent of such victims that nothing can be done for them!

In Switzerland, as well as in France, the rights of the victim *vis-à-vis* those of the accused are sharply focused when the former becomes a civil party in a criminal trial. This is the usual practice: if one and the same act gives rise to both civil and criminal liability, the injured party asserts his claim in the criminal prosecution.[37] If the court finds the accused guilty, it also settles the claims for damages. This not only saves time and money, but it also takes from the victim the great burden of personally initiating a separate civil action, as procedure in the United States demands.

If the crime were serious, the defendant would be entitled to a lawyer, and a state-provided one if he were indigent. The injured party can assert his claims personally; rarely would the state provide him a lawyer, since his rights will probably be sufficiently protected by the court, especially by the prosecuting attorney.[38] However, some laws state equivalently that if the defendant has a lawyer,[39] this can be a reason for appointing counsel for an indigent civil party in the same case.[40]

After the president has questioned the accused and the prosecuting attorney has presented the accusation, counsel for the *partie civil* frequently rises[41] and presents a much more relentless attack. Thus, even if the state should decide to pursue a softer line, his active participation in the trial is a constant reminder to the court that the case involves more than the accused and the faceless general public.[42]

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37 See, for instance, Code de Procédure Pénale de Vaud, arts. 48-55.

38 The basic requirement is that, lacking counsel, a person could not properly safeguard his interests. K. contre Thurgovien, 9 mai 1941, Arrêts du Tribunal Fédéral, 67, I. 65. Thus no lawyer is provided if the case is an easy one or if it is thought that the prosecuting attorney will protect these interests.

39 The Court has not ruled on this point. But it has said that even if the civil party in a criminal case has a lawyer this does not give an indigent defendant the constitutional right to have counsel appointed for him. *Supra* notes 19 and 38. This seems to be stacking the cards too much against the accused. There is, of course, such a right in all serious cases, and probably in minor offenses if because of his inexperience or his youth, an accused cannot properly defend himself. *Supra* note 7. *Cf. supra* note 19.

40 *Supra* note 25. art. 10. Art. 213 of the Procédure Fédérale says simply that a lawyer can be appointed for the injured party in a penal case. Much depends upon how complicated the civil aspects may be.

41 Code de Procédure Pénale de Genève, art. 308: "The civil party or his counsel . . . speak next and develop points which support the accusation."

42 In a federal criminal case, the injured party has the right to question witnesses

Such provisions underscore the fact that the Swiss do not denigrate the just claims of the innocent victim by excessive zeal in protecting the criminal. If procedural rights of the latter have really been infringed, Swiss law has ways for calling the responsible official to task and for providing condign satisfaction.[43] But this is not done by indirectly punishing the innocent victim by letting the guilty go free!

To the Swiss it seems like a weird type of justice where the judge extinguishes the victim's claim by tearing up a perfectly valid confession[44] or by discarding a most convincing piece of evidence merely because the official who obtained them neglected to follow a legal technicality.[45]

CONCLUSION

What conclusions may be drawn from the matter presented above? It is obvious, first of all, that in Swiss law the suspect and the accused are by no means as privileged as in American law in the matter of state-appointed counsel. Many Swiss lawyers and professors of law

and experts, and after all evidence has been presented, he makes his own summation following that of the prosecuting attorney. Procédure Fédérale, arts 159, 167. A similar practice prevails in the cantons. See, *e.g.*, Code de Procédure du Valais, art. 136. Note that art. 167 of the Procédure Fédérale permits the prosecuting attorney to represent the injured party in the summation *only* if the latter agrees.

[43] Switzerland has a highly developed sense of the responsibility of the state for the official acts of its functionaries. It freely allows itself to be sued by parties injured through their negligence or by their illegal acts. This is true even of judges who cause harm to a person by a decision rising from grossly careless legal work. See, *e.g.*, Loi sur la responsibilité de l'Etat du Canton de Vaud (16 mai 1961); Clerc, "La Responsabilité de l'Etat en Matière Pénale," 75 Revue Pénale Suisse 366 (1959); Specziali contre Etat de Genève, Arrêts du Tribunal Fédéral, (22 déc. 1953), 79, II, 424. Here, the court, in granting 20,000 francs in damages against Geneva, said that "the responsibility of the state is involved by the faults committed by magistrates on the judicial plane." (at 439). The state must repair the damage if the fault was serious and one "which an ordinary judge, serious in his work, would not have committed." (at 439).

[44] A confession can not be used in an American court if it came during police questioning of an accused who was not previously advised that he had a right to consult a lawyer. *Supra* note 1.

[45] Mapp v. Ohio, 367 U.S. 463 (1961). Switzerland also forbids searches without warrants and it has carefully drawn laws governing proper respect for persons and homes during the search. But it would not discard valid evidence even if obtained in violation of these procedures. To prevent violations, the State, in addition to means mentioned above in note 43, provides for the discipline and even the dismissal from service of the offending functionary. Moreover, after the state has paid damages, it can sue the guilty officer, if his action has been the product of grave negligence. Loi sur la responsabilité de l'Etat du Canton de Vaud (16 mai 1961), arts. 9, 10; Loi sur le statut général des fonctions publiques cantonales (9 juin 1947), arts. 30-45. Other cantons have similar laws.

freely admit their dissatisfaction with this aspect of criminal procedure. On the other hand all are quite astonished at the extent of the right in the United States as a result of recent decisions of the Supreme Court. They would not like to see such a practice established in Switzerland. As mentioned above, in a Swiss criminal case, the injured person usually joins as the civil party and sues for damages, recovery of property, redress for bodily harm, etc. Thus the Swiss are not likely to lose sight of the victim. Consequently they are little inclined to let a guilty man go free because of technicalities when that would strip the innocent party of all means of restitution.

Perhaps one should conclude that the Swiss are negligent in not providing counsel in all criminal cases and in not permitting suspects freely to consult lawyers at every period of the interrogation. But in civil cases Swiss law seems far more advanced than American law. The "equality" clause in the Swiss Constitution has been interpreted by the Court to demand state appointed lawyers in civil cases, but not necessarily in criminal cases. (As mentioned above, actual practice is far more generous than the tribunal's demands). The Swiss Court seems sound in its reasoning: in a criminal case the accused is automatically guaranteed a hearing by the Court procedure itself,[46] but in civil cases everything depends upon the parties themselves. Here the procedure is frequently so complicated that a lawyer is almost essential even to take the preliminary steps.

Moreover, the very practical Swiss realize that the greatest substantive injustices are those committed in civil cases. Percentage-wise, the number of persons punished for crimes they did not commit is infinitesimal. The real tragedy is seen in divorce, paternity, property, and personal injury cases. If a plaintiff has a legitimate grievance, the

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[46] Perhaps this is much truer in Switzerland than in America because of the active part taken by the Swiss judge. On this point, see *supra* notes 19-25 and accompanying text. For a general treatment of the procedure in French-speaking Switzerland, see Clerc, Le Procès Pénal en Suisse Romande (1955).

It should be pointed out that the Supreme Court of Switzerland very rarely imposes any obligation on the cantons in the matter of penal procedure even though there is only one criminal code dealing with substantive matters for the whole country applicable everywhere. On the possibility of the adoption of one single protedure, see Clerc, "L'Avenir de la Procédure Pénale," Regards sur le droit Suisse (1962).

There is no "due process" clause in the Swiss constitutions and thus the Swiss Court is denied a handy legal formula which the United States Supreme Court has effectively used for establishing some general procedures in America. In the instances where the Court in Switzerland has intervened, it has employed the "equality before the law" clause found in article four of the Constitution. Its decisions frequently read like "due process" rulings. See Darbellay, "Le droit d'être entendu," 83 Zeitschrift fur Schweiz Recht 419-584 (1964).

Swiss think it unfair that the judicial portals must remain locked for him simply because he has no legal craftsman competent to open them. As for the innocent defendant, Swiss law would consider it an outrage that he must stand naked before its tribunals to be humiliated and destroyed by a vindictive plaintiff and his crafty attorney.

The Supreme Court of the United States is disquieted that accused persons, no matter how guilty, should be unable to enjoy all their legal rights merely for lack of money. The Swiss are disturbed that innocent persons might have to forgo theirs for the same reason. To prevent such untoward happenings, Swiss law provides indigents with lawyers in all civil cases.[47]

[47] That is in all cases not doomed to failure for want of any reasonable grounds. *Supra* notes 26-28.