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NOTES

COUNSELING THE INDIGENT—AN ANALYSIS OF DEFENDER SYSTEMS

*If we are to keep our democracy, there must be one
commandment: Thou shalt not ration justice.*

—*Judge Learned Hand*¹

It is ludicrous to suggest that justice is equally available to a wealthy defendant represented by a skilled, highly-paid attorney, and an indigent defendant required to prepare his own defense. An unassisted prisoner is no match for the prosecutor who is not only armed with experience, but also has the investigatory resources of the state at his disposal. There is no contest where the defense is prepared and executed by a person unaware of the principles of criminal procedure, confused by the basic rules of evidence, and mystified by the adversary system which characterizes our judicial proceedings. Counsel is necessary to explain the charges, to prevent unlawful detention and unreasonable bail, to investigate the facts, and to prepare and present an adequate defense. Thus, the scales of justice are weighted heavily against the unaided defendant for "without the help of a lawyer all the other safeguards of a fair trial may be empty."² Mr. Justice Sutherland recognized the vulnerability of the unrepresented accused in *Powell v. Alabama* where he said:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.³

¹ Ervin, *Uncompensated Counsel: They Do Not Meet The Constitutional Mandate*, 49 A.B.A.J. 435 (1963).

² Statement by Mr. Justice Brennan in 22 LEGAL AID BRIEF CASE 48 (1963).

³ 287 U.S. 45, 69 (1932).

The purposes of this note are: (1) to determine when society is required, under present law, to provide representation for an accused indigent; and, (2) to critically analyze and evaluate the four types of defender systems available to satisfy these requirements.

The Right To Counsel

The right to counsel in criminal proceedings was recognized early in American history⁴ and was embodied in the sixth amendment which provides in part that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."⁵ The guarantee of counsel in criminal proceedings in federal courts was clearly enunciated in *Johnson v. Zerbst*,⁶ where the Supreme Court decided that the sixth amendment withholds from federal courts in all criminal proceedings the power and authority to deprive the accused of his life or liberty unless he has or waives the assistance of counsel. However, it was not until the Court's decision in *Gideon v. Wainwright*,⁷ twenty-five years after *Johnson v. Zerbst*, that the right to counsel in criminal cases was held to be a fundamental right under the fourteenth amendment.⁸ This right is so essential to a fair trial that the due process clause requires the *states* to furnish counsel to an indigent defendant, accused of a serious offense, who requests such aid.⁹ As Mr. Justice Black, the Court's spokesman in *Gideon*, stated: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled

⁴ Although the right to the aid of counsel was denied defendants in almost all felony cases under English common law and the full right to assistance, in respect to felony prosecutions, was not recognized by Parliament until 1836, this doctrine never obtained a foothold in the colonies. "It . . . appears that in at least twelve of the thirteen colonies the rule of the English common law . . . had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes. . . ." *Powell v. Alabama*, 287 U.S. 45, 64-65 (1932). For examples of early state constitutions and statutes rejecting the English common-law rule and recognizing the right to counsel even before the adoption of the federal constitution, see *id.* at 61-64.

⁵ U.S. CONST. amend. VI.

⁶ 304 U.S. 458 (1938).

⁷ 372 U.S. 335 (1963); see 37 ST. JOHN'S L. REV. 358 (1963) for an interesting discussion of this landmark case.

⁸ U.S. CONST. amend. XIV, §1 provides in part that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

⁹ See Krash, *The Right To A Lawyer: The Implications Of Gideon v. Wainwright*, 39 NOTRE DAME LAW. 150 (1964).

into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."¹⁰

Although the Constitution requires that every man have the assistance of a trained advocate whether the criminal trial occurs in a state or federal courthouse, the scope of this right is an issue that remains unresolved. Must counsel be furnished in *all* criminal cases, including prosecutions for misdemeanors and petty offenses? In his concurring opinion in *Gideon*,¹¹ Mr. Justice Douglas in effect urged that the requirement of counsel in state courts under the fourteenth amendment should be as broad as the federal right under the sixth amendment, thus assuring the assistance of counsel in *all* criminal prosecutions. The Supreme Court, however, has never decided whether the sixth amendment guarantee extends to misdemeanors and petty offenses, but a lower federal court has held that misdemeanors are covered.¹² Before *Gideon* a distinction had been recognized between capital and noncapital offenses prosecuted in state courts. While there appeared to be an absolute duty to furnish counsel in a case where the death sentence could be imposed,¹³ in all other cases the state's duty depended upon special circumstances.¹⁴ This distinction has been abolished by the unanimous Court in *Gideon*.¹⁵ Mr. Abe Krash, who assisted Mr. Abe Fortas in preparing the brief in *Gideon v. Wainwright*, believes that "the case supports the proposition that the test of the right to counsel is not the severity of the penalty but the *need* for legal assistance. A man charged with an offense classified as a misdemeanor or a petty offense, who can be imprisoned for six months, may need the help of a lawyer very badly, indeed."¹⁶

¹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹¹ *Id.* at 345-47.

¹² *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942). The Criminal Justice Act of 1963—a bill proposed to implement the right to counsel in federal courts by permitting each federal district to adopt a plan to provide adequate representation, said plan to be either the appointment of a federal public defender, assigning an attorney from an already established legal aid or defender office, compensating counsel assigned on an *ad hoc* basis, or a combination of these—explicitly provides for assignment of counsel in misdemeanor cases, but excludes petty offenses. See *Hearings on Criminal Justice Act of 1963 Before the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. 4 (1963); see also Ervin, *supra* note 1, at 437-38.

This bill, also known as S. 1057, passed the Senate with minor amendments and a similar bill, H.R. 7457, which allows each district to exercise the above option but eliminates the federal public defender plan, was also recently passed. The next step is a joint conference to adjust the differences in the bills. 22 LEGAL AID BRIEF CASE 38-39, 132 (1963-1964).

¹³ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁴ *Betts v. Brady*, 316 U.S. 455 (1942).

¹⁵ The special circumstances test of *Betts v. Brady* was jettisoned in *Gideon* where the Court held: "Upon full consideration we conclude that *Betts v. Brady* should be overruled." *Gideon v. Wainwright*, *supra* note 10, at 339.

¹⁶ Krash, *supra* note 9, at 157-58.

Mr. Fortas forecasts that the Court will not be unanimous in applying its doctrine and predicts that Mr. Justice Harlan is apt to confine the *Gideon* doctrine to prosecutions involving a substantial prison sentence, whereas Mr. Justice Black and Mr. Justice Douglas probably will advocate extending the doctrine to all criminal prosecutions.¹⁷ He also suggests that "as time brings to decision specific issues as to the scope of *Gideon*, the constitutional right to counsel will be defined in the broadest terms."¹⁸ Substantial support for this prediction can be found in the many recent Supreme Court decisions reflecting the Court's deep concern with the problems of individual rights and civil liberties. The Court, in decisions dealing with unreasonable search and seizure,¹⁹ habeas corpus jurisdiction,²⁰ impartial juries,²¹ right to a trial transcript,²² cruel and unusual punishment,²³ and right to counsel,²⁴ has demonstrated its willingness to prescribe standards of fair procedure for state criminal prosecutions and thus provide safeguards to insure the rights of the accused person in criminal courts.²⁵

The *Gideon* decision cannot be regarded as an isolated phenomenon. It is part of a variety of governmental and private activities directed toward providing adequate counsel for the indigent defendant. As of the time of the *Gideon* decision, March 1963, there remained only five states which had not provided for appointment of counsel in felony cases,²⁶ and many counties throughout the country were already in the process of re-examining their defender systems in order to determine whether adequate assistance was being provided.²⁷ In 1963, there was a substantial increase in the number of defender organizations, highlighted by the creation of public defender offices in twelve judicial circuits of Florida,²⁸ and the establishment of a mixed, private-public defender organization in populous Nassau County, New York.²⁹ Two

¹⁷ Fortas, *The Consequences of Gideon*, 22 LEGAL AID BRIEF CASE 7, 8 (1963).

¹⁸ *Id.* at 9.

¹⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁰ *Fay v. Noia*, 372 U.S. 391 (1963).

²¹ *Irvin v. Dowd*, 366 U.S. 717 (1961).

²² *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

²³ *Robinson v. California*, 370 U.S. 660 (1962).

²⁴ *White v. Maryland*, 373 U.S. 59 (1963); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

²⁵ See generally Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213 (1958).

²⁶ Krash, *supra* note 9, at 153.

²⁷ 22 LEGAL AID BRIEF CASE 32 (1963).

²⁸ *Ibid.*

²⁹ The organization, the Criminal Division of the Legal Aid Society of Nassau County, was created July 1, 1963 and opened its office on September

weeks before *Gideon*, the Ford Foundation dramatically announced their 2.3 million dollar grant to the National Legal Aid and Defender Association—the national co-ordinating body for organizations throughout the country which provide legal services for the poor—to establish a program to study, improve and expand present services.³⁰

The Model Defender System

Under the Ford Foundation grant defender systems will be established in three or four major cities,³¹ providing laboratories for new concepts and a point of reference for communities interested in expanding or improving their present facilities. Those responsible for the program will be required to determine the characteristics of a model system. They will be required to study the scope of legal services, type of personnel, investigatory facilities available, and the nature of community responsibility and participation in the system. They may find assistance from a study conducted by a Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association under a grant from the Fund for the Republic. The committee's findings³² are embodied in the most complete report, to date, of what has been done and remains to be done to achieve the goal of equal justice for the many who cannot pay for legal services.

This committee established standards to be used in evaluating defender systems and therefore, in effect, created a model defender system against which it could compare the effectiveness of existing systems.³³ The paragon of defender organizations would: (1) provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction; (2) afford representation which is experienced, competent, loyal, and zealous; (3) supply the investigatory and other facilities necessary to prepare an adequate and complete defense; (4) com-

9, 1963. It is classified as a mixed private-public defender organization because the society is a private charitable corporation receiving public funds and obligated by contract to supply legal services to indigent defendants accused of felonies in Nassau County. Letter from James J. McDonough, Director of the Criminal Division of the Legal Aid Society of Nassau County, to this writer, February 13, 1964.

³⁰ *Legal Aid to the Indigent*, 21 N.Y.B. BULL. 64 (1963). Major General Charles L. Decker, former Judge Advocate General, was recently named director of the defender project to be financed by the Ford Foundation grant. 22 LEGAL AID BRIEF CASE 171 (1964).

³¹ 21 LEGAL AID BRIEF CASE 203 (1963).

³² SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NAT'L LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED (1959) [author hereinafter cited as SPECIAL COMMITTEE].

³³ *Id.* at 56.

mence operation at a sufficiently early stage of the proceedings to afford adequate protection; (5) continue assistance through appeal; and, (6) enlist community participation and responsibility.³⁴ Thus, a model defender system must be capable of providing a broad scope of representation and still maintain a high quality of service.

However, the burden of conforming to these standards can only be appreciated by those familiar with the shocking statistics illustrating the number of defendants too poor to hire a trained spokesman to direct their defense. Generally, more than half of those charged with crime are indigents.³⁵ The Criminal Courts Branch of the Legal Aid Society of New York City reported that in 1963 the society's staff had 57,000 requests for assistance, an almost threefold increase in the last decade.³⁶ Undoubtedly, the need for professional defenders in a community is most impressive in an urban center like New York City, where the demand for competent legal services for the indigent is tremendous, and defender systems must accommodate a court system in which the number of cases concerning defendants facing serious criminal charges amount to more than 100,000 a year.³⁷

It is mandatory that any defender office solve the fundamental problem of providing competent representation and a wide scope of legal services to large numbers of defendants. All possible systems must be examined in order to determine which is best equipped to solve this problem, for it would be this system that will eventually be used as a guide for all future defender organizations. All present systems may be classified into one of the following categories: (1) the assigned counsel system, (2) the voluntary defender system, (3) the public defender system, or (4) the mixed, private-public defender system, a hybrid of the latter two.³⁸

The Assigned Counsel System

The assigned counsel system is the most widely used defender program, serving more than half the population of the United States.³⁹ Statutes providing for assignment of counsel are varied.⁴⁰

³⁴ *Id.* at 56-62.

³⁵ Voorhees, *One Half of Our Program*, 22 LEGAL AID BRIEF CASE 4, 5 (1963). In 1961, 30 per cent of the persons accused of crimes before federal courts could not afford counsel. Bennett, *A Prison Director's Views on the Public Defender*, 21 LEGAL AID BRIEF CASE 44, 45 (1962).

³⁶ 151 N.Y.L.J., March 11, 1964, p. 1, col. 3.

³⁷ Carr, *The Defender Work of the Legal Aid Society in New York City*, 35 N.Y.S.B.J. 299 (1963).

³⁸ SPECIAL COMMITTEE, *op. cit. supra* note 32, at 47-48.

³⁹ *Id.* at 48.

⁴⁰ See *id.* at 98-111 for a guide to all the state provisions for assignment of counsel for indigent defendants in criminal cases.

Most provide for assignment in at least all felony cases,⁴¹ and thirty-two states require some form of compensation.⁴² However, in a populous state such as New York, assigned counsel generally serve without compensation regardless of how extended the proceedings, and are also expected to finance the defense out of their own pockets without any provision for reimbursement by the state.⁴³ In practice the New York system is typical of most of the assigned counsel systems.⁴⁴ After indictment and upon arraignment, the trial court asks the defendant whether he has counsel or whether he is financially able to procure counsel; upon a negative response, counsel is then assigned. The choice or assignment of counsel is usually carried out in a casual fashion, and in many cases it is simply a matter of appointing any attorney who happens to be present in the courtroom during the proceedings, or selecting some young attorney who has volunteered his services in order to gain experience.⁴⁵

According to his professional ethics, "a lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."⁴⁶ Thus, the assigned counsel system places the responsibility of defending poor persons directly upon the members of the Bar and views it as an obligation assumed by counsel upon their admission to the Bar. Mr. Chief Justice Charles Evans Hughes has stated:

Whatever else lawyers may accomplish in public affairs, it is their privilege and obligation to assure a competent administration of justice to the needy, so that no man shall suffer in the enforcement of his legal rights for want of a skilled protector, able, fearless, and incorruptible.⁴⁷

It is obvious from the nature of the assigned counsel system that it is capable of supplying an adequate number of attorneys,

⁴¹ 21 LEGAL AID BRIEF CASE 90-94 (1962).

⁴² Brownell, *A Decade of Progress: Legal Aid and Defender Services*, 47 A.B.A.J. 867, 868 (1961).

⁴³ N.Y. CODE CRIM. PROC. §§ 308, 308(a). In New York counsel is assigned on arraignment and compensation and expenses are only awarded to counsel assigned in cases where the charge is punishable by death or on appeal from a judgment of death or life imprisonment. The New York procedure is similar to the federal procedure except counsel assigned in federal prosecutions serve without compensation in *all* cases. FED. R. CRIM. P. 44.

⁴⁴ See generally Engel, *Assigned Counsel—The Right to Defend*, 35 N.Y.S.B.J. 292, 293 (1963); SPECIAL COMMITTEE, *op. cit. supra* note 32 at 48, 63-72.

⁴⁵ See Ervin, *Uncompensated Counsel: They Do Not Meet The Constitutional Mandate*, 49 A.B.A.J. 435, 436 (1963).

⁴⁶ ABA CANONS OF PROFESSIONAL ETHICS, Canon 4.

⁴⁷ SPECIAL COMMITTEE, *op. cit. supra* note 32, at 95.

an education in professional responsibility for young lawyers, and a public relations tool for the profession. It has also been praised for its ability to provide loyal, independent counsel by creating a situation where loyalty to the defendant is based solely on the attorney-client relationship. Each case is handled individually and is not merely one of many to be reported as a statistic to the board of directors of a defender organization or a county board of supervisors.⁴⁸

Although some believe that the assigned counsel system should be retained,⁴⁹ most writers agree that it is generally unable to supply uniformly qualified, zealous representatives for the large population of indigent prisoners in urban centers, nor can it enter the proceedings early enough to supply the full scope of representation in accordance with the standards of the model defender system.⁵⁰ All assignment systems work on the basic assumption that all attorneys have sufficient competence in the defense of criminal cases to represent defendants adequately. However, Judge Leon David of California reports that the convicted repeatedly contend upon appeal that they are victims of the incompetence of their assigned counsel. Furthermore,

the presumption that all persons licensed to practice are competent to handle all legal matters is refuted every day. Judges strive at times in criminal cases to protect the defendant against the ineptness or incompetency of his private counsel.⁵¹

The danger of appointing incompetent counsel is very real in a system which in practice relies heavily upon the young attorney who is eager for experience and unrestricted by a busy schedule. Of course the young attorney should bear his professional role in his community's defender system, but his inexperience should preclude his assuming the leading role. Even appointment of senior members of the Bar may not assure the indigent prisoner of a fair day in court, for specialization within the legal profession, especially in urban areas, leaves many a lawyer with little or no trial practice, especially in the criminal area. Surveys have found that in 33.3 per cent of the cases in Tompkins County, New York and in 43.4 per cent of those in Essex County, New Jersey the assigned counsel had no criminal law experience before

⁴⁸ Engel, *supra* note 44, at 293.

⁴⁹ *Ibid.*

⁵⁰ See, e.g., BROWNELL, LEGAL AID IN THE UNITED STATES 38-40, 136-43 (1951); SPECIAL COMMITTEE, *op. cit. supra* note 32, at 64-67; Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 723-25 (1961).

⁵¹ David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753, 760 (1961).

their first assigned case.⁵² The zealousness of even experienced lawyers may be somewhat dampened in jurisdictions where counsel are obligated to serve without compensation and are not reimbursed for out-of-pocket expenses. Senator Sam J. Ervin, Jr., a member of the Senate Committee on the Judiciary, believes that the resulting financial burden upon the Bar is intolerable and surely not conducive to the effective administration of justice.⁵³ In support of the proposed Criminal Justice Act,⁵⁴ which would provide for compensated counsel, Senator Ervin argued that "the lawyer himself should not fear indigency while defending the indigent."⁵⁵ In hearings before the House Judiciary Committee, testimony provided convincing evidence that the uncompensated assigned counsel plan is unduly burdensome on attorneys. One young attorney reported devoting approximately 600 working hours to such litigation without compensation or reimbursement for out-of-pocket disbursements.⁵⁶

Closely related to the financial burdens placed upon members of the Bar is the problem of investigatory services. Any defender system must provide the indigent with such services, since:

Furnishing him with a lawyer is not enough: The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, *e.g.*, if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist.⁵⁷

The assigned counsel system is particularly lacking in this area for many appointed attorneys who cannot afford to hire investigators attempt to personally fill the role. Do-it-yourself investigation may result in a state of affairs where the originally appointed attorney may be forced to withdraw and request that new counsel be appointed, since Canon Nineteen requires that "when a lawyer is a witness for his client, except as to merely formal matters . . . he should leave the trial of the case to other counsel. . . . Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."⁵⁸ Effective investigation is also hampered where counsel is not appointed until arraignment which in some jurisdictions occurs at

⁵² SPECIAL COMMITTEE, *op. cit. supra* note 32, at 65.

⁵³ Ervin, *Uncompensated Counsel: They Do Not Meet The Constitutional Mandate*, 49 A.B.A.J. 435 (1963).

⁵⁴ See note 12 *supra*.

⁵⁵ Ervin, *supra* note 53.

⁵⁶ 21 LEGAL AID BRIEF CASE 81 (1962).

⁵⁷ *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (dissenting opinion), *rev'd*, 352 U.S. 565 (1957).

⁵⁸ ABA CANONS OF PROFESSIONAL ETHICS, Canon 19.

a fairly late stage in the proceedings.⁵⁹ In order to be effective, therefore, representation should be provided as soon after arrest as possible.⁶⁰

Although states such as New Jersey have attempted to rid the assigned counsel system of its many defects,⁶¹ the system as presently functioning in New York, and most other states, apparently does not meet the standards of a model defender organization and hence cannot possibly provide competent counsel for the great numbers of indigent persons without placing an intolerable burden on the few members of the Bar who are experienced in the practice of criminal law.

The Voluntary Defender System

Voluntary defender offices are private, non-governmental organizations providing a "law office" approach to legal assistance. This approach differs from the unsystematic assigned counsel plan by providing a centralized organization which is already in operation when the prospective client is arrested. These offices are staffed primarily by experienced, professional defenders and trained investigators, and are responsible only to an interested board of directors composed of prominent citizens from varied professions. It is generally recognized as a satisfactory means of providing competent advocates and is able to assist an accused within forty-eight to seventy-two hours after arrest.⁶²

The growth of private legal aid organizations in both the civil and criminal areas was the result of the development of urban population centers. The nineteenth century saw great waves of immigration causing the birth of many social service organizations, such as the German Society of the City of New York, an organization created to assist the German immigrant. On March 8, 1876, Der Deutsche-Rechtsschutz-Verein was organized by members of the German Society to provide legal aid to those of German birth. In 1889 the Verein ceased being parochial and amended its constitution so that legal aid could be given gratuitously to all, and in 1896 the name was changed to The Legal Aid Society. Thus, the voluntary defender system was born in New York, later spreading to such other areas as Boston, Philadelphia, and New Orleans.⁶³ Most of the 241 legal aid offices in existence

⁵⁹ SPECIAL COMMITTEE, EQUAL JUSTICE FOR THE ACCUSED 67 (1959).

⁶⁰ See *id.* at 60-61; see generally Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771 (1961).

⁶¹ SPECIAL COMMITTEE, *op. cit. supra* note 59, at 49-50.

⁶² See *id.* at 50-51, 68-72; CART, *The Defender Work of the Legal Aid Society in New York City*, 35 N.Y.S.B.J. 299 (1963).

⁶³ For interesting historical treatments of the voluntary defender system see SPECIAL COMMITTEE, *op. cit. supra* note 59, at 43-47; TWEED, *THE LEGAL AID SOCIETY NEW YORK CITY, 1876-1951* (1954).

today do only civil work but there are 134 defender offices devoted to providing representation in criminal prosecutions.⁶⁴

Some defender offices developed independently of the legal aid movement while others, like the Criminal Courts Branch of the Legal Aid Society of New York City, grew out of existing legal aid societies. With a staff of forty-eight attorneys, the Branch appears in defense of indigent defendants in both the local and federal courts of all five counties of the City. It handled 57,000 requests for assistance in 1963, and with the assistance of more than 100 volunteers, its criminal appeals staff of seven members handled more than 400 cases.⁶⁵ These experienced staff attorneys are supported by a team of five investigators who are for the most part former members of the New York City Police Department.⁶⁶ Quality service is insured by a program which requires young attorneys joining the Society to be supervised and trained for as long as two years before being permitted to conduct trial work in the state supreme court.⁶⁷ The cost of the work of the Criminal Courts Branch, in 1963, was estimated to be approximately 500,000 dollars.⁶⁸ The forty-five member board of directors of the Legal Aid Society is principally responsible for raising the money to meet such expenses. An annual fund raising drive is conducted and in each year, since 1961, the society has received a contribution from the City of New York. In 1963, it was estimated that somewhat more than 25 per cent of its costs would be met by the City.⁶⁹

It appears that the voluntary defender system is capable of providing a wide scope of services to large numbers of people by a staff of competent, defense-minded, experienced counsel supported by trained investigators. In theory the system is completely divorced from the government and is insulated from political pressure. Its appeal for support is directed, therefore, at individuals and private organizations. Thus, through charitable contributions, the whole community may participate in this type of defender program.

In practice, however, the voluntary defender system has not been wholly successful in meeting the problems of the high cost of supplying legal services to the large number of defendants

⁶⁴ 21 N.Y.B. BULL. 64 (1963). This term, defender office, is used to describe both voluntary and public defender offices supplying legal services in the criminal areas.

⁶⁵ 151 N.Y.L.J., March 11, 1964, p. 1, col. 3.

⁶⁶ Carr, *supra* note 62, at 301.

⁶⁷ *Id.* at 300-01.

⁶⁸ *Id.* at 301.

⁶⁹ *Ibid.* The Society's expenses have grown steadily in the last decade, from \$347,000 in 1953 to more than \$1,021,000 in 1963. The estimated budget for this year is \$1,266,000. 151 N.Y.L.J., March 11, 1964, p. 1, col. 3.

requiring aid.⁷⁰ Philadelphia, like New York, had to appeal to the city government for aid, thus following the lead of other private defender organizations such as Buffalo, Rochester, and Cleveland, which were already receiving public funds.⁷¹ Most private organizations are not as fortunate as New York's because they are not located in as wealthy a community nor do they have as large and prominent a board of directors. Many are forced to rely heavily upon the United Fund or Community Chest, as does the Defender Association of Philadelphia.⁷² The fact that even New York must accept public funds is strong evidence that private financing alone cannot be relied upon to meet the expanding costs of legal aid. It seems, however, that the voluntary defender system is capable of conforming to the standards of a model defender system but is, in practice, restricted by inadequate funds and a reliance on charitable contributions. Harrison Tweed, a pioneer in legal aid, in recognizing expense as the great obstacle to the private defender system, stated that he "never believed that sufficient funds would be available to make this system an adequate ultimate solution for most communities."⁷³ Therefore, it is not surprising that voluntary defender organizations have made provision to receive public funds, and by doing so, they appear to be moving into the category of mixed, private-public defender systems.

The Public Defender System

Most of the defender offices providing legal services to the poor in criminal courts are publicly supported government units. Many are created under enabling statutes allowing local districts or counties to create public defender offices.⁷⁴ The scope of each system is only as wide as the enabling statute allows, and a poorly drafted statute may tend to restrict future growth. Public defenders, like prosecutors, are public officials whose salaries, in

⁷⁰ SPECIAL COMMITTEE, *op. cit. supra* note 59, at 69. For examples of the limitations suffered by a voluntary defender system because of a shortage of funds, see Interview With Herman I. Pollock, Chief Attorney of the Defender Association of Philadelphia, in 22 LEGAL AID BRIEF CASE 143 (1964).

⁷¹ The financial crisis that led to the appeal for public funds in Philadelphia is reported in Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 738, 749-52 (1961).

⁷² *Id.* at 749. The author states that "private financing cannot be relied upon to supply the minimum necessary to carry on the existing program, let alone the expanded program needed to make the defender system a first-class operation. . . ." *Id.* at 751-52.

⁷³ SPECIAL COMMITTEE, *op. cit. supra* note 59, at 5.

⁷⁴ See, e.g., N.Y. Sess. Laws 1962, ch. 881, §716; CAL. GOV'T CODE § 27700.

addition to all other expenses in a public defender system, are paid by the government. They may be chosen by judicial appointment, competitive civil service examinations, or public election.⁷⁵ In practice, a public defender organization is similar to a voluntary defender office. It is capable of providing a broad scope of legal services, entering the proceedings forty-eight to seventy-two hours after arrest, and providing experienced, professional defenders supported by investigatory facilities and personnel.⁷⁶ However, the full burden of a public defender system rests upon the government which is financially responsible for its existence.

The United States was late in accepting the public defender system and it was not until the second decade of the twentieth century that the first true public defender office was established in Los Angeles County. As early as the third or fourth century, the Romans had an office known as *Pauperus Procurator*, and practically every European country had a public defender as early as the eighteenth or nineteenth century.⁷⁷ It appears that the system is still not completely accepted in this country for apparently there are no more than sixteen states providing for public defender offices.⁷⁸ Yet, there is no indication that the growth of the public defender system has been retarded by any bad experiences with it, since it has borne the burden well in the states where it is operating.⁷⁹ Judicial notice was taken of the ability of the public defender system to supply competent representation when a California court stated that "it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the Public Defender of Los Angeles County and his staff."⁸⁰

Although New York does not have any public defender office presently in operation, it has accepted the concept and, in 1961, the Legislature enacted a Public Defender Law.⁸¹ This law permits any county with a population of over 100,000 to create the

⁷⁵ BROWNELL, *op. cit. supra* note 50, at 133.

⁷⁶ SPECIAL COMMITTEE, *op. cit. supra* note 59, at 72-76; see generally Carmody, *The Public Defender System*, 35 N.Y.S.B.J. 296 (1963); Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715 (1961); David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753 (1961).

⁷⁷ Address by Hon. Raymond E. Peters, Annual Conference of the Public Defender and Legal Aid Ass'n of California, April 29, 1961, in 20 LEGAL AID BRIEF CASE 24 (1961).

⁷⁸ These states include California, Connecticut, Colorado, Florida, Indiana, Illinois, Minnesota, Missouri, Nebraska, New York, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, and Washington. See statutes cited note 74 *supra*; BROWNELL, *LEGAL AID IN THE UNITED STATES* 133 (1951); 22 LEGAL AID BRIEF CASE 32, 169 (1964).

⁷⁹ David, *supra* note 76, at 762.

⁸⁰ *People v. Adamson*, 34 Cal. 2d 320, 333, 210 P.2d 13, 19 (1949).

⁸¹ N.Y. Sess. Laws 1961, ch. 365, §§ 716-21.

office of Public Defender, to join with other counties in doing so, or to contract with an established legal aid organization to provide this service. It specifically provides that nothing contained therein shall preclude a court on its own motion or upon application by the public defender or the indigent defendant from appointing an attorney other than the public defender to represent said defendant. The law was amended in 1962 to omit the population limitation.⁸²

Although the public defender system has been praised and has been provided for in such populated states as California, Connecticut, New York and Illinois, it is not without critics. Its most outspoken opponent is Judge Dimock who claims that "of all the fields of private right, this field of legal representation is the last field where we ought to permit the Government to move an inch inside the gate."⁸³ Furthermore, he maintains that the public defender system cannot provide zealous representation because the state cannot both effectively prosecute and defend an accused. He also doubts whether a defendant would have faith in a public advocate, knowing that he, as well as the prosecutor, is a government official.⁸⁴ Judge Dimock argues that a public defender chosen by judges before whom he will practice would be influenced by his personal relations with these judges, instead of concentrating on the defendant's interests. If the public defender is elected, he would be similarly sensitive to public opinion, especially in cases involving a particularly heinous crime for which the public demands vengeance.⁸⁵ The Judge concludes that the system would bring us so close to a police state that "we ought to shun it like the plague."⁸⁶

Edward T. Carmody, public defender of New Haven County, Connecticut, rejects Judge Dimock's thesis. While recognizing the possibilities of a joint effort of a public prosecutor and defender to railroad a defendant, he observes that there is not the remotest evidence that this has ever happened. Defender Carmody states that all the public defenders he has known "have been jealous of their independence" and "have been proud of the fact that they are their own men."⁸⁷ Edward Q. Carr, Jr., attorney-in-chief of the Legal Aid Society of New York City, in comparing public and private defender service, remarked:

There is no reason to expect any distinction in the professional effort. I am sure that a public defender with sound provision for his appointment

⁸² N.Y. Sess. Laws 1962, ch. 881, § 716.

⁸³ Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A.J. 219 (1956).

⁸⁴ *Id.* at 220-21.

⁸⁵ *Ibid.*

⁸⁶ *Id.* at 221.

⁸⁷ Carmody, *supra* note 76, at 297.

and tenure will be just as competent, independent and zealous for his client's interest as a private defender.⁸⁸

California counties generally base their choice of a public defender on civil service examinations while Connecticut defenders are chosen by judges and Omaha defenders by election. Judge J. Edward Lumbard, Chief Judge of the United States Court of Appeals for the Second Circuit, claims that a qualified public defender can best be selected by the judges of the courts in which the defender will practice, since those judges are in the best position to assess the character and ability of those members of the Bar who litigate cases before them. Furthermore, he believes that judges would give more weight to fitness for the job and less weight to political factors than would any other public official or public body.⁸⁹

The public defender system, established with proper safeguards to insure the undivided loyalty of defense counsel, can apparently satisfy the requirements of the model system. However, since the full responsibility for the system is on the government, there is the very real danger of losing community support. Citizens may become apathetic about such a defender system after it is initially established because their only relation to it is as taxpayers.

Mixed, Private-Public Defender System

The mixed, private-public defender system is a hybrid of the voluntary defender system and the public defender system, with, theoretically, the advantages of both and the disadvantages of neither. In practice it is a voluntary defender system which draws upon both private and public funds and is independent and insulated from political control. The government has no part in policy-making or in the selection of personnel.⁹⁰ This mixed system is exemplified by the Legal Aid Society of New York City, formerly a purely private, voluntary defender organization. Although it is directed by a private board of directors, it receives about 25 per cent of its funds from the city government. Similar private legal aid organizations in Philadelphia, Buffalo, Rochester, and Nassau County are also receiving public funds. The special committee to study defender systems reported that this mixed system has great potential and should be seriously considered by com-

⁸⁸ Carr, *The Defender Work of the Legal Aid Society in New York City*, 35 N.Y.S.B.J. 299, 301-02 (1963).

⁸⁹ Lumbard, *How Should Defenders Be Chosen?*, 22 LEGAL AID BRIEF CASE 40 (1963).

⁹⁰ See SPECIAL COMMITTEE, EQUAL JUSTICE FOR THE ACCUSED 52-53, 76, 93-94 (1959).

munities that are either re-examining an existing defender system or planning to establish one.⁹¹

The most recent example of a mixed, private-public system is in New York's Nassau County. According to James J. McDonough,⁹² director of the Criminal Division of the Legal Aid Society of Nassau County, the Bar Association of Nassau County, through its Criminal Courts Committee, recommended to the county government in 1961 that it enter into a contract with the society to provide legal assistance in criminal matters to needy persons charged with a crime.⁹³ The Nassau County Legal Aid Society, a charitable corporation which was originally incorporated about thirteen years ago, previously handled only civil matters, since there were no funds available for representation in criminal courts. The matter lay dormant until the Supreme Court decision in *Gideon v. Wainwright*.⁹⁴ Mr. McDonough reports that:

Shortly after this decision the Board of Supervisors of Nassau County appropriated the sum of \$60,000 for the operation of a defender's office by the Legal Aid Society of Nassau County and authorized the County Executive to enter into a contract with the Society. The contract was executed on July 1st, 1963 to be effective for a period of one year.⁹⁵

Under the terms of the contract the society agreed to represent indigent defendants accused of felonies at the time of their arraignment in the district court, at felony examinations in that court, before the grand jury, in the county court if indicted, and in any post-conviction proceedings.⁹⁶ The contract also provides that the county would exercise no control over the selection of the personnel of the office or in its operation. However, personnel must be recruited from the residents of the county, and the office is required to submit reports to the County Executive concerning its activities and finances.⁹⁷ Mr. McDonough, an attorney with twenty years experience in the field of criminal law, was appointed director of the Criminal Division by the society's board of directors. With the aid of a committee from the board, he then chose two assistants, both of whom are experienced in criminal practice. The division, employing an investigator and two secretaries, opened on September 9, 1963, and occupies quarters in the Nassau County Courthouse.

⁹¹ *Id.* at 76, 93-94.

⁹² Letter from James J. McDonough to this writer, Feb. 13, 1964.

⁹³ The enabling statute is N.Y. Sess. Laws 1961, ch. 365, §§ 716-21. Under this statute a county may: (1) contribute financial support to a legal aid society, (2) formally contract with such a society to provide legal services in the county, or (3) create a public defender office.

⁹⁴ 372 U.S. 335 (1963).

⁹⁵ *Supra* note 92.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

In a recent report to the board of directors, Mr. McDonough states that because of a complete evaluation of each case, his office is in a position to get a more favorable plea in many cases and has a greater opportunity to secure the fairest possible sentence for a guilty defendant.⁹⁸ Although his report is optimistic and reflects great promise and potential for the program in Nassau County, Mr. McDonough recognizes that the society does not provide a broad enough scope of legal service and should expand its coverage to include misdemeanors and appeals.⁹⁹ Expansion and development depend on the ability of the society to obtain more financial support from both private and public sources. The system, however, appears flexible and capable of being expanded to meet all future needs. In addition, it is directed by an experienced and dedicated criminal lawyer.

Conclusion

The mixed, private-public defender system appears to be capable of conforming to all the standards of a model defender system, both in scope of representation and competency of personnel. It places the burden for the defense of the indigent where it belongs—on the government and on the private citizen. This system need not fear bankruptcy for it enjoys government financing, and it need not fear political domination, since it is privately directed.

There is much to be done, however, before equal justice before the law becomes a reality. Mr. Justice Goldberg, in a lecture recently delivered at the New York University School of Law, suggested that legal services should be provided free of cost, not only to indigents, but also to an accused who, although not impoverished, cannot without extraordinary sacrifice raise enough money for an adequate defense.¹⁰⁰ He urged that "we should certainly consider adopting procedures whereby persons erroneously charged with crime could be reimbursed for their expenditures in defending against the charge."¹⁰¹ Mr. Justice Goldberg's suggestions seem quite ambitious, but they are consistent with the primary goal of all defenders, *i.e.*, to someday make the poverty of the defendant an irrelevancy in the administration of criminal justice.

⁹⁸ REPORT OF THE DIRECTOR OF THE CRIMINAL DIVISION OF THE LEGAL AID SOCIETY OF NASSAU COUNTY (Jan. 1964).

⁹⁹ *Ibid.*

¹⁰⁰ Goldberg, *Equal Justice for the Poor, Too*, N.Y. Times, March 15, 1964, § 6 (Magazine), p. 24, 102.

¹⁰¹ *Ibid.*