



## Santa Clara Law Review

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Volume 5 | Number 1

Article 4

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1-1-1964

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### Recommended Citation

H. Reed Searle, *An Argument for the Public Defender System*, 5 SANTA CLARA LAWYER 48 (1964).

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# INSTITUTE OF CONTEMPORARY LAW

## AN ARGUMENT FOR THE PUBLIC DEFENDER SYSTEM

H. Reed Searle\*

### INTRODUCTION

This article attempts to summarize some of the many arguments favoring the Public Defender system as opposed to the assigned counsel system of providing representation for indigent defendants in criminal cases in California, and its purpose is one of advocacy rather than of analysis.

Complete equality before the law for rich and poor in criminal proceedings is and has been considered traditionally a requisite of our judicial system. Such equality will always be an ideal toward the realization of which we must constantly strive.

It could be argued that there is substantive inequality in our criminal law because the laws themselves are written by members of the dominant social groups and at least in the area of crimes against property the laws largely protect the dominant group. The argument continues that much of our criminal law is merely a method of enforcing rights to private property which could be enforced equally well through the civil courts. Any such discussion is beyond the scope of this article, although the oft-quoted observation of Anatole France serves to demonstrate that in the very nature of criminal law there is an inequality which is not likely to be eliminated:

The law, in all its magnificent equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread.

In some ways the poor suffer before the bar of criminal justice because they are poor and no system of providing representation will cure this type of inequality.

It is the administration and not the content of the system with which we are concerned. Our adversary system of criminal law presupposes and requires equally competent attorneys on both sides

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of criminal prosecutions. Justice can be triumphant under our system only if the opposing sides are equally represented. While this has been recognized for centuries,<sup>1</sup> it has only been in recent years in the United States that we have seen the logical application of the principle as far as indigents are concerned.<sup>2</sup> For many years, we were content to place in our statute books<sup>3</sup> and constitutions<sup>4</sup> the guarantee of right to counsel. Unwritten in many of these guarantees was the economic exception: The right to counsel existed only if the defendant had funds with which to retain counsel.

It is now established as a matter of Federal constitutional law binding upon the states that counsel must be provided to the indigent in all criminal proceedings.<sup>5</sup> California has provided for actual representation of the poor for many years in certain cases,<sup>6</sup> and the area of required representation has been rapidly expanding. The question at issue is how best to provide this representation.

If the prosecution attorneys in criminal cases generally are inexperienced, if the caliber of prosecuting attorneys is low, and if prosecuting officials spend little time properly investigating or presenting cases, then perhaps it could be argued that defendants in criminal cases need not have extremely competent counsel. It is assumed here, however, that prosecuting attorneys usually are experienced, competent, dedicated and possessed of adequate investigatory facilities. If this is true, then the system demands for its proper functioning equally competent and zealous defense advocates with adequate time to prepare their cases and adequate investigatory facilities.

There is another type of equality which the system demands. Regardless of the quality of prosecuting officials, persons accused or convicted of violating our criminal laws need assistance in their dealings with the state. Defendants who have adequate finances will retain counsel of their choice. It is the basic assumption of this article that the poor should not only have an abstract "right" to counsel, but that the right must be implemented by actually providing experienced and competent counsel.

It follows that the only relevant consideration in a discussion of the assigned counsel versus the Public Defender system is quality

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<sup>1</sup> *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522 (1961).

<sup>2</sup> CONTINUING EDUCATION OF THE BAR, STATE BAR OF CALIFORNIA, CALIFORNIA CRIMINAL LAW PRACTICE 512 (1964).

<sup>3</sup> CAL. PEN. CODE §§ 686 and 987.

<sup>4</sup> CAL. CONST. art. I, § 13.

<sup>5</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>6</sup> 14 CAL. JUR. 2d, *Criminal Law* § 146 (1954).

of representation. If the poor must not be disadvantaged in their dealings with the criminal law merely because of their economic status, the only question is how we can assure that economics is a consideration irrelevant to questions of providing representation. In this discussion, it should be remembered that equality of representation is not restricted to assuring that only the 'guilty' are convicted. Criminal law starts with the question of whether charges should be brought and concludes with problems regarding length of sentence, rehabilitation and record clearance. The poor should have the same representation as the wealthy throughout the entire process.

#### PUBLIC DEFENDER SYSTEM V. ASSIGNED COUNSEL SYSTEM

There are different systems which purport to provide adequate representation for the indigent.<sup>7</sup> Since this article deals with California, the discussion contrasts only the assigned counsel and Public Defender systems. The assigned counsel system is one in which some or all of the members of the local bar association take turns at volunteering or being assigned by the courts to represent indigent defendants; assignment may be with or without compensation and compensation may be adequate or inadequate. In counties of small population where most local attorneys engage in criminal practice and where the District Attorney also maintains a private practice and spends a relatively small amount of time on criminal cases, this system may be adequate. Community awareness is higher in small counties, and the lawyer who shirks his assigned case duties is disciplined by community pressure. The assigned counsel system is currently operating in California in such larger counties as San Diego, Contra Costa, and San Mateo.<sup>8</sup>

The Public Defender is an attorney or an attorney and his assistants or deputies who are employed generally on the county level and specialize in criminal law. In California, some Public Defender services are rendered on contract, i.e., a county may contract with a local attorney for representation of indigent defendants.<sup>9</sup> In other counties, the Public Defender is a full time occupation. He is either elected or appointed, and in the larger counties he must practice no law except as Public Defender.<sup>10</sup> His duties are specified by the Code and his jurisdiction includes minor civil matters, representation of persons subject to commitment under various sections

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<sup>7</sup> SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK TO STUDY THE DEFENDER SYSTEM, EQUAL JUSTICE FOR THE ACCUSED 47 (1959) [hereinafter cited as SPECIAL COMMITTEE].

<sup>8</sup> *Representation of Indigents in California*, *supra* note 1.

<sup>9</sup> CAL. GOV'T CODE § 27700 *et seq.*

<sup>10</sup> CAL. GOV'T CODE § 27705.

of the Welfare and Institutions Code and criminal and juvenile offenders.<sup>11</sup> Such large counties as San Francisco, Los Angeles, Alameda, San Bernardino, and Orange have a Public Defender. In Santa Clara County, a Public Defender's office will soon be established.<sup>12</sup> It is assumed that a Public Defender and his deputies are free from political influence or control, adequately compensated for their services, and are possessed of adequate investigatory facilities. Anything less than this is inadequate and should not exist.

The problem of providing representation for the indigent is a large one because indigent defendants are numerous. In most larger counties, the majority of criminal arrests, excluding traffic offenses, are of the indigent and a Public Defender office will often represent more than half of all criminal defendants.<sup>13</sup>

Criminal law is increasingly becoming a specialty of increasing complexity and is practiced by a diminishing percentage of active lawyers:

Although few fields of practice are more challenging or of greater fundamental importance to society, an overwhelming proportion of the American Bar avoids any connection with the defence of persons accused of crime.<sup>14</sup>

The need for guidance and assistance in the area of criminal law actually precedes the commission of any act which might violate the criminal law. As our society has grown in complexity, our laws have made illegal many acts regardless of any substantial "criminal intent" or "mens rea." True equality before the law would require that the indigent be provided legal counsel to render opinions on possible criminal liability for certain desired acts. It is quite unlikely that the indigent will ever receive such counsel, and to this extent inequality will remain.

### *Before Trial*

The advantages of a Public Defender system over an assigned counsel system may be discussed as they exist at the various stages of criminal proceedings. Let us suppose that an act has occurred which may constitute a violation of any one of the numerous branches of criminal law. The offense may be an obvious homicide or a possibly indecent touching of a young child or any one of the

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<sup>11</sup> CAL. GOV'T CODE § 27706.

<sup>12</sup> The Santa Clara County Board of Supervisors has established a Public Defender office and it will be operational by April, 1965.

<sup>13</sup> SPECIAL COMMITTEE 38.

<sup>14</sup> Continuing Education of the Bar, State Bar of California, California Criminal Law Practice XIX (1964).

innumerable social or technical crimes. At the point where the police or investigating agency decide that perhaps an offense may have been committed and suspicion focuses on the accused, the wealthy accused will, at this early stage of the proceedings, immediately seek legal counsel.<sup>15</sup>

In California, the recent cases of *People v. Dorado*<sup>16</sup> and *People v. Anderson*<sup>17</sup> have made another logical extension of the constitutional right to counsel. In the *Dorado* case, the California Supreme Court held that confessions obtained from a defendant at a time when he is not represented by counsel and does not intelligently waive the right to counsel are not admissible. This landmark decision has vast implications for the criminal law. The Court stated:

We hold, in the light of the recent decisions of the United States Supreme Court, that, once the investigation focused on defendant, any incriminating statements given by defendant during interrogation by the investigating officers became inadmissible in the absence of counsel and by the failure of the officers to advise defendant of his right to an attorney and his right to remain silent. The admission into evidence of a confession obtained in such a manner requires reversal. . . .<sup>18</sup>

The question presented, then, is whether this failure of the accused to request counsel distinguishes the instant case from *Escobedo*. We conclude that it does not; that the constitutional right to counsel precludes the use of incriminating statements elicited by the police during an accusatory investigation unless that right is intelligently waived; that no waiver can be presumed if the investigating officers do not inform the suspect of his right to counsel or his right to remain silent.<sup>19</sup>

If the person accused is affluent, he will, when advised of his right to counsel, immediately contact his attorney. The indigent are not so privileged, and the practical effect of this decision is that legal counsel must be made available to the accused prior to actual arrest or formal charge. There appears to be no manner by which the assigned counsel system can provide representation before arrest or booking. A Public Defender system is capable of providing representation at this early stage of the proceedings. If the *Dorado* decision stands,<sup>20</sup> it appears almost as a matter of law that a Public Defender must exist in every county.

Pre-booking assistance is not restricted to advising a potential

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<sup>15</sup> *Escobedo v. Illinois*, 378 U.S. —, 84 Sup. Ct. 1758 (1964).

<sup>16</sup> *People v. Dorado*, 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964).

<sup>17</sup> *People v. Anderson*, 61 A.C. 903, 394 P.2d 945, 40 Cal. Rptr. 257 (1964).

<sup>18</sup> *People v. Dorado*, 61 A.C. 892, 893, 394 P.2d 952, 953, 40 Cal. Rptr. 264, 265 (1964).

<sup>19</sup> *Id.* at 899, 394 P.2d at 956, 40 Cal. Rptr. at 268.

<sup>20</sup> Petition for rehearing granted in *People v. Dorado*, 61 A.C. 892, 394 P.2d 952, 40 Cal. Rptr. 264 (1964).

defendant of what he should or should not say. In numerous instances, the substantial benefit to a potential defendant is obtainable only in the pre-arrest stages. It is to the decided advantage of persons in this position to avoid arrest with its attendant publicity and social stigma. The ill effects of arrest itself do not disappear or diminish because of economic status. In many prosecuting offices, arrangements are permitted for informal disposition of many potential cases either by agreements for restitution or compromise<sup>21</sup> or through a 'warning' or 'citation' proceeding. Crimes committed by the mentally ill are likely to be compromised or dropped if counsel can assure the prosecution that the defendant will obtain psychiatric care or will commit himself to a hospital. It appears that only a Public Defender system can provide these services.

As has been indicated, the assigned counsel system does not permit entry of counsel until after arraignment, and arraignment generally occurs from one to three or four days after arrest.<sup>22</sup> In California, many Public Defender systems permit representation prior to arraignment<sup>23</sup> and in addition the Code<sup>24</sup> requires that the Public Defender be available at this stage. The most intensive interviews with the defendant often occur at this time and the process of investigation, both by defense and by the prosecution, must be commenced and completed as soon as possible. Witnesses in criminal cases have a tendency to become unavailable and this unavailability is encouraged by publicity attendant to arrest and arraignment. In practice any defendant who has financial ability will certainly contact his attorney immediately after arrest and booking (if he has not contacted him earlier). The indigent must have the same privilege. Additionally, the time between arrest and release with or without bail is materially shorter when the defendant is represented by counsel. Judges are understandably reluctant to release a defendant without bail or to reduce bail materially at arraignment, unless they have the benefit of some investigation of the defendant's alleged offense, his previous record, and his stability.

Where the assigned counsel system prevails, there is of necessity a two or three day period between the time when counsel is actually appointed and the time that counsel manages to interview his client and make such motions for reduction or release as are appropriate. As a practical matter, assigned counsel in a felony matter wait until the preliminary hearing to make such motion. This practice often results in an additional three or four days un-

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<sup>21</sup> CAL. PEN. CODE § 1377.

<sup>22</sup> CAL. PEN. CODE § 835.

<sup>23</sup> *Representation of Indigents in California*, *supra* note 1, at 537.

<sup>24</sup> CAL. GOV'T CODE § 27706.

necessary incarceration for the defendant; this incarceration is directly traceable to and caused by the defendant's economic status. Under a Public Defender system, the attorney may have the matter placed on the calendar for arraignment earlier, he can make the necessary investigation prior to arraignment, and he will be ready for appropriate motions regarding bail or release at that time.

To reduce "dead time" (time spent in custody awaiting trial or sentence which does not count towards any state prison sentence and which may, at the discretion of the court, count towards any county jail sentence) is of substantial importance especially in all of the later stages of the proceedings. Under an assigned counsel system, attorneys are likely to consent to continuances of assigned cases, because of economic pressure alone, where they conflict with retained cases. As a result they often secure continuances on the grounds of conflicting appearances in other courts. While this writer has not seen statistics, it is estimated that the "dead time" served by defendants represented by assigned counsel is substantially greater than the "dead time" served by defendants represented by a Public Defender. A Public Defender is operating full time in the criminal defense area; he has no other obligations than the defense of the indigent; he has no inclination to continue cases; and in the metropolitan counties, a Public Defender is in attendance at all criminal court calendars.

Assigned counsel likewise generally fail to perform or have adequate facilities to perform the necessary pre-trial investigation. While many Public Defender offices similarly lack adequate investigatory facilities, most offices are staffed with one or more full-time investigators and appropriations for investigation work are generally provided. In many assigned counsel systems, reimbursement, if any, for investigation expenses is usually totally inadequate. The attorney who wishes to represent competently his client must perform the investigation work himself. Clearly, considerable motivation is required for an attorney to spend time performing investigation at a cost to his private practice. In addition to the normal investigation procedures of contacting witnesses and securing statements, there is a large and rapidly increasing area of use of expert witnesses in criminal cases. Public Defenders, because of their constant contact with the field, become familiar with and are able to use such expert witnesses. Psychiatrists, pathologists, ballistics experts, handwriting analysts, document examiners, physicians, surgeons, and a host of other experts commonly consulted and retained by District Attorney offices are rarely used by assigned counsel. Funds for the use of such witnesses are often available to Public Defenders although seldom available in adequate amounts to assigned counsel.



*During Trial*

In the remaining phases of criminal prosecutions exist the greatest advantages for the use of the Public Defender system. Public Defenders are experts in criminal law; assigned counsel usually are not.<sup>25</sup> Criminal law practice demands expert attorneys with the ability to devote adequate time and energy to each case. Public Defenders, like District Attorneys, operate full time in the area of criminal law and thus become experts. In a Public Defender office, there is adequate time for investigation, study of all aspects of the cases, and determination of trial tactics or non-trial dispositions, all without the undue pressures which typically burden the lawyer in private practice.

There are numerous questions in any criminal case. The answers to these questions require experience and intimate familiarity with the law and the personnel of the local criminal system. The questions concern: whether to go to trial; what plea to make; whether to have a jury trial or court trial; which witnesses to call; whether to attack the prosecution's entire case or to attack only one part of it; and the extent of pre-trial and discovery proceedings. These are only indicative of the questions on which decisions must be made. These are major decisions which can be made only by one who is thoroughly experienced and familiar with the criminal law.

In any prosecuting office, a formal or informal specialization exists. Certain deputies become especially familiar with, and competent in, certain types of cases and are customarily assigned to those cases. The same type of competency occurs in a Public Defender office. This permits equality between opposing counsel, such equality being required for the successful functioning of the system. No such opportunities exist in an assigned counsel system.

One of the major traditional arguments for the assigned counsel system is that it provides experience for younger attorneys. The answer to this argument is that the purpose of a Public Defender system is not to gain experience for the young attorney, it is to provide competent representation for the indigent. In an assigned counsel system, it is not unusual to have a young attorney try a felony in his first criminal trial. In a prosecuting office or a Public Defender office, a beginner is never allowed to try a felony. In these offices beginners are trained in the lower courts with cases involving very minor offenses and are not allowed to practice in the superior court without a sound and thorough period of apprenticeship. The defendant may have his trial, but he may also find himself in prison for a term of five years to life on a conviction for first degree bur-

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<sup>25</sup> SPECIAL COMMITTEE 64.

glary whereas he could have been sentenced to the county jail. He may in fact be serving time because of poverty.

### *After Trial*

Should the defendant be convicted, the post-trial procedures are as important as the pre-trial or trial stages. Probation hearings, sentencing, new trial and related motions, and non-sentence dispositions (sexual psychopathy, mental illness observation, etc.) are all extremely complex. The proper use of the available tools requires as much expertise as the trial of the case itself. Public Defenders also have appeal jurisdiction<sup>26</sup> thus providing consistent representation throughout the criminal proceedings. This is extremely important in view of the fact that the indigent also has a right to counsel during the appellate procedure.<sup>27</sup>

Recent additions to the Penal Code indicate that in the near future, the whole area of parole, setting times for release, and parole violations may be the proper domain of attorneys.<sup>28</sup> It is argued that since the decisions of the parole authorities are at least as important as decisions of Judge and jury, counsel should be available for hearings on all these matters.<sup>29</sup> Once again, the Public Defender is in the position to perform these functions for his clients.

### *Other Considerations*

For a variety of other reasons, a Public Defender system will expedite the proper administration of criminal justice. Initially, the same practices which reduce dead time permit the criminal-legal system to function more smoothly and efficiently. Work is performed more quickly by experienced and efficient persons. Court calendars run more smoothly when there are not numerous requests for continuances. If a plea of guilty is to be made, it is usually entered under a Public Defender system upon arraignment; when a case is set for jury trial, it will be tried within the statutory period.<sup>30</sup>

There are peripheral advantages to a Public Defender office which should be noted. A Public Defender office acts as a constant check upon the activities of District Attorney offices and the various police departments. The Public Defender office promotes commu-

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<sup>26</sup> CAL. GOV'T CODE § 27706.

<sup>27</sup> *Douglas v. California*, 372 U.S. 353, 355 (1963).

<sup>28</sup> CAL. PEN. CODE § 3042.

<sup>29</sup> Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 812 (1961).

<sup>30</sup> CAL. PEN. CODE § 1050.

nity awareness and respect for our system of criminal justice. As a public agency, the Public Defender is subject to constant public scrutiny; consequently, the public becomes aware of the advantage to the community and to society of adequate representation for indigent defendants. Public Defenders usually participate in local and state bar commissions revising or modifying our criminal laws or procedure and hence operate for the benefit of all persons accused of crime and for the benefit of the public generally.

If assigned counsel were adequately paid, some of the inequality in representation would disappear. The fees ordinarily and customarily paid to assigned counsel, in, for example, Santa Clara County, are inadequate to cover even the expenses of an attorney who devotes adequate time to his assigned cases. In fact, the only means of making these cases economically productive would be by a waiver of preliminary hearing followed by a plea of guilty in the superior court.<sup>31</sup> While many assigned counsel willingly sacrifice the time properly to represent their assigned cases, it is impossible to deny that the necessity of economic sacrifice tends to diminish responsible representation. If counsel are not in an economic position to devote the time required, their clients will not receive competent representation. Chief Justice J. Edward Lumbard, United States Court of Appeals, Second Circuit, states:

Such counsel should be in a position to devote to the indigent's case the time and attention which would be devoted to the case by the average criminal court lawyer who receives a reasonable minimum fee. Counsel should also be reimbursed for necessary investigation and out-of-pocket expenses. Such counsel is adequate; anything less than this is inadequate. Measured by this standard, it is clear from recent surveys that there are very few communities in this country where a majority of indigent defendants in criminal cases have adequate counsel. The difficulty is that most lawyers simply cannot give a case the necessary attention unless they are reasonably paid to do so.<sup>32</sup>

It is probable that a Public Defender office will be more costly than assigned counsel. Certainly the costs of Public Defenders are substantially less than the cost would be for adequately compensated assigned counsel. By eliminating unnecessary trial, reducing jail and prison sentences (and therefore reducing costs of the welfare and related programs) and minimizing dead time, the Public Defender will in fact produce economic savings.<sup>33</sup> In any event, the cost of procuring equality before the law is at most a second-

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<sup>31</sup> *Representation of Indigents in California*, *supra* note 1, at 537.

<sup>32</sup> Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. Am. Jud. Soc'y 178 (1964).

<sup>33</sup> Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 724 (1961).

ary consideration. The assigned counsel system, with its low or no fee tradition, has been justified on the grounds that it is the responsibility of the Bar to defend the indigent. To the contrary, the responsibility is that of society, and in any event, the Bar has not met the obligation.

### CONCLUSION

Reginald Smith in his book, *Justice and the Poor*,<sup>84</sup> states that the assigned counsel system is "a dismal failure." The book, *Legal Aid in the United States*,<sup>85</sup> written by Emery Brownell in 1951, states that, "Except possibly in a few rural areas, the assigned counsel system fails miserably to afford the equal protection under law which it pretends to give and which the Constitution of the United States contemplates." The authors of *Equal Justice for the Accused*<sup>86</sup> state that the assigned counsel system does not afford representation which is uniformly experienced, competent, and zealous; does not provide the investigatory and other facilities necessary for a complete defense; does not come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect; and often does not continue through the appeal. The Public Defender system has none of these defects and numerous other advantages.

The American Bar Association in February, 1960, adopted a series of eight standards for Public Defender services. The Public Defender system of every state should:

1. Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanction;
2. Afford representation which is experienced, competent, and zealous;
3. Provide the investigatory and other facilities necessary for a complete defense;
4. Come into operation at a sufficiently early stage of the proceedings so as to fully advise and protect the defendants;
5. Assure undivided loyalty by defense counsel to the client;
6. Include the taking of appeals and the prosecuting of other remedies, before or after conviction, considered by the defending counsel to be in the interest of justice;

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<sup>84</sup> REGINALD SMITH, *JUSTICE AND THE POOR* 103 (1919).

<sup>85</sup> BROWNELL, *LEGAL AID IN THE UNITED STATES* 142 (1951).

<sup>86</sup> SPECIAL COMMITTEE 57.

7. Maintain in each county in which the volume of criminal cases requiring assignment of counsel is such as to justify the employment of at least one full-time lawyer to handle the work effectively, a defender office, either as a public office or as a quasi-public or private organization;
8. Enlist community participation and responsibility and encourage the continuing cooperation of the organized bar.<sup>87</sup>

The assigned counsel system may have served us well in past years, but it does not fulfill the requisites listed above. Like the volunteer fire department,<sup>88</sup> the assigned counsel system simply does not apply to metropolitan areas. Only a properly organized and financed Public Defender system can remedy procedural inequality for the indigent and bring us closer to our ideal of "equal justice for the accused."

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<sup>87</sup> BROWNELL, *LEGAL AID IN THE UNITED STATES*, SUPPLEMENT 56 (1961).

<sup>88</sup> Analogy from Pollock, *Equal Justice in Practice*, 45 *MINN. L. REV.* 737, 743 (1961).