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Equal Justice in Practice

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INTRODUCTION

Many legal and philosophical treatises have been written on the constitutional right of an accused to counsel and on the various methods adopted to assure that right. From my standpoint, a study which goes to the heart of the counsel problem in practice is *Equal Justice for the Accused,* published in 1959 by the Association of the Bar of the City of New York and the National Legal Aid and Defender Association, joint sponsors, of a Special Committee to Study Defender Systems.[1] Based on a review of the actual operations of a number of representative defender organizations and based on its own collective experience, the Special Committee concluded (1) that each community should choose the type of defender organization it prefers based on the size of the community, the number of indigent accused, the probable cost to the community, and the particular conditions within the local bar,[2] and (2) that whatever the form of organization, the system should meet certain qualitative standards. These standards are as follows:

1. The system should provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction.
2. The system should afford representation which is experienced, competent, and zealous.
3. The system should provide the investigatory and other facilities necessary for a complete defense.
4. The system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal.
5. The system should assure undivided loyalty by defense counsel to the indigent defendant.

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1. The fieldwork for the study was done by a paid staff under the direction of a Special Committee to Study Defender Systems.

2. SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED 79 (1959).

6. The system should enlist community participation and responsibility.[3]

The report of the Special Committee to Study Defender Systems could not have come at a more propitious time.

I. THE NEED FOR COUNSEL

For almost forty years, the Committee on Legal Aid of the American Bar Association and the National Legal Aid Association, now known as the National Legal Aid and Defender Association, have been spear-heading a concerted national effort to establish effective legal aid and defender facilities throughout the United States. While progress in this direction has been heartening it has been far outdistanced by the enormous and growing demand for free legal representation in criminal cases. Each year thousands of indigent persons accused of crime but unaided by counsel are processed through our criminal courts. In 26 states needy defendants charged with noncapital offenses go completely unrepresented or else receive cursory representation by court-appointed counsel who are neither compensated for their services nor reimbursed for expenses necessarily incurred in the investigation and trial of a criminal case. Privately supported defender organizations exist in only a handful of communities and provide only limited and sporadic coverage. Only 78 Public Defender offices are currently in operation in the entire country and of this number 63 are located in three states—California, Connecticut and Illinois.

The task of providing counsel to needy defendants in all criminal cases would have been onerous at any stage of this nation's development. It is even more difficult today. The tremendous growth of the nation in population and industry, the increase in urbanization, the shift of ethnic groups from one section of the country to another and the complexity of our social institutions have created varied and complex problems in the administration of criminal justice.

In this changing era national, state and local laws undreamed of in the last century proscribe innumerable activities of daily life. The result is an enormous increase in the number of persons charged with criminal offenses and a corresponding increase in the need for counsel. The extent of the problem can be appreciated from the fact that more than 2,000,000 people charged with the commission of major offenses will be arrested in the United States this year. More than 1,000,000 of those arrested for such offenses will require free legal representation, but of this number only

3. *Id.* at 56. See also *id.* at 56–62 for a discussion of these standards.

about 100,000 will receive the services of voluntary and public defenders.

The appalling truth is that more than half of the country's needy defendants facing a traumatic court experience and a possible prison sentence are not supplied with counsel at all or are supplied with counsel who fail to furnish adequate representation.

How should this enormous and pressing demand for legal aid in criminal cases be met effectively? The most respected and informed authorities differ on this point. E. J. Dimock, United States District Judge for the Southern District of New York, believes that the privately supported defender organization is excellent and the system for case-by-case assignment, if compensated, is reasonably good, but that the Public Defender system is bad law and bad statesmanship. Judge Dimock has warned that "there is great danger in the doctrine that the highest welfare of the human race is to be obtained only by complete subservience to an all-providing state."[4] He believes that the burden of defense of the poor rests logically upon the Bar and should therefore be financed wholly by the Bar.

At the other extreme I have heard the late John J. Parker, presiding judge of the United States Court of Appeals for the Fourth Circuit, say that he favors public defense—indeed, that the ultimate resolution of the free counsel problem may well be the establishment of a Public Defender in every jurisdiction, with services without charge available to all persons who are accused of crime who may wish to utilize them, without any regard being given to the applicant's ability to employ private counsel. I have learned of late that such a system of making counsel available at public expense to all persons accused of crime is presently in use in Norway. These state appointed counsel are employed on a part time basis and are chosen from the most prominent members of the Norwegian bar.

I am not persuaded by the assertion that the adoption of a Public Defender system is an ineluctable "step toward a police state," nor that the establishment in this country of a system of public defense for all persons who wish to have it would be a stride toward an all-providing state. The thing which disturbs me is the unavailability of counsel for those whose needs are immediate and urgent.

II. DEVELOPING INTERPRETATION OF THE RIGHT

For more than 150 years the right to have the assistance of counsel in a noncapital case was interpreted by American courts to

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

mean no more than that an accused person who had a lawyer had the constitutional right to be defended by him.

It was not until 1938 that the Supreme Court of the United States in *Johnson v. Zerbst*,[5] a counterfeiting case, interpreted the sixth amendment to mean that a defendant in a federal court is not only entitled to be represented by his retained counsel, but that he is entitled to have counsel assigned to him by the court if he appears without counsel and is unable to obtain counsel, unless he intelligently waives the assistance of counsel.

As recently as 1942 the Supreme Court in *Betts v. Brady*,[6] a robbery case, held that due process does not require a state to furnish counsel to a defendant in every criminal case but only in a case in which the factual situation is such that it would be potentially and fundamentally unfair to proceed without counsel.

In *Uveges v. Pennsylvania*,[7] involving a 17 year old boy who pleaded guilty to four burglaries, the Supreme Court clarified its holding in *Betts* by laying down the rule that "where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . the accused must have legal assistance under the [Fourteenth] Amendment,"[8] and this is said to be so, "whether he pleads guilty or elects to stand trial, whether he requests counsel or not."[9] In such cases, said the Court, "only a waiver of counsel understandingly made, justifies trial without counsel."[10]

Since 1948 the Supreme Court, in an unbroken series of cases, has extended its interpretation of the right of a defendant in a state court to be supplied with counsel,[11] until today, under *Hudson v. North Carolina*,[12] it would seem that an uncounselled defendant who finds himself in a "prejudicial position" and who is left entirely to his own devices in a serious criminal case is being deprived of his constitutional right to the assistance of counsel in violation of the fourteenth amendment.

Paralleling this line of decisions making lawyers accessible to needy defendants is a line of decisions making state appellate

5. 304 U.S. 458 (1938).
6. 316 U.S. 455 (1942).
7. 335 U.S. 437 (1948).
8. *Id.* at 441.
9. *Ibid.*
10. *Ibid.*
11. See, *e.g.*, Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, 337 U.S. 773 (1949); Wade v. Mayo, 334 U.S. 672 (1948).
12. 363 U.S. 697 (1960).

courts more accessible to such defendants in post-conviction proceedings. Thus, the Supreme Court of the United States has held it to be a denial of due process for a state to refuse to furnish a free copy of the transcript of trial testimony when the presentation of such a transcript is a prerequisite to obtaining appellate review.[13] And the Court has held it to be a violation of due process for a state appellate court to refuse to accept an appeal without the prepayment of the filing costs in a case in which the defendant is financially unable to pay them. In *Burns v. Ohio*[14] the Court held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty."[15] Notwithstanding the ruling in *Hudson v. North Carolina,* which casts doubt on the validity of any judgment of sentence imposed by a state court on an unrepresented defendant in a serious criminal case, a great many state courts continue to try indigent defendants in such cases without counsel.

III. EFFECTIVENESS OF EXISTING METHODS

A. The Court or District Attorney as Counsel

It is my considered opinion that to try an indigent defendant without counsel in any criminal case is to utilize one method for the trial of those defendants able to engage private counsel and another for those who are not. I believe that an adversary system presupposes the existence of two opposing parties and that it is a contradiction in terms to say that we have an adversary system when there is only one contending party—the district attorney. I believe that to try a needy defendant without counsel is to abandon the adversary system.

Frequently in the trial of an uncounselled defendant, I have heard the judge announce that he will protect the defendant's legal rights. An inexperienced observer of such a trial may take pride in a system which appears to show so much solicitude for the rights of an accused, but a lawyer who specializes in the trial of criminal cases recognizes the proceeding for the travesty that it is.

I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of

13. Griffin v. Illinois, 351 U.S. 12 (1956).
14. 360 U.S. 252 (1959).
15. *Id.* at 257.

the prosecuting witness. Not infrequently, this violation of the rules of trial procedure brings forth sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.

I have heard a judge presiding over the trial of a criminal case inadvertently misquote the governing law to the serious detriment of the unrepresented defendant. And I have observed the district attorney, preoccupied with the next case, remain silent while an excessive and illegal sentence was imposed on the uncounselled defendant whose interest he had said earlier in the proceedings he would protect. The judge's erroneous statement of the law and the district attorney's failure to protect his uncounselled "client" are not hard to understand. The judge usually spends only a small portion of his time in criminal court and cannot be expected to be fully informed on the law of the immediate case. The district attorney, conditioned by his official experience to view a criminal case from the standpoint of the prosecution, is not apt to think in terms of moves, defenses and laws favorable to the defense. I have found this to be true of the prosecutor even when he has had an extensive and successful criminal practice before his appointment to the district attorney's staff.

Obviously the uncounselled defendant, when he appears for trial, cannot be advised properly by the district attorney or the court on the crucial questions of plea or as to whether to submit his case to a jury or to a judge sitting without a jury, and he cannot during the progress of a trial confer and consult privately with the district attorney or the court.

A judge or a prosecuting attorney who would assume the duties of defense counsel at the trial of an unrepresented defendant should bear in mind that defense counsel would long ago have interviewed the defendant; that he would have represented the defendant at the preliminary hearing; that he would have investigated the case, subpoenaed witnesses for the defense and researched the law. Defense counsel would have scanned the bill of indictment before trial to determine its validity, meaning and scope and he would have considered what plea, if any, should be entered in the interest of his client.

It is obvious to any person familiar with the practice of criminal law that the failure to do any one of these things might well result in irreparable harm to the accused. By the time a criminal case is called for trial the case of an unrepresented defendant may already have been seriously damaged. For instance, for want of counsel at arraignment, the defendant may lose an opportunity to obtain a *nolle prosequi.* He may lose an opportunity to quash, consolidate or sever bills of indictment; he may lose an opportunity to obtain a bill of particulars. He may lose an opportunity to have the names

of his witnesses placed on the bill of indictment so that they might be subpoenaed by the state on his behalf. If a juvenile, he may forfeit an opportunity to have his case transferred to the juvenile court. The need for a lawyer at the sentencing of a defendant who pleads guilty or is found guilty may be even greater than the need at arraignment or trial. In Pennsylvania, as in many other states, the sentencing structure is complicated and not easily understood even by lawyers. Commitment to one penal institution rather than to another may result in substantially greater punishment. Doubt exists as to the maximum penalties which may be imposed for attempts to commit specific offenses. Even lawyers are unclear as to whether a specific sentence imposed upon a defendant will begin to run immediately or at the expiration of a prior sentence. Frequently there is disagreement on whether one bill of indictment or count merges with another or whether conviction on two related counts may only result in a single sentence. A defense counsel who has researched the appropriate sentencing laws is in a far better position than a judge or a district attorney who has not to assure that the sentence is in conformity with law and consistent with the defendant's rights.

From arrest to arraignment, trial, sentence and through appeal, a defendant needs the aid of competent counsel. It is unrealistic to believe that an unrepresented defendant can avoid the many pitfalls which are to be found in our complex criminal laws and technical procedures. When he is tried without counsel, he is placed ipso facto in a position of prejudice. Therefore, it is a serious mistake to assume that an uncounselled defendant receives procedural due process when a district attorney or judge departs from his assigned role and undertakes to safeguard the defendant's rights at the trial of his criminal case.

I venture to say that if competent counsel were provided to represent an indigent defendant at every stage of the criminal proceedings in which the accused faces the possible loss of his liberty, the courts might not be flooded as they now are with so many post conviction petitions filed by prisoners in which the claim is made that they have been denied due process.

B. Court-Appointed Counsel

Legal representation of indigent defendants without charge stands as a monument to the contributions of the bar to the cause of humanity and justice. Like the rural volunteer fire company, it can, to some degree, fill the need of a sparsely settled community, but it is incapable of meeting the needs of the modern city. Moreover, in these times, a lawyer should not be expected to provide free services to accused persons who are unable to pay legal fees.

The country's shift of emphasis from economic to human rights in recent years has been accompanied by a corresponding change in concept as to the character of legal aid. The traditional philosophy that legal aid is a charity has given way to the concept that it is a political and social right. Implicit in this new concept is a growing conviction that all those in need of legal aid in criminal cases should receive it and that all those who perform legal aid services in criminal cases should be adequately compensated. This is not to say that a lawyer should not continue to render free legal services in individual cases. This practice is in the best tradition of the profession. But when one considers the tremendous demand for legal aid it is unfair and unrealistic to call constantly on the bar for free services in order to meet a pervasive and basic need.

I find no fault with having a system of court-appointed counsel in sparsely settled communities, provided counsel is adequately compensated for services and reimbursed for incidental expenditures. I believe, however, that the system of appointing lawyers on a case-by-case basis would be prohibitively expensive, inefficient and ineffective if applied to our larger cities. The amount spent last year by the Philadelphia Defender office to carry out its limited program was approximately $80,000. If the Defender Association of Philadelphia had purchased the same services from lawyers on a case-by-case basis at the rates set forth in the minimum fee scale adopted by the Philadelphia Bar Association, it would have spent in excess of $800,000. And if the Association were to extend its services to include legal representation in courts not now covered by its operations, it would require an annual budget of $1,500,000 to pay for legal services on a case-by-case basis.

Apart from the expense, there are other reasons which make a system of appointing lawyers from private practice to represent indigent defendants ineffective in a large city. The jail population in a rural community is small while the population in the untried department of a city prison may run into the hundreds and consists of many inmates against whom no criminal charges are pending.

C. The Public Defender and the Voluntary Defender Systems

The system of appointing individual lawyers on a case-by-case basis is geared to the furnishing of legal representation to a prisoner accused of crime. Such a system does not reach and cannot benefit many persons who are confined in prison, not awaiting trial as defendants, but for other reasons—such as those held as material witnesses, those held in violation of probation or parole, those held on contempt of court charges, those held as United

States Department of Justice prisioners, those awaiting extradition or transfer to mental institutions, or prisoners held on civil charges or in lieu of fines. Sometimes prisoners in these categories are desperately in need of legal assistance. A person may be arrested illegally on a bench warrant and committed to prison or, having been legally arrested and committed to prison, he may be forgotten there. A person may be unjustly languishing in jail because of an illegal conviction in summary proceedings or for failure to pay a fine and costs or for failure to pay a penalty.

A witness or even the prosecutor himself may be lodged in jail by a magistrate who is ignorant of the legal limitations on the right to commit a person to prison as a material witness. Persons committed to prison constantly require advice, guidance and often representation in court in matters which do not involve the actual trial of a criminal case. A system of appointing individual laywers is designed to represent persons accused of crime. It is not designed to supply legal services to prisoners who need representation but who are not awaiting trial on criminal charges.

Justice and common decency demand the establishment in every large city of a permanent body with knowledge of the law and with the initiative to act in the public interest on behalf of such indigent prisoners, as well as for those charged with the commission of crime. Only a defender organization whose staff regularly visits the city's prisons and interviews inmates can make it possible for such persons to have the legal protection they require. Some of the Defender's most rewarding cases involve legal assistance to prisoners who fall within these classes.

Only a defender organization adequately staffed and set up on a modern office basis is able to handle a heavy case load effectively. The defender organization, by concerted effort, can help relieve court calendar congestion, help reduce the time which elapses between arrest and trial of the defendant and thereby relieve overcrowding in the untried departments of the city prison.

Anyone familiar with criminal court practice knows that a criminal case is usually tried sooner and more expeditiously when handled by a defender organization rather than by an individual lawyer. This is because the Defender is a specialist in the trial of criminal cases and is able to do a good workmanlike job in court in less time than would be required for a lawyer who appears in court infrequently. Unlike the individual lawyer, the Defender has no conflicting engagements which might cause him to ask for a postponement. If for any reason he is unable to try a case, it is handled by an office associate. By trying cases quickly, competently and at the earliest moment, equal justice is made a living reality for the unfortunate indigent defendant. In addition, the city saves

a great deal of money in having cases tried without delay—thereby enabling citizens and witnesses more quickly to present their testimony and resume their work without unnecessary waiting for cases to be tried and without being subjected to unnecessary continuances. A welcome and important by-product of this increased efficiency is a rising respect for law on the part of the public.

It is the first duty of a Defender, no less than that of court-appointed counsel, to safeguard the individual rights of clients. However, in the performance of that duty, the Defender is in a unique position to observe the effect of our criminal law and administration on many individuals. Situations constantly arise which emphasize the need for correcting inequities and deficiencies in the administration of justice. A defender organization is in a far better position to focus attention on such situations and to lend a helping hand in having them corrected. In Philadelphia, for example, when it was discovered that there was no reliable procedure by which the case of a prisoner committed to prison on a bench warrant would be given a prompt listing for arraignment and trial, the Defender brought the matter to the attention of the Board of Judges and the condition was corrected. When it was discovered that bondsmen were compelling defendants to pay for new bail every time a case was continued for a further hearing, this matter was likewise brought to the attention of the proper authorities and this bad condition corrected. When it was noticed that several persons against whom a bill of indictment had been ignored were nevertheless kept in prison because of the absence of a system whereby the authorities would be notified of the action of the grand jury, this too was corrected. Again, when it was learned that a number of persons arrested on bench warrants were committed to prison without the setting of bail or the date for a preliminary hearing, this situation was corrected by the adoption of a new rule of court providing that every adult who is arrested shall have bail set for him immediately. For the better protection of children who appear as witnesses, the Defender worked out an arrangement with the District Attorney of Philadelphia County which spares child witnesses the experience of hearing testimony given in trials involving crimes of sex or violence if the child is not immediately concerned. Inordinate delays in sentencing have been eliminated by the adoption of a procedure by which the sentencing judge is systematically notified by the prison authorities of a deferred sentence case one month after the deferment of sentence and is also notified monthly thereafter until the case is finally removed from the institution's deferred status list.

A defender system is preferable to an assigned counsel system in an urban area for the further reason that the defender system

can assure representation which is uniformly experienced, competent and zealous. If a Defender office is well run the client reaps the benefit of specialization, team work and consultation. A young lawyer will not be permitted to do what is beyond his competence and his work will be closely supervised by experienced colleagues.

In an urban community defense counsel and client are likely to be total strangers. In such a situation it is important that an uninformed client know by whom he was represented, where his lawyer can be located and how he can obtain any information which he desires relating to his case. Such a client would be more apt to remember that he was represented by the Defender than to recall the name of court-assigned counsel. The importance of having records relating to the trial of indigent defendants in a well-publicized central location cannot be overemphasized. In post-conviction proceedings particularly it often helps to eliminate a duplication in effort on the part of the court, the district attorney and defense counsel.

The preceding observations illustrate the ways in which a Defender can properly meet the manifold legal needs of clients in a large city and at the same time help to improve the administration of criminal justice. Inherent in the assigned-counsel system —paid or unpaid—is a structural inability to provide the wide scope of defender services demanded in a metropolitan community.

D. The Voluntary Defender System is Preferable

Some 40 years ago, Charles Evans Hughes, chairman of the first Committee on Legal Aid of the American Bar Association, acknowledged the responsibility of the bar to assure to indigent defendants legal representation as competent and zealous as that enjoyed by those financially able to employ private counsel, when he said: "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 right for want of a skilled protector, able, fearless and incorruptible."[16] Today this means that lawyers must not only take the lead in establishing effective defense organizations to serve the needy defendants, but they must also see to it that defender organizations, once established, continue to supply services of a high professional order.

I believe that a perfect system of providing representation to indigent persons accused of crime cannot be devised. While the Public Defender system, entirely supported by tax funds, can provide

16. Address by Mr. Charles Evans Hughes to the American Bar Association, reprinted in *Justice and Need of Legal Aid for Poor*, 6 A.B.A.J. 83, 85 (1920).

comprehensive coverage and investigation facilities equal to that of the prosecution, the Defender is susceptible to political manipulation and domination by the court. I believe that the voluntary defender system is in the best position to afford independent representation and "a competent administration of justice to the needy" and therefore is preferable to the Public Defender system. A voluntary defender is not hemmed in by statutory limitations and political pressures and is in a better position to stand his ground before a tyrannical judge or an arbitrary public official. One real test of evaluation of any defender system is whether the system protects the legal rights of an unpopular defendant. It seems to me that the voluntary defender system supervised by a responsible Board of Directors composed of leading members of the legal profession is better able to meet this test. It is more difficult for a public official—a Public Defender—than it is for a Voluntary Defender to protect fully the rights of a person who, let us say, is charged with cop-beating, robbery accompanied by violence or a repulsive sex act. It takes professional courage in such cases for a lawyer to assert his independence before a wilful judge bent on obtaining a conviction. I remember one occasion in which I was publicly rebuked by the trial court for "overzealousness" in defending an unpopular client. Without the slightest hesitancy I informed the court that it was my professional duty to protect my client against what I believed was arbitrary judicial conduct. When this story appeared in the newspapers, several directors of the Defender Association called to offer their congratulations. As a post script, I am happy to say that the conviction in that case was subsequently reversed on appeal on the ground that the defendant's constitutional rights had been violated.

One of the most forceful judges in Philadelphia, a former district attorney who has never fogotten that fact even on the Bench, is one of the strongest advocates of the Voluntary Defender system in Philadelphia. In my opinion he could not have paid the Defender office a higher compliment than when he said on the occasion of the Association's 25th anniversary, ". . . it has steadily maintained its position, and to its credit, as being a real defender. This office in my judgment, has never surrendered."

Although the voluntary defender system in a particular case can provide the same quality of representation which is enjoyed by those who are represented by private counsel, it is unable, solely because of inadequate financial support, to provide the over-all defender needs in a large city. Philadelphia is a case in point.

IV. THE DEFENDER ASSOCIATION OF PHILADELPHIA

As recently as 35 years ago, two-thirds of the criminal cases listed in the criminal courts of Philadelphia were tried without counsel for the defense. Each year a mass of bewildered human beings who could not speak for themselves and sorely needed, but lacked, the guiding hand of counsel passed through the grinding routine of the criminal courts without any perceptible concern on the part of the Bar or the public.

Systematically in those days, a prisoner awaiting trial was rushed to arraignment and trial on the day immediately following indictment. He was not furnished with a copy of the bill of indictment. He was not given notice of the date set for trial. He was given neither an opportunity to investigate the facts of his case nor means to secure necessary witnesses.

Twenty-five or more prison cases were listed daily for arraignment and trial in a single courtroom. At the arraignment, as a defendant's name was called out by the crier the prisoner was quickly yanked from the cell room behind the court to a point only a foot or two from the door and before he could take in his surroundings the charges were read and he was asked to plead. The plea taken, the defendant was peremptorily shoved back into the "bull pen" like a jack-in-the-box even as the next defendant was being brought out for arraignment. In order to correct this nightmarish situation sixteen outstanding lawyers representing a variety of civic and social interests organized to form the Philadelphia Voluntary Defender Association.

Since its organization in 1934, the Defender Association has been supplying free counsel in noncapital cases to accused persons committed to prison for want of bail and waiting to be tried in the criminal courts of Philadelphia County.[17]

In 1936, the Association became a member agency of the Community Fund. It is now a member of the United Fund and is supported principally out of contributions made to the United Fund Campaign.

In 1947, it extended its activities to the representation of destitute persons awaiting trial in the federal court.

In 1958, the Association was renamed the Defender Association of Philadelphia in order to avoid the misleading impression that the services performed by the Defender are uncompensated, casual or part-time.

The Association is governed by a Board of Directors. The Board chooses the Defender and charges him with the responsibility of carrying out Association policy. The staff consists of the

17. See generally Note, 107 U. PA. L. REV. 812, 836–54 (1959).

Defender and four assistant defenders, a chief investigator and three assistant investigators and five clerical workers. The legal staff is employed on a full time basis and its members are precluded from engaging in private practice. The work of the regular legal staff is augmented each month by the services of a private attorney contributed to the Association for a full month by a law office. The Defender is also assisted by law students who interview clients in prison, perform legal research and otherwise aid in the preparation of cases for trial.

The Association has become an integral part of the administration of justice and the community health and welfare program. It is a member of the Health and Welfare Council and the National Legal Aid and Defender Association. It collaborates on local counsel problems with the Philadelphia Bar Association, the Legal Aid Society and the Lawyers Reference Service. Over the years, it has helped to improve criminal procedure and to correct inadequate and outmoded practices inimical to the public welfare. Thus, it assisted in the drafting of legislative provisions which were later incorporated in the Mental Health Act of the Commonwealth. It aided in obtaining the adoption of legislation authorizing the automatic release from prison after 10 days of persons held only because of inability to pay costs and after 30 days for those unable to pay a small fine and costs. It initiated court proceedings which brought about the opening of the only adult institution for defective delinquents in Pennsylvania. It was successful in having declared unconstitutional a statute which authorized the court to compel a defendant acquitted of crime to file a bond for good behavior. The practice of compelling an acquitted defendant to file such a bond had been in existence for over 200 years and often resulted in the imprisonment of the innocent who could not raise bail. It was successful in obtaining a decision of far-reaching importance from the Supreme Court of Pennsylvania clarifying the mandatory provisions of the Pennsylvania Drug Act. The decision enables the sentencing judge to individualize treatment in a drug case and brings this type of case within the general sentencing scheme of the commonwealth.

Since 1934 the Association has supplied free counsel to more than 70,000 needy persons.

Despite all these accomplishments, the Association still faces a financial and professional crisis. Louis B. Schwartz, Professor of Law at the University of Pennsylvania and a member of the board of the Defender Association, in an eloquent address on the future of the Defender Association delivered at the Philadelphia Bench-Bar Conference last September, graphically characterized the situation confronting the Defender Association as "a crisis in equal justice."

The financial crisis arises from the fact that the United Fund on which the Defender Association heavily relies for financial support has not been able to provide even the minimum needed by the Association to maintain present services. In 1958 the Association had to dispense with the services of one investigator because of inadequate financing. In 1959, and again in 1960 the United Fund was only able to allocate about $10,000 less than the sum needed to carry on the Association's restricted program.

The professional crisis stems from the inability of the Defender Association to supply the wide range of defender services which is needed in the city of Philadelphia. The present program of supplying representation in the so-called "prison cases," that is, in those cases in which an accused is confined in prison to await trial, is not broad enough to meet the over-all demands for defender services. If the Association program is to live up to the standards formulated by the Special Committee to Study Defender Systems, it must provide counsel not only to those in prison awaiting trial on criminal charges, but to "every indigent person who faces the possibility of loss of his liberty or other serious criminal sanction." This means that the Association must expand its program to provide counsel to:

1. A destitute person accused of crime who is at liberty either on his own bond to appear when wanted, or on a bond provided by acquaintances.

2. An older juvenile who is unable to obtain a private lawyer and who faces a charge of delinquency based on an alleged act which, had it been committed by an adult, would have amounted to a criminal offense. In Pennsylvania an adjudication of delinquency on such a charge may result in commitment to a correctional institution for a maximum of six years.

3. An impoverished defendant who is charged with failure to comply with a court order for the support of a wife, children or parents.

4. A penniless defendant who appears in the municipal court charged with fornication and bastardy; here too, an accused if found guilty, is subject to imprisonment.

5. An indigent defendant in the magistrates court whether charged with the commission of a summary offense or an indictable offense on which he is to have a preliminary hearing to determine whether he should be held to await the action of the grand jury.

The Defender Association has always been devoted to the principle of obtaining financial support solely from private sources. However, once the Association reached the conclusion 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, it took immediate action. First, it sought and obtained appropriations from the City Council in order to make up its deficits and prevent an interruption in services. In order to insulate the Association from political influence these appropriations were made to the Court of Quarter Sessions, earmarked for the use of the Defender Association. Secondly, the Association prepared a long-range proposal for an effective and comprehensive defender system in keeping with the standards set up by the Special Committee to Study Defender Systems. Thirdly, it has asked the Health and Welfare Council for an evaluation of its plans to broaden its program and the Council's help in obtaining a substantial increase of private and tax funds on a regular basis. The idea of having a private defender program maintained by tax funds is not altogether new. Private agencies supported by tax funds are presently supplying counsel to persons accused of crime in some courts in the cities of Buffalo and Rochester in the State of New York, and the cities of Cleveland, Columbus and Toledo in the State of Ohio. In accepting tax funds the Defender Association of Philadelphia with the full support of the Philadelphia Bar Association is determined to preserve its autonomy and freedom from judicial, political and economic controls. This it expects to accomplish by maintaining a fixed and balanced ratio between private and tax support.

Should its plans materialize, Philadelphia will not only enjoy the advantages inherent in a voluntary defender structure but also the many benefits which flow from long range financial stability. Thus it will possess the type of dynamic private-public defender operation which the Special Committee to Study Defender Systems concludes "has great potentialities and should be seriously considered by communities which are either re-examining an existing defender system or seeking to adopt a new system."[18]

18. SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, *op. cit. supra* note 2, at 76.