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An Advocate for Indigent Accused

William P. Murray

Thomas J. O'Hara

AN ADVOCATE FOR INDIGENT ACCUSED

Right of the Indigent Accused Today and Duty of the State

The Preamble of the Constitution expressly states that one of its primary purposes is "to establish justice" for all the people in the United States. Does our existing judicial system measure up to this guarantee? The verbiage of the Fifth, Sixth and Fourteenth Amendments would, at first glance, lead one to presume that every citizen is equally protected under the law and, when charged with a crime, entitled to a fair trial including, when necessary, the assistance of counsel. Yet an anamalous situation exists because, in practice today, assistance of counsel for an accused is not deemed to be an absolute and necessary incident of justice. A cardinal theory of our criminal system is that an accused is innocent until proven guilty. This phrase is but mere rote when one considers the plight of the hapless accused indigent inadequately protected during the proceedings. The government must place such an indigent on the same plane as other defendants. Must the justice he receives be proportioned to the funds in his purse? Justice Rutledge, dissenting in Foster v. Illinois [1], said "Poverty or wealth will make all the difference in securing the substance or only the shadow of Constitutional protection."

The need for providing indigents with legal assistance has obviously not yet been accorded full and complete recognition in the United States. In the past few years, the right of an indigent accused of crime to the assistance of counsel has gained more cognizance. Federal courts were formerly loath, on appeal, to invade the sacred precincts of the state courts and construed the "due process" clause of the Fourteenth Amendment very strictly, coupling it with a rather questionable presumption that all former proceedings in the state courts were legally correct. In Bute v. Illinois [2] the Supreme Court described its position, saying:

> "Because the Constitution, during nearly eighty formative years, permitted each state to establish, maintain and accustom its people to its own forms of "due process of law", a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right to continued recognition by the Federal Government as due process of law."

Early common law looked upon the court as the counsel for the prisoner in criminal cases involving felonies. From its inception, the United States has rejected this outmoded practice and recognized and protected the right of any accused to the assistance of counsel in all proceedings, criminal and civil. A rather unique situation exists in our country, however, in that it is the duty of the court to provide counsel for indigents in criminal actions in Federal Courts, whereas state courts recognize no such similar duty.

1. 332 U.S. 134, 142 (1947).
2. 333 U.S. 640, 653 (1948).

The Federal Government at last formally recognized this right of the indigent and its correlative duty by the adoption of Rule 44 of the Federal Rules of Criminal Procedure in 1946 [3], which imposed a duty on Federal Courts to appoint counsel for indigents in all criminal proceedings. This rule was the culmination and extension of a statute passed in 1790 [4], which imposed a similar duty on Federal Courts in trials involving treason and capital crimes. Thus it took more than one-hundred and fifty years for a full and complete recognition of the necessity for providing counsel to secure for indigents the complete protection guaranteed them by the Constitution. Must we wait this long again for the states to acknowledge their duty to so provide counsel? The fourteenth Amendment, adopted in 1868, provided, ". . . nor shall any state deprive any person of life, liberty or property without due process of law." The peculiar situation which exists because of our dual system of government can be better exemplified by some recent opinions of the Supreme Court. A bare majority of the Supreme Court stated the problem thus in Foster v. Illinois [5].

> "The 'due process' of law which the Fourteenth Amendment exacts from the states is a conception of fundamental justice. . . It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused 'the Assistance of Counsel for his defence.' By virtue of that provision, counsel must be furnished to an indigent defendant prosecuted in a federal court . . . Prosecutions in state courts are not subject to this fixed requirement."

Justice Black, dissenting, claimed such a holding "waters down the Bill of Rights guarantee in criminal cases" and he followed with a logical deduction that if counsel must be furnished in federal courts, why not in state courts.

The Supreme Court recognizes the right of all accused to have assistance of counsel; yet it refuses to postively declare that in every instance the Constitution imposes a duty upon the individual states to furnish counsel for indigents accused of crime. In Carter v. Illinois [6], the Court said:

> "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant . . . the Due Process clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure . . . the prosecution of crimes outside the limited federal scope is left for the individual states. The Constitution commands the States to assure fair judgment . . .

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3. Fed. R. Crim. P. 44 - "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."
4. 1 Stat 118 (1790), 18 U.S.C. sec. 563 (1940).
5. 332 U.S. 134, 136 (1947).
6. 329 U.S. 173, [illegible] (1946).

so long as they observe those ultimate dignities of man which the United States Constitution assures."

In Gibbs v. Burke [7], the Court further said:

". . . the Constitution does not guarantee to every person charged with a serious crime in a state court the right to the assistance of counsel regardless of the circumstances . . ." but "where the ignorance, youth or other incapacity of the defendant made a trial without counsel unfair, the defendant is deprived of his liberty contrary to the Fourteenth Amendment."

This stand by the Court leaves the States in a rather uncertain position as to whether or not counsel must be offered in the case before the state court; the Supreme Court refuses to offer a panacea for the difficulty. The obvious and simple solution, of course, would be for the legislature of each state to reguire the appointment of counsel to all accused unable to afford it. Many states have adopted this measure by appropriate legislation but the deplorable fact remains that other states have made no such provisions for the protection of the individual's rights, and to gain the consequent surety that the conviction will not be subsequently reversed and remanded for want of due process. Such legislation would also affirmatively declare that the indigent is entitled to such protection as a matter of right under the Constitution and not as a matter of charity. With all due respect to the admirable accomplishments of charitable agencies, the fact still remains that some men are too proud and stiff-necked to accept such assistance given under the guise of charity. When all states finally recognize that they have a duty to provide an indigent with counsel, and that the indigent's right is one assured him by the Constitution, then indeed, and then only, will they take the necessary steps and pass legislation to positively secure that right. The current socially progressive trends in our country give fair promise that such universal recognition is not too far away.

Current Systems of Coping with the Problem

Various methods have been attempted to solve and remedy this problem. They may all be considered under four general classifications and plans:

Legal Aid Society;
Assigned Counsel;
Voluntary Defender;
Public Defender.

Legal Aid bureaus throughout the country have endeavored to correct this obvious defect and have attempted to balance the scales of justice for the indigent. They are doing and have done a tremendous task with what little financial assistance they receive. Some operate on a purely local basis and subsist entirely on donations from the community chest or some similar sources. Others attempt to work on a nation-wide level to promote the formation of local legal aid bureaus. [8] Their operations naturally are restricted by their budgets. The activities of these legal aid bureaus extend to assistance for indigents in civil as well as criminal matters; hence, in communities which provide no aid for indigents accused of a crime, their assistance is

7. 337 U.S. 773, 780 (1948).
8. 36 A.B.A.J. 265 (1950).

even much more limited. Their intentions are very worthy but the fact still remains that they are unable to adequately cope with the problem.

A second method to attempt to assist the accused indigent is the assignment of counsel to the indigent by the court without compensation for his services. This was the first system adopted by the courts in an attempt to remedy the situation of the pauper accused. The system will still work in small communities where a co-operative bar association functions and the lawyer recognizes the duty he owes to society because of the nature of his profession. But such a system is completely inadequate in any metropolitan district. Too often the assigned counsel is young and inexperienced; even if an able lawyer, he is giving of his time and cannot be expected to expend the funds necessary to conduct an extensive investigation, to secure witnesses, etc., i.e. to do what is necessary to conduct a reasonable defense. The committee appointed by the Supreme Court in 1943 concluded that the voluntary or uncompensated services of counsel is not an adequate way of providing representation for indigents. [9] This defect, however, has been remedied to a great extent by the payment of compensation to the assigned counsel; the measure of compensation for each individual case is at the discretion of the trial judge. The compensation is naturally not a munificent sum but it does take the assignment out of the realm of a charitable undertaking and establishes the right of the indigent to be so represented. This system of assigned counsel with compensation has worked out to the satisfaction of all concerned. One drawback is the short delay between the discovery of the need and the appointment of counsel; another is the possibility that the appointed counsel will be unfamiliar with criminal procedure and, hence, not furnish satisfactory assistance, though his intentions may be of the very best.

A third answer to meet the need of the indigent is the so-called Voluntary Defender system. This system is in operation in a few large cities which provide no adequate assistance to such indigents in criminal cases. The Voluntary Defender and his staff are appointed by a Board of Directors who usually consist of prominent members of the legal profession. The Defender is selected on the basis of his record and his past experience in the criminal courts; hence he is no novice in the field and is fully equipped to furnish competent service to the indigent. The staff may not be of the same high calibre but gains rapidly in skill. There is also an unlimited source of civic-minded young law students upon whom he can call to do office work, run errands, conduct routine investigations, etc. so as to leave the Defender and his staff free to handle the more important problems confronting his office. The salary for the Defender and his staff is met by funds supplied by the Community Chest, the Bar Association, or some similar organization. The plan thus has the obvious advantage of being an organized system completely divorced from state control. This leaves the Defender free to practice without being subjected to pressure from political forces, or from fear of incurring the dislike of members of the Bench. The plan, however, has the glaring disadvantage of an uncertain and limited source of funds; such a financial structure must necessarily limit its activities and render it incapable of furnishing the full measure of service required in all circumstances. The assistance, because of the very nature of the organization, is furnished to the indigent as a matter of charity and not as a matter of right.

Some states and cities have recognized the right of the indigent to the assistance of counsel throughout the proceedings and their correlative duty

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9. 13 J.B.A., D.C. 23 (1946).

to afford such assistance. They have endeavoured to meet the burden through the establishment of the Public Defender system. [10] This system is rapidly gaining prominence and is being widely adopted throughout the country. [11] This defender is either elected or appointed by the state; he has a permanent position, usually, at a fixed yearly salary. His office and operational expenses are financed by the state; he has a competent staff, commensurate with requirements of his business; he has access to all the public facilities for securing evidence and information. The Public Defender is usually a man of ability, fully skilled in criminal pleading who is capable of supplying full and adequate assistance to the indigent. Some states provide for his election by the judges of the state courts and determine his remuneration in each action by the judge before whom he appears; however, the money is paid him from a fund appropriated by the legislature for the expenses of the court. In every instance, whether elected by popular vote, [12] appointed, [13] or elected by the judges, [14] the state treasury finances his operations. He is not confined, therefore, in his attempts to render assistance, by the shackles of financial insecurity. When the court is satisfied that the prisoner is unable to afford counsel, the Public Defender immediately steps in and takes over the defense. He solicitously listens to the accused's side of the story; if convinced of the guilt of the prisoner, he advises him to plead guilty, but if the prisoner doesn't wish to so plead, he proceeds to arrange a defense. The Public Defender thus serves a double function by disposing summarily of some actions, thereby relieving the crowded criminal dockets, and by furnishing the accused with sufficient legal assistance so as to prevent his receiving a disproportionate sentence. The Public Defender also works in close conjunction with the District Attorney's office, is usually located in the same building and has access to the same mediums of gathering information; he thus has a distinct advantage over any other lawyer in preparing the defense and meeting the issues involved. But this particular "advantage" has been criticized by opponents of the system as being its chief disadvantage. [15] Continued familiarity with the prosecution might tend to cause laxity in preparing a defense; in trial proceedings he might not wish to incur the wrath of the prosecutor and thereby rupture their close relationship. He might also become zealous in his attempt to dispose of cases in which he is fairly certain of the guilt of the accused; his encouragement to "cop a plea" might

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10. Statutes provided for a Public Defender have been adopted in the states of California, Connecticut, Illinois, Minnesota, Nebraska and Virginia. Cities where this system has functioned are Bridgeport, Conn.; Chicago, Ill.; Columbus, O.; Hartford, Conn.; Los Angeles, Cal.; Memphis, Tenn.; New Haven, Conn.; Oakland, Cal.; Providence, R.I.; St. Paul, Minn.; St. Louis, Mo.; San Diego and San Francisco, Cal. The city of Portland, Ore., provided for the appointment of a Public Defender by the City Council under Ordinance No. 30107 (1915) but this was repealed by implication since no appropriation has ever been made for this position
11. The last six U.S. Attorney Generals have recommended this system.
12. Nebraska provides for "the office of public defender who shall be elected at the general election in the year 1916, and every four years thereafter . . ." Neb. Rev. Stat. sec. 15 of L.B. 430 (1943).
13. Virginia's statute states "All judges of courts having criminal jurisdiction. . . may, in their discretion, appoint. . . as public defender. . ." Va. Code sec. 4970a (1920).
14. Conn. Gen. Stat. sec. 6476 (Revision of 1930).
15. 32 J. Am. Jud. Soc'y 115 (1948).

be offered too frequently. He might be too slow to adopt dilatory tactics to protect the indigent when he realizes the displeasure he might arouse, knowing full well that, to some extent at least, his continued employment in such a position depends on placating all parties. He might be swayed too often to keep all operational expenses to a minimum to prove his administrative efficiency. The public nature of his office and its apparent connection with other public agencies have prompted opponents of the system to advance the above cogent probabilities. [16] The fear is that under such a system expediency at times may be the prime motivating consideration, whereas protection at all times is the main need.

Conclusion

A brief summary of the merits and disadvantages of the existing systems to aid indigents in criminal prosecutions has been set forth. Obviously, no single system completely solves the problem. An effective system would be one organized along the lines of the Public Defender system. The stigma of state control, however, must be eliminated; the public official, as such, must be removed. Yet no organization can adequately handle the task without the backing of public funds. The duty is on the state, so why shouldn't the State Treasury finance the project! How can this difficulty of securing state financing while avoiding state control be overcome? The only feasible solution lies in the establishment of a Board, composed of representative public officials and prominent attorneys selected by the Bar Association; this Board would supervise the fund appropriated for the system and select a competent, experienced advocate. The compensation for the advocate would be liberal enough to attract men equipped with the requisite qualifications; his tenure of office would be definite, being semi-permanent in nature, and contingent solely upon the satisfactory performance of his duties. The attorney chosen could be called the Advocate for the Defense, and have an office of his own and a staff to assist him. The expenses of such a program would not be too great a drain on public funds. This system would combine the best features of the Public Defender and Voluntary Defender systems and yet discard the main defects of each. The establishment of such local systems throughout the state would insure complete protection for indigents, for they would be truly represented in court and receive the "substance and not only the shadow of Constitutional protection." This would conclusively prove that the Bill of Rights is more than mere phraseology.

William P. Murray
Thomas J. O'Hara

16. The D. C. Bar Association, on at least four occasions, has failed to adopt committee reports in favor of the public defender system. 17 J.B.A., D.C. 617, 620 (1950).