
After several years of study and a substantial grant from the Fund for the Republic, the Special Committee to Study Defender Systems has concluded that all indigent persons accused of crime should be represented by counsel and that a private defender organization, subsidized by public funds, is best equipped to do the job.

The Committee finds seriously inadequate the more common method of assigning counsel to serve the indigent, without payment, on a case by case basis. Such a system ordinarily pits against prosecutor and police an inexperienced defense counsel—ill versed in the techniques of trial of criminal cases, possessed of no investigative assistance and motivated only by his sense of injustice and professional responsibility. Whatever may have been the case in a frontier society where lawyers may truly have been generalists, it makes a mockery of the "right to counsel" today to assume that every lawyer is competent to handle any case which comes his way. Now and then, of course, one hears instances of selfless service by particularly dedicated individuals, or of diligent efforts by judges to obtain for an accused the services of really competent counsel. But such reports serve only to demonstrate the inadequacy of the system regularly used. Little more can be said in favor of unpaid assigned counsel than that he is likely to learn a good deal about the largely unknown administration of criminal justice. Unfortunately, the system educates the bar at a considerable price to the indigent accused.

When assigned counsel is paid well for his work, he is likely to be adequately motivated to do a good job. If there were, in addition, a sufficiently large bar practicing criminal law, from whose ranks counsel could be drawn and paid, the argument from inexperience would also be eliminated. There would still remain, however, the matter of comparative cost and efficiency of a defender system and of a system of paid assigned counsel. Apparently, the latter would not only cost far more; it could never hope to develop the degree of special knowledge and competence which can be expected from an office exclusively concerned with the defense of the indigent accused. In short, the defender system has all the advantages of institutionalization and professionalization. Yet we should certainly have learned by now that what looks like an advantage may bring with it new and unanticipated problems. Though a defender system may perform very well in those cases in which it is being used to its
optimum, it need not follow at all that it will serve best for the entire class of defendants over time.

If issues of this kind are ever to be resolved, considerable attention will have to be devoted to the manner in which defenders and paid assigned counsel represent their clients and, more particularly, to the problems inherent in institutionalization of defense counsel. Is this perhaps an area in which it is desirable to concentrate authority in limited hands (public or private) or is it preferable to distribute authority to persons less responsible and less efficient but perhaps willing to dare more, as a result? For example, in a jurisdiction where the plea bargain is the prevalent mode of deciding cases, is a professional defender likely to see his relationship with the prosecutor jeopardized, and his plea bargaining potential minimized, if he is "unduly" litigious, or if he espouses unusual positions? Is there some likelihood that A's case will be bargained away for less in order to get more for B? Unquestionably, a comparable problem exists in the office of any lawyer with a volume criminal practice. But since he is not a public or quasi-public official, it becomes more difficult and more open to question for him to make his arrangements with the prosecutor.

The professional defender poses yet another problem. Those who represent the indigent are better situated than any other group in society to report on what is going on in the largely invisible world of criminal procedure, particularly in the police station, in the magistrates' courts and in the office of the prosecutor. Their accumulation of information about the criminal process can have an incalculably beneficial effect upon legislative reform. It may be in the nature of a professionalized defender system, however, that it brings with it a reluctance to intrude upon a whole pattern of working relationships, even beyond those essential to the plea bargain.

I believe it is problems of this order to which Judge Dimock sought to direct us, though his imagery was somewhat overdrawn, when he wrote of the authoritarian potential of the public defender system. It is unfortunate that a group as distinguished as the Committee which authored this volume did not see fit to deal with them. If it had done so, we might now have some clues about the possible side-effects of committing community resources to a professionalized defender system.

There are several other aspects of this volume which I find disturbing. For one thing, it seems to treat the provision of effective counsel for the indigent accused as if that, without more, would accord him equal justice. It tends, therefore, to make us feel quite virtuous. The end of equal justice is placed within our reach if we would but grasp it. Yet we know very well that it re-

1 The overwhelming majority of criminal cases are disposed of by pleas of guilty. See the sources collected in Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1163 n.37, 1189 n.131 (1960).

2 See Dimock, The Public Defender: A Step Towards a Police State, 42 A.B.A.J. 219 (1956). It should be pointed out that Judge Dimock saw danger only in a public defender system. He did not think that a private defender organization posed much of a threat.
mains a long way off. It is a gross, though well-intentioned, distortion to suggest that this is not so.

The distortion derives from too complete an acceptance by the Committee of the existing system of criminal procedure. This can be demonstrated by examining one of the many sound statements it makes. It points out that the accused often needs counsel "soon after arrest. . . . At this early point in the criminal proceeding, a lawyer should be available to explain the charge, to investigate the facts, to prevent unreasonable detention and unjustified bail, to probe sympathetically for possible explanations and defenses, and to determine what course of further action the accused should adopt." But it does not address itself to the problem posed by police failure to inform the accused of his right to counsel, or to the use of the period of detention before preliminary hearing (where the accused first learns officially of his right to retain counsel and to remain silent) as an occasion for interrogation of the accused. Yet such practices, undoubtedly resorted to more often with the indigent than with others, may render counsel's role almost meaningless—particularly when he arrives on the scene any time from two to one hundred and eighty days after arrest. Clearly, until we place counsel in the police station, or bar interrogation before counsel has been appointed—and develop effective sanctions for such rules—the notion of "equal justice for the accused" will be part of a public face we give to a system of criminal justice which gets most of its work done in other ways. There is nothing in this volume which touches on this question, or explicitly saves it for another day, or which places the Committee's prestige behind what must be the larger objective—the conduct of the process of interrogation on as fair a basis as the trial itself.

A second illustration: though the Committee asserts that there should be adequate investigative facilities available to the defense—either as part of the defender's office or as a centralized service for assigned counsel—it does not discuss the inequality of position in relation to the government of even the best-equipped defender office or the best-paid assigned counsel. Unlike the prosecution, it would still have no subpoena power before trial; nor would it be fed by an ever-growing network of police and administrative investigative services. There is not even a hint of exploration of potentially meaningful ways of assuring "equal justice" in the trial preparation stage—such as according the accused a measure of discovery comparable to that available in civil cases.

It is perhaps unfair to take so critical a tone in dealing with a book so obviously written in a manner designed to win as many friends as possible for a praiseworthy cause. Unquestionably, Equal Justice for the Accused will be a useful aid in the growing movement to introduce throughout the United States the notion that indigent defendants have a right to effective representation.

3 P. 35.
4 Pp. 67, 71.
5 See generally Goldstein, supra note 1, at 1180-98.
Not only are its comments on the assigned counsel system well-taken, but its inclination in the direction of a publicly subsidized-privately administered defender office is probably correct. And it has a number of helpful comments to make about the structure and organization of a defender system. Regrettably, however, the book is so narrowly conceived and so sparse in its presentation of either data or discussion that it is unlikely to sway those who are not already persuaded. *Equal Justice for the Accused* is an outline for a discussion which should take place somewhere and which may well have taken place in the course of the Committee's deliberations, but which has not been shared with the readers of its report.

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The problem of conflict of interest is a crucial factor in the recruitment of a number of critical groups of public servants in the United States today. It is raised in its most dramatic form when Senate confirmation of a Cabinet nomination is withheld until the nominee disposes of his allegedly conflicting corporate holdings, but it comes up also in respect to less spectacular appointments of lawyers, scientists, and others having little or no political significance. There is no question that the integrity of the public administration must be preserved. On the other hand, students of law and political science have for a long time doubted whether the essentially mechanistic approach of the existing federal conflict of interest statutes responds in any adequate way to the realities of contemporary economic organization or the requirements of the public service. The thesis of the New York City Bar Association's report is that effective legal control of conflict of interest, and the preservation of the integrity of the public service, can be achieved in a manner which is reconcilable with the facts both of economic life and the needs of the government.

There is a considerable body of legislation on the books dealing with conflict of interest. Indeed, the 1st Congress in 1789 passed a law forbidding the Secretary of the Treasury to invest in securities of the United States. In the main, however, conflict of interest legislation of general application is found in seven statutes, five of which stem from Civil War scandals. These scandals, it may be noted, were little more than the culmination of the sordid record of political immorality which had obtained throughout much of the first half of the nineteenth century. Three of these statutes impose restrictions on government employees or former employees in assisting the prosecution of claims, presumably by judicial action, against the United States. A fourth imposes restrictions on government employees assisting for pay in actions before ad-