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## "How Can You Defend Those People?" The Making of a Criminal Lawyer

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**“HOW CAN YOU DEFEND THOSE PEOPLE?” THE MAKING OF A CRIMINAL LAWYER.** By *James S. Kunen*. New York: Random House. 1983. Pp. xii, 263. \$15.95.

Everything James Kunen did in law school, and much of what he did before law school, he did with the intention of becoming a public defender.<sup>1</sup> Kunen lacked the aspirations of the typical law student seeking a comfortable existence in the bosom of a large, high-paying law firm. Instead, his idealistic disposition and countercultural background<sup>2</sup> seem to have predestined him for his job. After graduation, he spent two and a half years with the Public Defender Service in Washington, D.C. His clients were nearly all black, always poor, and often guilty (p. xi). They were mostly charged with committing crimes in the streets because they did not have a better place to commit them (p. xi). Kunen's conduct in their defense was dictated by a system in which “[e]verybody lies”<sup>3</sup> and where “guilt or innocence is

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1. Before law school Kunen was a counselor in a group home for juvenile delinquents and an investigator and clerk for a legal aid attorney. In school he participated in the criminal law clinic. P. 27.

2. Kunen will also be remembered as the author of the well-known book, *THE STRAWBERRY STATEMENT* (1969).

3. P. 188 (emphasis in original).

completely irrelevant; what matters is what the D.A. can prove" (p. 36). "*How Can You Defend Those People?*" is Kunen's look into that system, and into his own methods and motivations as a public defense attorney working within it.

The book, written in diary format, encompasses Kunen's participation in the clinical law program at New York University and his time spent with the Public Defender Service in Washington. The chapters, numbered and sectioned as if part of some statutory scheme, chronologically present the author's cases and experiences as a public defender. Kunen artfully describes to the reader his clients, their cases, and their lives, descriptions which are fictitious only in the names and surroundings which were altered to maintain confidentiality. The work, while similar in format, differs substantively from the works of many other criminal defense attorneys. Gratefully, Kunen lacks the self-aggrandizing stance of a Nizer, Bailey, or Dershowitz.<sup>4</sup> Rather, Kunen airs his numerous personal and methodological shortcomings in addition to his successes. For this, his honesty can forever be respected.

Among the shortcomings this honesty reveals are Kunen's sometimes questionable defense tactics. His conduct ranges from the relatively minor infraction worthy of being overlooked because of the ultimate good it achieves to that not so easily brushed aside. In terms of the former, the reader grants Kunen deference when he subpoenas an impoverished yet unknowledgeable witness in order to give him the thirty dollar witness fee (p. 146). Such a petty misappropriation of public funds is easily forgiven in light of the graft occurring in Washington. However, the reader cannot so easily dismiss other actions taken by Kunen on his clients' behalf. The flashing of inadmissible pictures to a jury (p. 192), allowing a judge to make a sentencing determination known by Kunen to be incorrect because of facts not presented (p. 117), and the coaching of witnesses (pp. 94-95) all represent severe abuses of the fact-finding process.

While condemnation of this conduct flows easily from the sterile corridors of academia, critics must remember that Kunen's clients are real people en route to doing hard time. This realization cannot validate Kunen's actions, but it does confront the reader with the author's dilemma. Kunen's position typifies the Hobson's choice of criminal lawyers. His actions appear to be dictated by the inherent inequities of an imperfect society and a failing judicial system; a system in which "everybody lies" — the police, the D.A., the defendants, the complainants, the jurors — within a society where the defendant, as a victim, is doomed to suffer the injustices of poverty at birth. Morals are

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4. See, e.g., F. BAILEY, *THE DEFENSE NEVER RESTS* (1971); A. DERSHOWITZ, *THE BEST DEFENSE* (1982); L. NIZER, *MY LIFE IN COURT* (1961).

for people who can afford them and up until *Gideon v. Wainwright*,<sup>5</sup> so were defense attorneys. Kunen's clients, often forced into lives of crime because of the lack of an attractive career alternative, can no more afford morals than they can Kunen's services.

Kunen left his job with the Public Defender Service not because he was burned out by all the pain and sadness that surrounded him, but because after years of professionally suppressing his emotions he grew tired of not feeling the pain and sadness at all (p. 143). Like most public defenders, he also grew tired of the pressure of defending the Constitution and the rights of all, especially where "more often than not — *much* more often than not — [you're] defending a criminal. . . . After a while, it's somebody else's turn."<sup>6</sup> Kunen left because his turn was over and because he wanted to write about it. He allows the reader to understand why few lawyers remain public defenders for more than five years (p. 142). Indeed, taking a job with a public defender service appears akin to an outing with the peace corps. No one expects it to be a permanent career move, but the participant hopes to do some good while he or she is involved.

Kunen's stated reasons for wanting to do public defense work cloud what one suspects are his real motives. He proposes both "vicarious criminality" (p. 13) and the joy of thwarting the will of authority (p. 190) as his prime motivations. While these proposed reasons are intriguing, the reader no more believes them than he would believe that Kunen took the job to make friends and influence people. While the author acknowledged that had he really wanted to help people he would have gotten involved in welfare or tenants' rights (p. 13), his altruistic motive shines through. Kunen is a do-gooder and he spent two and a half years as a public defender to do good. He left proud of his personal accomplishments and he wrote this book to humbly pat himself on the back as much as he did to inform the public about what it was like working inside the criminal justice system.

As for informing the public about his experiences, "*How Can You Defend Those People?*" is suitable for both lawyer and layperson. For the layperson, the book's diary format and abundance of explanations make it intriguing and informative reading. In addition to serving as a look into the world of courts, cops, and robbers, the work contains good discussions on pertinent public issues. Further, the tragic and ironic humor which can only stem from real life adds a flare to the book which is immediately apparent. For the lawyer, the book addresses some of the more poignant ethical and moral dilemmas that accompany the profession. The author's dual skills as a writer and a

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5. 372 U.S. 335 (1963). In *Gideon*, the Supreme Court held that the sixth amendment right to counsel for indigent defendants applied to the states by way of the fourteenth amendment.

6. Pp. 142-43 (emphasis in original).

lawyer allow him to present his trials and tribulations from an interesting and somewhat unique point of view.

The major criticism that can be levelled at the book is purely stylistic. Kunen should have forgotten some of his lawyering skills in writing, because the statutory scheme employed in lieu of chapters and the repetitious use of footnotes tend to confuse the reader. On the other hand, he should have recalled some of his skills as a writer in that the use of a chronologically arranged diary, when imposed on a lawyer's massive caseload, tends to lose the reader. Yet these stumbling blocks of style are by no means major. They simply add some minor difficulties in reading what otherwise is an insightful and absorbing behind-the-scenes look into our criminal justice system.