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Silverstein: Defense of the Poor in Criminal Cases in American State Courts

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RECENT BOOKS

DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS. By *Lee Silverstein.* Chicago: American Bar Foundation. 1965. Pp. 280. $7.00.

In 1962, the House of Delegates of the American Bar Association adopted a resolution calling for the appointment of a committee to study the defense of indigent persons charged with crime. The American Bar Foundation agreed to undertake the basic research, and advisory committees from each of the fifty states were appointed. Lee Silverstein of the American Bar Foundation, who directed the research, has now written *Defense of the Poor,* the first of a three-volume series describing the results of the project. Included in this first volume are 112 pages of appendices, which are, for the most part, reproductions of the forms and questionnaires used by the various state committees in the conduct of their studies, together with some breakdowns by state of the various statistical data gathered. The remaining two volumes, not yet published, will set forth the detailed results of the studies conducted in each of the states.

Several recent cases have made the collection of empirical data on this subject a timely task. Counsel must now be afforded free of charge to all indigent defendants in felony cases, both those who go to trial[1] and those who plead guilty,[2] unless there is an intelligent waiver of the right to counsel. Moreover, the indigent appellant is entitled to counsel, at least for the first appeal he is allowed as a matter of right.[3] Future expansion of the right to counsel is not difficult to foresee. Whatever may be the ultimate ramifications of *Escobedo v. Illinois,*[4] the bar should at least be prepared for the possibility that indigent defendants may be entitled under the Constitution to free legal service at some stage prior to arraignment. Furthermore, it is hard to draw a meaningful distinction between the rights of a person accused of a felony and those of a person accused of a misdemeanor, considering that misdemeanor prosecutions frequently result in substantial fines and loss of liberty.

The author estimates that about three hundred thousand persons are charged with felonies in state courts each year, and that at least half are financially unable to hire counsel. The study estimates that about fifty thousand felony trials take place every year in the state courts, with about forty thousand resulting in convictions. It is estimated that approximately five million persons are charged

1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. Weigner v. Russell, 372 U.S. 767 (1963); Garner v. Pennsylvania, 372 U.S. 768 (1963); Vecchioli v. Maroney, 372 U.S 768 (1963).
3. Douglas v. California, 372 U.S. 353 (1963).
4. 378 U.S. 478 (1964).

with misdemeanors each year, of whom about seventy thousand are imprisoned. The author candidly acknowledges that all of the foregoing estimates are projections based upon limited information, but there is no reason to doubt that they provide at least a fair indication of the numbers involved.

Defense of the Poor provides a comprehensive description of the procedures now used throughout the country to afford legal representation to the poor, and some assessment of the effectiveness of those procedures. The research methods used in the project seem sufficiently reliable to produce reasonably accurate information in an area which is not susceptible of exact measurement. The state committees interviewed judges, prosecutors, and defense attorneys in three hundred sample counties thought to be representative of the 3,100 counties in the United States. Detailed questionnaires were mailed to judges, prosecutors, defense attorneys, and others involved in the administration of criminal law in numerous other counties. In 194 of the sample counties, detailed docket studies were made in 11,300 sample cases for the year 1962 or a comparable court year.

Various means have been devised to provide counsel for indigent persons in criminal cases. Generally speaking, there are two systems. In the "assigned counsel" system, the judge appoints a lawyer for a defendant who cannot afford to hire one. In the "public defender" system, a salaried lawyer devotes all or part of his time to the defense of indigents. The author has devoted a chapter to an analysis of the assigned counsel system, one to the public defender system, and a third to a comparison of the two systems.

In 1964, approximately seventy per cent of the felony defendants were prosecuted in counties using an assigned counsel system, which is the only system used in about 2,900 of the 3,100 counties in the United States. The author points out that it is misleading to talk about "the" assigned counsel system, since there are numerous varieties of this method. In some, the judge makes the appointment from a list of attorneys which he maintains, or from attorneys present in the courtroom. In others, the list is furnished by a bar association. In thirty-five states, the appointed lawyer is paid a modest amount from county or state funds. In four states, he is paid only in capital cases. In six states and the District of Columbia, he receives no compensation. Among the states that do pay the assigned counsel, there is a great disparity in the fee schedules; similar disparities exist between counties within the same state. Usually there is no provision for reimbursing counsel for out-of-pocket expenses.

The arguments for and against an assigned counsel system are set forth and analyzed, without any definite conclusions being reached. One of the more serious criticisms of the assigned counsel

system is that court-appointed attorneys are more likely to advise their clients to plead guilty than are retained lawyers. The implication, of course, is that the assigned lawyer is less devoted to the cause of his client. The study includes a docket analysis of eighty-one sample counties showing that in forty-nine counties defendants with assigned counsel plead guilty more often, in twenty-one counties they plead guilty less often, and in the remaining eleven counties the frequency of guilty pleas is about the same for defendants with assigned counsel as for those with retained counsel. The author points out that these figures do not necessarily reflect upon the quality of representation afforded by the two systems, because the advisability of a guilty plea is influenced by many factors unrelated to the ability or dedication of counsel. One of the factors suggested by Mr. Silverstein is the nature of the crime with which the defendant is charged; I assume he means to include as a component of that factor the nature of the evidence available to prove the crime. While the book does not include statistics to confirm this, it is a fact known to every lawyer who has had much to do with the criminal process that there is a marked correlation between the economic status of the defendant and the type of crime with which he is likely to be charged. The indigent defendant is more likely to be charged with the types of crime which are comparatively easy to detect and prove, such as theft, whereas it is relatively seldom that he is charged with the more complicated type of crime, such as fraud, which is more difficult to prove. Again, it seems the indigent defendant is more likely to have made a confession than is the defendant with means. (The public defender in the county where this reviewer resides is almost never assigned a defendant who has not given a signed confession to the prosecutor.) This phenomenon may be related to the indigent defendant's relative lack of education and his unfamiliarity with his rights. Certainly the indigent defendant is less likely to make bail and have quick access to legal advice. For these and other reasons, the assigned counsel is more likely to be confronted with a situation where the best service he can render his client is to advise a plea of guilty and attempt to work out the best bargain he can on the sentence.

The study also includes statistics showing that retained counsel win acquittals more frequently than do assigned counsel on the cases which do go to trial. However, as the author acknowledges, the difference is hardly great enough to support the conclusion that retained counsel do a better job. In the forty-two sample counties which afforded sufficient information for statistical comparison, appointed counsel won more acquittals in nineteen, assigned counsel won more in eleven, and the ratio of success was about equal in the remaining twelve counties. The nineteen counties where retained

counsel won more acquittals amount to only forty-five per cent of the counties studied.

The study also shows that the indigent defendant is considerably more likely to go to jail after his conviction than is the defendant with means to hire a lawyer. In forty-nine of fifty-one sample counties studied, a higher percentage of defendants with assigned counsel were sentenced to prison after their conviction, whether the conviction followed a trial or a plea of guilty. As the author points out, however, it cannot be concluded that this fact has anything to do with the quality of legal representation:

> On the contrary, one may suppose that these clients end in prison largely because of conditions over which the lawyer has no control, namely, conditions associated with poverty. The indigent client is a poor risk for probation because he has failed to make a place for himself in the community. He lacks a steady job, he has no contacts with substantial persons who can help him, and he may have an unstable family situation. Thus the higher incidence of prison sentences among defendants with assigned counsel probably is more a function of their poverty than of the kind of counsel they have.[5]

The study includes a description of the different standards used in the selection of counsel. It appears that in some counties the judges make it a point to select only experienced trial counsel, whereas in other counties the most recently admitted members of the bar are appointed. There is also some variation in the willingness of counsel to serve. Some judges reported that they had no difficulty in obtaining cooperation from the bar in the matter of assignments, whereas others reported that a substantial percentage of the lawyers asked to be excused. The study apparently made no attempt to account for these differing experiences.

As indicated, the author is explicitly dubious that any inference as to the quality of legal representation can be drawn from the bare statistics concerning frequency of guilty pleas, percentage of acquittals, and the degree of punishment imposed after conviction. There is nothing novel about this recognition of the fact that the indigent defendant, more often than not, and for a variety of reasons, presents a more difficult case to his advocate than does the defendant with means. Similar observations were made in 1963 by the Attorney General's Committee on Poverty and the Administration of Criminal Justice, which compared the performance of appointed and retained counsel in the defense of indigents in the federal courts.[6] What seems unfortunate to this reviewer is that the study

5. P. 25.

6. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 28-29 (1963).

apparently did not attempt to correlate the performance of assigned counsel with the various factors which differed *as between* assigned counsel. Since all assigned counsel were representing indigents, the inherent distinctions between indigent and nonindigent defendants would not cloud the comparison. Yet, the study makes no attempt to account for the different results in counties using the assigned counsel system. One suspects that, somewhere in the material collected, there may be some evidence as to why the assigned counsel in one county obtain a relatively high percentage of acquittals, whereas the assigned counsel in another county do not. Are there any correlations between the results and the experience of the lawyers appointed, their attitude toward their assignments, the frequency of their assignments, the stage of the proceeding at which they are appointed, the amount of their compensation, or any of the other factors included in the study?

The chapter on public defenders is an excellent description of how the system works in the various counties where it is used. As of February 1965, there were 117 public defender offices in the United States, serving 178 counties. Most of the offices have been established since 1950, and the trend seems to be away from assigned counsel systems toward more public defender systems, especially in the larger counties. Statistical comparisons of the results achieved by public defenders in comparison to retained counsel are about as inconclusive as the similar comparisons of assigned and retained counsel. No definite conclusions are drawn as to the desirability of a public defender system as opposed to an assigned counsel system, although the study does indicate that in the more populous areas the former is more economical. The author concludes that "far greater variations occur among various counties using each type of system than occur between the two systems considered as a whole."[7]

A chapter is devoted to the matter of when counsel is first appointed in felony cases. In some states, counsel is available at or before the time of the preliminary hearing; in others, there is no offer of counsel until after indictment. Mr. Silverstein aptly points out that a defendant appearing *pro se* can derive but little benefit from a preliminary hearing. In fact, he can seriously prejudice his case. From the questionnaires submitted by judges, prosecutors, and defense lawyers, there appears to be a consensus that the effectiveness of counsel is in large part dependent upon his being appointed at an early stage of the proceeding. Indeed, in response to a question as to when the appointment of counsel should be made, one New Mexico lawyer, a practical sort, responded, "before the confession."[8]

In what this reviewer considers the best chapter of the book,

7. P. 73.
8. P. 86.

there is a treatment of the manner in which counsel is offered to the indigent defendant. From a study of three hundred sample counties, it was determined that there are four general types of practice followed in offering counsel. The first, followed in about fifteen of the sample counties, is to appoint counsel only for those defendants who go to trial. A plea of guilty is, in effect, a waiver of counsel. It is clear that this type of practice must soon disappear, since it does not satisfy the constitutional requirement that counsel be appointed unless there is an intelligent waiver by the defendant. This, in turn, requires that the defendant be informed, prior to his plea, that he does have a right to appointed counsel. In about fifty of the sample counties, the court asks the defendant whether he wishes to have counsel appointed to represent him, but does not make any comment about the matter. The study revealed that this type of inquiry by the court may not be understood by the defendants as an offer of free legal services. Instances were reported of defendants who declined such an "offer" of counsel because they knew they did not have money for a lawyer. At least two instances were reported involving defendants who did not even understand the meaning of the word "counsel." One defendant thought it meant "some sort of adviser like a family counselor."[9] Another defendant waived "counsel" because he did not know that the word meant a lawyer.[10] In another group of about one hundred counties, the judge takes pains to explain the nature of the proceeding and the fact that counsel will be provided free of charge. In the fourth group of about one hundred ten counties, the judge urges the defendant to accept the appointment of counsel or even appoints counsel without asking the defendant, once his indigency is apparent. The study shows that these variations exist not only between states, but also between counties in the same state, and even between judges on the same court.

A chapter is devoted to the criteria for determining the defendant's eligibility for appointment of counsel. Here again, there is a wide variation in practice between states, between counties in the same state, and between judges on the same court. In a substantial number of jurisdictions, the defendant who makes bail is considered ineligible for appointed counsel, and in many other jurisdictions the question of bail plays a considerable role in the determination of eligibility. Mr. Silverstein offers a persuasive argument against this practice, pointing out the large number of reasons why the defendant's ability to make bail does not necessarily imply an ability to hire a lawyer. The author also covers the related question of partial indigency. It is clear that there are many defendants who are able to afford some but not all of the services they need for an

9. P. 90.
10. *Ibid.*

effective presentation of their defense. For instance, a defendant may have a hundred dollars for a bond premium (or he may have a relative who will post a property bond), but he does not have the considerably larger sum it might require to retain competent counsel. Or, while a defendant might have money to hire a lawyer, he might have no funds to finance necessary investigation or to hire necessary expert witnesses. Among the lawyers who responded in the survey, the majority indicated a consciousness of this problem presented by the defendant of moderate means. In the federal courts, the problem has been recognized by enactment of the Criminal Justice Act of 1964,[11] which provides for the appointment of counsel and the furnishing of certain other services to defendants "who are financially unable to obtain an adequate defense." The term "indigent" was deliberately omitted from the act so as to avoid any misconception that its provisions were intended only for the totally destitute defendant.

There is a chapter on the question of providing counsel in misdemeanor cases and another chapter discussing the problems of providing counsel on appeal, for postconviction proceedings, and other types of proceedings which involve possible deprivation of liberty. These chapters are brief and merely suggest the necessity of future study. Finally, there is a chapter devoted to conclusions and recommendations, setting forth suggested standards which any adequate defense system should meet.

If defense of the poor was ever a problem which could be assigned to a small segment of the bar and forgotten by the rest of us, it is clear that those days are gone forever. Under our changing concepts of due process and equal protection, increasing numbers of defendants are entitled to a greater quantity and variety of free legal service. This will require effective participation by a greater number of lawyers. More than that, there is a need to devise efficient and equitable systems for utilizing available talent. Mr. Silverstein's book provides a good description of our existing procedures and some valuable suggestions for future action.

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11. 18 U.S.C. §§ 3006A(a) (1964).