

Summer 1964

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Recommended Citation

Junius L. Allison, Poverty and the Administration of Justice in the Criminal, 55 J. Crim. L. Criminology & Police Sci. 241 (1964)

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POVERTY AND THE ADMINISTRATION OF JUSTICE IN THE CRIMINAL COURTS*

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Poverty of the degree I shall be concerned with in this discussion is not so severe as to be placed among the Four Horsemen. Further, since I am not a sociologist, most of my comments will relate to the impoverished *individual* rather than to the mass of people who are economically underprivileged. These indigent citizens are, of course, scattered throughout the land, but most of them are cramped in easily recognizable pockets in our large metropolitan centers where many of them were driven by a kind of demographic "Gresham's Law." However, they are not taken from circulation to be hoarded, as "good money" is under the classic economic principle. They remain to generate and compound social problems which affect not only themselves but the whole community, the state, and to a degree, the country.

It is almost a paradox that in our affluent society so many human beings live in substandard conditions. But they do. In the book, *The Exploding Metropolis*,¹ there is this disturbing conclusion: "Today some 17 million Americans live in dwellings that are beyond rehabilitation—decayed, dirty, rat-infested, without decent heat, light or plumbing."

President Kennedy, in his Youth Message, February 14th of this year, pointed out that the twenty per cent of the population at the bottom of the economic ladder still receive only five per cent of the personal income, the same as in 1944; that some 16,000,000 children live in families with incomes so low that federal tax exemption is of no direct benefit because they are not required to pay any income tax.

Along with this unpleasant picture, the President warned that during the 1960's, 7,500,000 students will drop out of school without high school education—entering the labor market unprepared for anything except the diminishing market of unskilled labor openings.

* Address delivered before the Illinois Academy of Criminology in Chicago, Illinois, April 26, 1963.

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¹ THE EDITORS OF FORTUNE, at 111 (1958).

A recent study in Illinois² showed that 30 per cent of the teenagers quit school short of a high school education. Commenting on the situation in a message to the General Assembly,³ Governor Kerner said that by next year this state will have 1,325,000 such drop-outs "roaming our streets," having "condemned themselves to a life of uselessness."

In a recent issue of *The New Yorker* there is a very readable profile on "Our Invisible Poor,"⁴ in which Dwight Macdonald reviews several current books on poverty.⁵ He notes that even though statistics of the Department of Commerce (April 1962) reveal that the average family income increased from \$2,340 in 1929 to \$7,020 in 1961, almost all the recent gain was made by families with incomes of over \$7,500 and that the rate at which poverty is being eliminated has slowed down alarmingly since 1953. The rich, he says, are almost as rich as ever and the poor are even poorer, in the percentage of national income they receive.

It is, of course, almost impossible to give a definition of poverty that everyone will accept. Certainly it is a relative concept, but in general terms it should include those who are denied the minimum levels of health, housing, food, and education. The United States Bureau of Labor Statistics gives this dividing line: \$4,000 a year for a family of four; \$2,000 for an individual living alone. This, too, would vary with age and place of residence.

The *New Yorker* article suggests that today it is easy for the poor to slip out of the "experience and consciousness of the nation"—to become *invisible*. (1) The poor are usually isolated and out of sight, in the central area of the city. (2) Clothes make the poor invisible—since it is easier to dress decently than it is to be decently housed

² CASSELL COMM., THE REPORT OF THE GOVERNOR'S COMMITTEE ON UNEMPLOYMENT (Frank C. Cassell, Chairman, Jan. 1963).

³ Delivered Jan. 3, 1963.

⁴ Jan. 19, 1963, p. 82.

⁵ M. HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1962); CONFERENCE ON ECONOMIC PROGRESS, POVERTY AND DEPRIVATION IN THE UNITED STATES (1962).

or fed or even doctored. (3) Many are of the wrong age to be seen—too old or too young. (4) Finally, a great percentage are politically invisible—no lobbies, no legislative program. "They have no face; they have no voice." The author of one of the books concludes that "Forty to fifty million are becoming increasingly invisible."

These studies and statistics and their interpretations are very interesting and challenging. However, the indigent person whose rights are often ignored in the tangled processes of the law is quite *visible* and quite significant in a society that boasts of *equality before the law*.

Perhaps we would prefer that this submarginal individual would remain invisible—or go away completely, but such is not a fact of our social order. We have to be sensitive to even a temporary disappearance—just as a seaman notes the hidden portion of an iceberg. From a purely selfish viewpoint we must remember that the most fertile soil for seeds of dissatisfaction, the most likely place to sell illogical "isms," a favorable climate for subtle infiltration, is among those who feel submerged and persecuted.

The late Justice Robert H. Jackson gave this pointed warning to a group of lawyers:

"Today any profession that neglects to put its own house in order may find it being dusted out by unappreciative and unfriendly hands. Society shows a growing disposition to call the professions to account for the use made of their privileges . . . it is only the part of wisdom for the leadership of any profession to anticipate the problems and difficulties of those it undertakes to serve and to remedy them before they grow into public grievances."⁶

It is not enough to say, as Anatole France did sardonically, that the majestic equality of the law forbids the rich as well as the poor from sleeping under bridges, from begging in the streets, or from stealing bread.

And yet, how can we safeguard the rights of the poor, the ignorant, the inarticulate, the frightened, and the insecure without becoming too paternalistic in demanding standards of conduct, or by placing exacting restrictions upon the way they use their vitamins, their privileges, their education, and how they occupy their place in the sun?

Consider the recent controversies over the treatment of recipients of ADC in some areas:⁷

⁶ *The County-Seat Lawyer*, 36 A.B.A.J. 497 (1950).

⁷ Wickenden, *Poverty and the Law* (mimeo, Nat'l Social Welfare Assembly, New York, Feb. 25, 1963).

1. In three New Jersey counties mothers of illegitimate children have been prosecuted under otherwise unenforced adultery and fornication laws.

2. In Connecticut, an attempt was made to "deport" a mother of an illegitimate child, both of whom were receiving public assistance. The Legal Aid Society successfully challenged the constitutionality of the action.

3. Recently in Alameda County, for the purpose of discovering a "man in the house," night raids (without search warrants) were made in the homes of 500 mothers who were receiving support for their needy children. This has been repeated, on a less comprehensive scope, in many other jurisdictions.

A law professor at Yale University writes that "it has become common practice for authorities to make unannounced inspections of homes of persons receiving public assistance."⁸

Where do we draw the line between the constitutional right of equal treatment, right of free movement, right of privacy, *on the one hand*, and what must be the responsibility of the state to spend the tax payer's dollar wisely and effectively, *on the other*?

Another situation that shows a dramatic by-product of poverty involves the indigent defendant who is held in jail preceding his trial. This confinement can be days, weeks, or even months for those unable to make bond. In the federal courts and in many states, this period of incarceration is not credited against any subsequent sentence. If the accused is ultimately acquitted, the unfortunate predicament is made more tragic.

For instance, according to the Mayor's Committee, in 1960, a total of 114,653 persons were detained in New York City jails. Yet only 30,827 defendants were later sentenced to prison terms.⁹ Another study showed that 28 per cent of the defendants were too poor to post bond where the bail was set at \$500 and 45 per cent could not raise bail when it was set at \$2,000.

Forty-six thousand persons were sentenced in New York City in 1961, but 118,000 had been held in jail, some for as long as six months, most of them being unable to make bail.¹⁰

In 1961 the Vera Foundation launched the

⁸ Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

⁹ N.Y. MAYOR'S COMM., AUXILIARY SERVICES TO THE COURTS OF NEW YORK CITY (1961).

¹⁰ Samuels, *Bail*, New York Times, Aug. 19, 1962, (Magazine) p. 13.

Manhattan Bail Project in cooperation with the New York University School of Law and the Institute of Judicial Administration. This study was to test the hypothesis that a greater number of defendants could be successfully released on their own recognizance if verified information about them, their families, and their roots in the community were presented to the court.¹¹

Under the procedure followed in this project, a prisoner is interviewed between the time of arrest and arraignment. At present the experiment does not cover defendants charged with narcotic offenses, homicide, forcible rape, or offenses against a minor. Five principal plus-factors are given great weight in deciding whether a defendant is a likely parole risk: present or recent residence at same address for six months, current or recent job for six months, relatives in New York City, no previous conviction, and residence in New York City for ten years or more.

In the first year more than 275 defendants were released on the basis of information furnished the court. Only three persons jumped parole. Of the first hundred parolees, 60 were ultimately acquitted; 30 were given suspended sentences, six were fined, and four drew prison terms. During the first month of the Project, 25 per cent of those interviewed were found to qualify for pre-trial parole; nine months later about 50 per cent of those studied were recommended as good prospects.¹²

The most ironic finding in the whole study is the revelation that accused persons, whom the law presumes to be innocent, are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons. Our appellate courts have reinforced the philosophy that we abhor the imposition of criminal sanctions before the accused is convicted.¹³ It is surprising to learn that under

¹¹ Sturz, *An Alternative to the Bail System*, 26 Fed. Prob. 49 (Dec. 1962).

¹² In a more recent report made by Herbert Sturz, Executive Director of the Vera Foundation (in an address at the 41st Annual Legal Aid and Defender Conference, Miami Beach, Oct. 23, 1963, published in the 1963 Summary of Conference Proceedings, National Legal Aid and Defender Ass'n, Chicago), we are told that during the first two years of the Project, of the more than 800 defendants released on their own recognizance, upon recommendation of Vera staff members, 99 per cent returned to court as required. Mr. Sturz also reports that similar experiments are being started in St. Louis, Chicago, Washington, D.C., and Baltimore.

¹³ *Williams v. United States*, 184 F.2d 280 (2d Cir. 1950).

the usually harsh law of early England, an indigent could obtain bail more easily than he can today.¹⁴

This New York experiment is a very positive and real approach to a serious problem that exists in every criminal court. It is encouraging to know that the Project will be continued. It has just received a grant of \$115,000 from the Ford Foundation. There is little doubt that the final results of the study will be valuable to other jurisdictions. Indeed, one Chicago judge has already established a similar practice in his court. I feel certain that we are to hear much more about this innovation in the somewhat sick bail system that now exists to sustain the professional bonds men and penalize the poor.¹⁵

The third and last issue I wish to raise in regard to poverty and the administration of our criminal law is one that arouses an even greater interest among lawyers. It is the right to have the assistance of counsel when one is accused of a violation of the law.

I need not labor the point that a lay person, even an educated one, needs a lawyer when his life or his liberty is at stake in a criminal proceeding. In the famous *Scottsboro* case¹⁶ Justice Sutherland of the Supreme Court of the United States had this paragraph in his historical decision:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the

¹⁴ Longsdorf, *Is Bail a Rich Man's Privilege?* 7 F.R.D. 309 (1948).

¹⁵ For more current information on the Manhattan Project and on other cities which have started similar bail bond programs, see Schultz, *Bail for the Have-Nots*, 20 J. Mo. BAR 8 (Jan. 1964).

¹⁶ *Powell v. Alabama*, 287 U.S. 45 (1932).

ignorant and illiterate, or those of feeble intellect.¹⁷

The constitutional guarantees of the right to have counsel provided for indigent defendants are reasonably comprehensive. Under the sixth amendment the Court has said that unless counsel is waived, indigent defendants in *federal courts* must have legal assistance provided.¹⁸ In applying the due process clause of the fourteenth amendment to actions in *state courts*, the Supreme Court, since the time of the *Scottsboro* case, has ruled that in every capital case, counsel must be made available¹⁹ and, since 1942, has held that for those charged with non-capital felonies, counsel must be provided if the presence of the defense lawyer is necessary for a fair trial.²⁰

And now, in a case handed down on March 18th, 1963, the Supreme Court specifically overruled *Betts v. Brady* and held that under the due process clause of the fourteenth amendment a defendant in any serious case has an absolute right of counsel.²¹ This will place a greater administrative responsibility on the states which heretofore did not, as a matter of course, provide lawyers for the indigent defendants. It will bring greater pressure for the adoption of some organized plan to meet the situation.

Fortunately, there were only 12 states²² in the *Betts v. Brady* camp, that is, jurisdictions whose laws or rules did not require the appointment of counsel in all felony cases without regard to "special circumstances." Of these, the five southern states, Alabama, Florida,²³ Mississippi, North Carolina, and South Carolina, are the least concerned with the right to have the assistance of counsel. (However, since the decision in *Gideon*, Florida has added 12 public defenders and North Carolina has provided for compensating counsel for indigent defendants charged with felonies.)²⁴

¹⁷ *Id.* at 69.

¹⁸ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

¹⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁰ *Betts v. Brady*, 316 U.S. 455 (1942).

²¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²² Four New England states: Maine, New Hampshire, Rhode Island, and Vermont; Delaware, Pennsylvania, Maryland; five southern states: Alabama, Florida, Mississippi, North Carolina, and South Carolina. Some of these states have public defenders, and in several counsel for indigent defendants is appointed upon request. See Kamisar, *The Right to Counsel and the 14th Amendment*, 30 U. CHI. L. REV. 1 (1962).

²³ Except where public defenders exist: Counties of Dade, Broward, Hillsborough, and Pinellas.

²⁴ For more recent data on changes made since *Gideon*, see Lewis, *Supreme Court Ruling Steps Up Legal Aid for Poor Defendants*, New York Times, June 30, 1963.

The practical administrative problem of *how* to provide counsel presents a far more controversial question than the philosophical one concerning the *right* to have representation. Under the traditional method, the trial judge appoints a lawyer from a volunteer panel or designates an attorney who happens to be in the court room at the time the accused is arraigned. Such an informal arrangement worked fairly well in rural America where the volume of cases was small and every lawyer was a general practitioner, including the prosecuting attorney. However, with the growth of our large cities and the specialization of law practice, the long criminal docket has presented a more difficult problem for the metropolitan centers.

In 1962 the American Bar Association's Standing Committee on Legal Aid Work reported to the House of Delegates that an effective solution "lies beyond the philanthropy of individual members of the bar." Others have listed serious weaknesses of the assigned counsel plan:

The volume of cases is too great in the larger cities.

A relatively small group of lawyers practice in the criminal courts.

If compensation is adequate, there may be criticism of assignment to "friends"—and the total cost would be almost prohibitive, or at least more expensive than a Defender.

With the advancement in crime detection and investigation, the prosecuting attorney has become such a specialist that the average practitioner is no match for him.

Assignment is usually late—at arraignment.

The criticism of assigning unpaid counsel is even stronger—as being unfair to the lawyer as well as the defendant.

Arthur S. Bell, Jr., Chairman of the Los Angeles County Bar Association's Committee supplying lawyers for federal court assignment, says:

"We cannot expect the fine representation we receive from attorneys drawn from civil practice consistently to match the performance of public defenders or paid assigned counsel proficient in the practice of criminal law. . . . The problem must be solved at the political level. . . . In the meantime, our Committee will continue to do the very best it can."²⁵

The Public Defender idea was first adopted in Oklahoma in 1911 as a solution to the problem of the increasing number of criminal cases in the

²⁵ *Criminal Indigent Defense in the Federal Courts*, 37 L.A.B. BULL. 297 (1962).

urban centers. In 1914 this innovation was followed by Los Angeles—a county that has the largest and one of the most effective offices in the country. One hundred ten other jurisdictions have established similar services. Under this plan, financial support comes from the city, county, or state. The Public Defender is selected in various ways: by civil service, by the judges, by the county commissioner, or, in a few places, he is elected.

The Private Defender system differs in that funds to support the office come from voluntary sources—such as the bar association, individual contributors, or the United Fund. The NLADA records show 13 cities and counties with Private Defenders.

Then, there is a third type of organization—the mixed Public-Private office that exists in twelve cities. Here an independent society sets the policies and selects the Defender, yet part of the funds come from the county or municipality.

There are, of course, weaknesses and strengths in each of these systems. Each has strong and persuasive advocates among the bar and judiciary.

Regardless of individual preferences concerning the various organizations, the total number of cases handled each year is substantial and the cost is surprisingly low. The 1962 statistics gathered by the NLADA show that about 142,000 indigent defendants were represented at an average cost of approximately \$19 per case. Further, there is reason to believe that in most instances the representation is competent. As one example, we note that the annual report of the Public Defender of Cook County shows that last year the office obtained acquittals for 52 per cent of the defendants tried before juries or before the court.

Unfortunately, there are many large cities that have no organized Defender services. Almost one-half of the 136 offices are located in California and Illinois. Thirty-four states have no such offices at all. There are 34 counties of more than 400,000 population each where only the haphazard appointment system exists.

In the federal courts, the problem is even more acute. Since there are no paid Defenders and no funds to compensate counsel appointed by the court, the lawyers must volunteer their services, pay for investigation, and bear all other out-of-pocket expenses. For the past 20 years efforts have been made to provide compensation for lawyers representing indigent defendants in the federal courts. The Judicial Conference has urged this legislation on at least 17 occasions, and it has been supported by every United States At-

torney General since 1937. In February, 1963, the American Bar Association adopted a strong resolution calling for Congressional action.

Legislation has passed the Senate three times, but the Judiciary Committee of the House has held up the bills each year. Fortunately, the picture is brighter now. With the full and active support of the ABA and many state bar associations we expect the passage of some favorable legislation.

S. 1057, introduced a few weeks ago by Senator Hruska and Senator Eastland, now before the Judiciary Committee of the Senate, embodies most of the ABA recommendations.²⁶ Principal among these are the alternative provisions permitting a federal district to adopt one of four methods of compensating counsel for indigent defendants:

- a. Public Defender,
- b. A bar association service, Legal Aid Society, or use of an existing state Defender system.
- c. Compensation of private counsel on a case-by-case method.
- d. Any combination of these.

It is indeed a strange contradiction we have in the federal system, where, on one hand, the Constitution gives everyone the right to have a lawyer, requiring that one be provided if the defendant is poor, and, on the other, having no provision for compensating or reimbursing the hundreds of lawyers who serve when they are appointed. With the some 35,000 federal cases each year—one-third to one-half being indigent—this problem is more than academic. The legal profession and the public generally are faced with a situation so serious that it is threatening the administration of justice in a branch of our court system that we regard as the most efficient, the fairest, and the best organized.

I conclude this somewhat sketchy discussion of the effects poverty has on the administration of justice by repeating a question familiar to students of criminology: How can we devise a plan that assures us that, *for the sake of the individual*, the innocent will be acquitted, and that, *for the sake of society*, the guilty will be convicted? I realize that there is not an easy answer, but I submit that in the adversary system, which is traditional in Anglo-American jurisprudence, we go a long way in balancing the scales of justice by eliminating poverty as a controlling factor in determining the rights of an accused.

²⁶ *Editor's Note:* As we go to press, S. 1057 has passed the Senate, and H.R. 4816 (without the Public Defender option) has passed the House. Both bills are now before the Conference Committee.