

Should We Have Public Defenders? PUBLIC DEFENDER SYSTEM: WILL IT WORK?

By A.W. Campbell

[Caveat: This edited newspaper article was written in 1971 when the author was studying law in a state whose most populous county was poised to adopt a public defender system.]

Since the Supreme Court's *Gideon* decision in 1963, new emphasis has been placed on providing counsel for indigents facing criminal prosecution. The Kanawha County Bar has recently declared that the implementation of the indigent's constitutional right to counsel is one of the paramount problems facing the American bar today. The Kanawha County Bar recommends establishing a public defender system. But does the public defender system meet the challenge of *Gideon's* trumpet?

Before judging the merits of any system one should ask what objectives must it fulfill? "Justice" as the aim of a criminal justice system is no easier to define than is the "fair trial" guaranteed by *Gideon*. However, at the very *least* a fair trial implies an adversarial proceeding.

Does the public defender system pass the adversarial test? Abstractly it is difficult to see how a prosecution and defense system funded by the same governmental body can be a dispute between fiercely antagonistic parties. But putting aside that abstraction, how does a public defender system work in reality?

There are three typical methods for selecting attorneys to be public defenders: public election, judicial appointment, and civil-service exam. Let us assume that the attorney whose job depends on voter popularity is sufficiently stalwart to withstand public pressures when duty calls her to defend one accused of a particularly heinous crime. Let us assume that an attorney appointed by the judge before whom she must practice is willing to incur the wrath of her benefactor on behalf of an indigent. (The Kanawha County Bar would place the ultimate power of appointment with the Governor.) Let us assume that a public defender selected from the top of a civil service test could be free of both these pressures. The question remains, how can public defenders effectively fight city hall when they *are* city hall?

The answer to this lies buried in an aspect of American criminal justice about which few citizens are aware: approximately ninety percent of all convictions in this country are obtained from negotiated pleas or "deals." In fact, criminal justice for indigents is largely one of *non*-trial proceedings in which a full-scale trial represents a breakdown in what is essentially closed-door negotiations.

A primary reason-- though no justification-- for this process is expediency: there are currently not enough time or governmental resources to conduct trials for 90% more people on an already overloaded docket. The courthouse is thus forced into being a processing machine, dedicated to the most efficient ways to keep its caseload moving in one door and out another.

At one end of this machine sits the prosecuting attorney, whose duty abstractly is to 'do justice' but whose re-election or re-appointment depends on a high batting-average of convictions. Insofar as other courthouse employees are on his "team," the general flow of courthouse business is towards securing convictions.

Even private attorneys for the wealthy accused finds themselves loath to offend courthouse officials, for success in obtaining favorable dispositions for clients depends heavily on the cooperation of numerous courthouse personnel. How, then, would a public defender work within the context?

First, consider the fact a private attorney can at times afford to antagonize a prosecutor or courthouse worker because tomorrow that attorney works elsewhere. A public defender, however, must work within the same bureaucratic structure day after day. Thus he cannot afford to "go all out" for *every* client. Instead he is forced to distribute whatever cooperation or favors he may have accumulated over his entire caseload-- or else sprinkle them sparingly over the few clients he personally considers "deserving."

Second, the private attorney's bargaining strength with the prosecuting attorney rests on the fact the prosecutor does not have time to try all the cases on his docket-- and is therefore willing to trade a lesser charge for a guilty plea. But the public defender's docket would be only slightly less crowded than the prosecutor's. In the hands of the public defender, then, a substantial bargaining chip for the defense is forfeited before the parties even sit down to negotiate.

The unsettling result is that in the interests of the large *group* of indigents on each one's docket, neither prosecutor nor public defender can afford to spend much time on any *individual* case. Both must systematically reduce their large caseloads or be swamped.

The bleak outcome is that two lawyers, regardless of their ethical inclinations, are virtually forced to sit down with each other and decide which indigent is going to be guilty, for what crime, and for how much time. That each lawyer is *trying* to attain the greatest good for the greatest number of people in the system is not reason for calling this forced bargaining an adversary proceeding.

In sum, although agreeing with the Kanawha County Bar that providing indigents with counsel is a critical issue, I am far from convinced a public defender system can lead to "justice." In the words of Learned Hand, 'If we are to keep our democracy, there must be one commandment: *Thou shalt not ration justice.*'"