

BOOK REVIEW

REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE. Washington: G.P.O., 1963. Pp. 154.

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The right of a person accused of crime to be represented by counsel at every stage of the criminal proceeding in a federal court is established by the Sixth Amendment to the Constitution of the United States as implemented by Rule 44 of the Federal Rules of Criminal Procedure. Federal court decisions over the last thirty years have interpreted the rights of an indigent person charged with a federal offense to include provision of counsel and other requisites necessary to a defense. Federal statutes have failed to keep pace with these rulings for they still fail to provide for a system of defense of the indigent by compensated counsel or even reimbursement of expenses necessarily incurred in their defense. As a result, the administration of criminal justice is burdened by vexing problems whenever an accused is financially unable to obtain the benefits of an adequate defense.

On April 6, 1961, the Attorney General of the United States, in an effort to come to grips with these difficulties, announced the appointment of a committee to identify problems in the administration of justice arising from the poverty of the accused and to make recommendations aimed at their solution. The committee's report was submitted to the Attorney General on February 25, 1963 by committee chairman, Francis A. Allen.

The report contains a clear, concise, and accurate description of the manifold problems which confront the administration of criminal justice when an accused is deterred from asserting his rights solely because he lacks the financial means to do so. Each chapter includes a series of practical proposals designed to solve some of the major problems in the area under discussion. While the study is not meant to constitute a definitive or exhaustive research into poverty and the administration of federal criminal justice, it is based on solid historical research, studies of district court practices, searching questionnaires, and reliable interviews—all reinforced by the knowledge and experience of individual committee members.

The committee makes a noteworthy contribution to the improvement of criminal justice in federal practice by proposing in chapter 1 that the concept of poverty, which has been interpreted generally in our law to mean a total lack of finances, be redefined; by proposing in chapter 2 com-

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prehensive federal legislation to provide competent, and compensated, counsel to an impecunious defendant at every stage of the criminal proceeding; by directing attention in chapter 3 to the shortcomings of current bail practices and by recommending adoption of a system of pretrial release based primarily on nonmonetary considerations; and by proposing in chapter 4 that access to appellate review be improved and representation provided throughout the appellate procedure.

Historically, the concept of poverty as applied in criminal law is equated with total destitution and indigency. This concept is reflected in laws requiring an accused to sign a pauper's oath to obtain free counsel, free transcripts of legal proceedings, the appearance of witnesses, and other means essential to an adequate defense. Indigency, or the ability to finance legal defense services, once established, is, in practice, often presumed to continue. Thus, the proven ability of an accused to raise bail or employ counsel in his defense is sometimes considered sufficient ground to deny him free legal defense facilities at some later stage in the criminal proceeding. This conception of poverty inhibits the defense and impedes the orderly and prompt disposition of cases.

In chapter 1 of the report, the committee discards the "indigency" concept of poverty as a relic of our ancient poor laws and proposes a wider and more liberal interpretation of poverty, as it applies to federal criminal practice. On the assumption that one of the prime objectives of the civilized administration of criminal justice is to render the poverty of the defendant an irrelevancy, the committee concludes that "poverty must be viewed as a relative concept," "measured in each case by reference to the particular need or service under consideration." P. 7.) In the committee's view, defense services should be supplied at public expense when, at any stage of the criminal proceeding, "lack of means of the accused substantially inhibits or prevents the proper assertion of a right or a claim of right." (P. 8.)

Although the committee's proposal is a step in the right direction, its objective falls short of solving the problem of poverty confronting the federal courts. The proposal would involve the establishment of complicated procedures to determine in each case, step by step, the eligibility of an accused for legal aid. It would also involve in each case, and step by step, determination of the amount of compensation to be allowed the defense attorney and also the extent of reimbursement for collateral expenses incurred by him in the defense of his client. More importantly, if we return to the premise that financial conditions should not be relevant to the availability of defense services, we find the problem broader than that presented in the report. Lack of equal justice under law can exist equally where a man without means is, for that reason, unable to use his defenses and when a man—because he has means—may be forced into destitution as the result of using his defenses.

The broader question, which is not articulated in the report, is whether the obligation of government is fully met if defense services are not made

available to all who wish to have them without regard to financial considerations. Fees for legal defense services from arrest through appeal are exceedingly high and are beyond the reach of a large and growing number of individuals charged with crime. Now that the right to counsel and other requisites for defense have been widened by court interpretation, we may expect that by the committee's criteria an excessive number of persons will slip into the "poverty" category. With this development may come a recognition of the need of government to reexamine the nature and extent of its obligation to the accused.

If the presumption of innocence is to have practical meaning, and if the adversary system is to function in a way which will promote even-handed justice, an impoverished accused must be provided, at public expense, with the means necessary to assert his rights in court. Conversely, in a system of criminal justice which takes pride in a tradition of protecting the rights of an accused, legal services at public expense should be made available to an accused who is able to pay for them. Indeed, this concept of free defense for all who wish it has gained acceptance in varying degrees in Sweden, Norway, and Denmark where a criminal defendant, regardless of his financial condition, may avail himself of defense services at public expense. Implicit in this concept is a recognition of the social benefit which results from a system of criminal justice in which defense, no less than prosecution, is deemed to be a public obligation.

Obviously, the concept that any defendant, regardless of his financial status, is entitled to be represented at public expense, cannot be expected to gain ready acceptance. The committee itself is forced to accommodate its concept of poverty to society's system of private fees for professional services. Nevertheless, as *Betts v. Brady*¹ foreshadowed *Gideon v. Wainwright*,² so may the committee's definition of poverty in this aspect of criminal law presage free defense for all who wish it regardless of their financial status. It is only when an accused of means is provided at his request with free defense facilities equal to those available for the indigent that access to our courts may be said to be equally available to all.

In chapter 2 the committee focuses attention on the nature and effectiveness of free representation of persons of limited means. In evaluating current practices the committee found the salient weaknesses to include the unavailability of counsel at preliminary hearings before a Commissioner, dependence upon young and inexperienced lawyers, and failure to provide defense services such as investigation, psychiatric examination, and expert testimony. To meet these deficiencies, the committee in collaboration with the Department of Justice drafted a bill which has come to be known as the Criminal Justice Act of 1963. Most of the provisions of this act are not new. They were hammered out and refined by knowledgeable and in-

¹ 316 U.S. 455 (1942) (dictum) (due process requires a state to furnish counsel to an indigent criminal defendant only when it would be potentially and fundamentally unfair to proceed without counsel).

² 372 U.S. 335 (1963) (due process requires a state to furnish counsel to indigent defendants in all criminal trials).

terested individuals and agencies over the last two decades. The act improves upon the numerous congressional bills introduced in the past by providing for the appointment of counsel at the accused's first appearance before a Commissioner. Further, it authorizes appointed counsel to represent the accused in all subsequent proceedings including appeal, and provides compensation at an adequate hourly rate. The report points out that such terms as "indigent" or "indigent defendant" are avoided in the act and that instead reference is made to persons who are "financially unable to obtain adequate representation." (P. 41.) On March 8, 1963, the Criminal Justice Act of 1963 was submitted to the Congress by the President. It is important domestic business which should receive immediate attention by the Congress.

Chapter 3 is devoted to a consideration of the varying bail practices in the federal districts as they affect the administration of justice when the accused is financially disadvantaged. It concludes that the present bail system is largely irrational, impedes the proper administration of justice, and places a heavy and unnecessary burden on the accused who has limited means for his defense. The committee rightly points out that the presumption of innocence is shaken by a system of pretrial release based primarily on financial incentives to induce appearance. It finds that such a system of pretrial release affects the ability of the defendant to make an adequate defense, often impedes an accused from employing counsel, hinders a lawyer from having contact with his client, and otherwise inhibits the defense.

These findings cannot be disputed effectively. Any lawyer engaged in the practice of criminal law in the state or federal courts knows from experience that bail practices have been attended with abuses, have brought about untold and unnecessary suffering on the part of an accused and his family, and have proved of questionable value in inducing the appearance of a defendant. On the basis of substantial data, the committee offers concrete proposals to eliminate the current shortcomings of pretrial release practices. Specifically, it recommends the establishment in the federal courts of a system of pretrial release which would make use of a summons as a substitute for a warrant of arrest and would facilitate release of a defendant on his own recognizance. It recommends further the establishment of improved fact-finding machinery for bail decisions and provisions for nonpecuniary inducement for appearance at trial. These provisions would involve informing a defendant of the criminal penalties attending bail jumping, the nature of the obligation to appear for trial, and supervision of persons obtaining pretrial release.

These enlightened recommendations if adopted in federal criminal practice would greatly improve present release procedures. Their adoption by the federal courts would undoubtedly have a salutary impact on state bail practices. A rethinking on the purpose of bail and the problems which current bail practices raise in our state courts is long overdue since it is there—rather than in the federal courts—that the conditions for pretrial release are most onerous.

The final chapter of the report is devoted to the accessibility of appellate review to those defendants who are financially unable to employ counsel or defray the necessary appeal costs. The committee finds that access to appellate review by financially disadvantaged persons is limited because the law fails to provide for a system of adequate representation. It finds further that *forma pauperis* appeals impede an impoverished defendant from advancing his cause without undue delay. To correct these conditions, the committee, in addition to recommending legislation to provide counsel to an accused who is financially incapacitated, proposes the enactment of legislation which would provide the convicted defendant with a transcript of trial proceedings whenever he files a notice of appeal and is found to be financially unable to pay for it. The committee would also abolish the multistep process presently directed to screening out frivolous appeals and would leave the elimination of such appeals to the courts of appeal. Although little attention has been given in the past to a consideration of the efficacy of the current *forma pauperis* practice, few would deny that present procedures in this area need radical change.

The report on *Poverty and the Administration of Federal Criminal Justice* offers a variety of valuable legislative and administrative measures to diminish the role which poverty plays in the administration of federal criminal justice. It can be read with profit not only by those concerned with the administration of federal criminal justice but also by those interested in the administration of state criminal courts who seek enlightenment on their own problems. Indeed, all persons interested in promoting the efficient administration of criminal justice will find the report thought provoking and informative.