



# The NASSAU LAWYER

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THE NASSAU LAWYER

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## Public Defender --- Pro and Con

—by John R. Dunne\*

The problem of furnishing legal representation to indigent defendants in criminal cases, which has received recent notice within the Bar and in the press, is a problem which has vexed the bar for centuries and which traces its origins into the obscure history of our legal system.<sup>1</sup> The constitutions of the United States<sup>2</sup> and of the State of New York<sup>3</sup> require that state courts furnish indigent defendants with counsel in all capital cases and in non-capital cases where the absence of counsel would result in an unfair trial. The New York Code of Criminal Procedure<sup>4</sup> goes further by requiring a trial judge to assign counsel to a defendant who desires the assistance of counsel but is without funds to retain legal assistance. Despite these guarantees, experience presents a picture of men before the Bar of Justice unable to capitalize on their wealth of rights due to their poverty of means. It has been estimated that approximately sixty per cent of those charged with a crime cannot afford to employ counsel.<sup>5</sup> In many jurisdictions this need for representation is not met by any system.

In communities where the problem has been met, there are three basic avenues of approach:

- 1) assignment of counsel by the courts from a list of volunteer attorneys;
- 2) privately financed public defender of legal aid offices; and
- 3) public defender offices supported by public funds.

The problem is squarely presented in these terms:

"How can an indigent defendant's right to counsel best be served both at the trial and appellate levels with the least possible burden on members of the judiciary and the bar?"

The problem of furnishing adequate counsel to indigent defendants in Nassau County differs little from the conditions found to exist throughout the nation. Statistics of the County Court reveal that, in 1960, volunteer counsel were assigned to represent fifty-two per cent of the defendants indicted by the grand jury. This was only slightly below the national average. Presently, the County Court judges have a roster of some one hundred and ten local attorneys who have volunteered to serve as counsel to indigent defendants. This number includes attorneys of varying degrees of experience and ability, but each is characterized by a willingness to assume part of the obligation of the Bar. At the current rate at which the

1 *Representation of Indigents in California*, 13 *Stanford Law Rev.*, 522

2 Fourteenth amendment

3 Article I, §6

4 §308

5 "Equal Justice for the Accused" (Doubleday & Company, Inc. 1959) p. 38

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realizing the true benefits of his wealth of rights. The present system is deemed unsatisfactory for a variety of reasons: (1) the quality of representation differs with attorneys of varied experience, competence and zeal; (2) investigatory and other facilities necessary for complete preparation are not available other than that for which the attorney is willing to pay out of his own pocket; (3) the present system does not come into operation at a sufficiently early stage of the proceedings and often does not continue through appeal; and (4) an unequal burden often falls on experienced attorneys or those frequently in and about the courthouse.

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With an eye towards correcting this situation the state legislature, at its last regular session, enacted as part of the County Law a statute<sup>7</sup> which gives counties the size of Nassau the option to establish a public defender office to be supported by public funds. The subject has received widespread attention and will most likely be accorded serious consideration by local officials and bar associations this year.

The legislation provides that the county board of supervisors may create an office of public defender, appoint an attorney to act as the public defender and fix his term and compensation.<sup>8</sup> The public defender, subject to the supervisors' approval, may appoint assistant attorneys, clerical and stenographic assistants and investigators, whose compensation he must fix within his appropriation.<sup>9</sup> His function will be to represent without charge an indigent defendant who is charged with a felony, either at defendant's request or by order of the court with his consent. If the defender is specifically authorized by the Board, he may represent an indigent defendant charged with any crime.<sup>10</sup> He shall represent the defend-

7 County Law, Art. 18-A: (L. 1961, c. 365)

8 County Law, §716

9 Ibid.

10 County Law, §717

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ant from the time of arrest through all of the steps he deems necessary to disposition of the charges and may, in his discretion, prosecute an appeal.<sup>11</sup>

The legislature has set forth a vague standard for determining who may avail himself of this service by defining an indigent defendant as one "not himself financially able to retain counsel" or, in the case of a minor, one who is without resources and "whose parent or guardian is not financially able to retain counsel for him".<sup>12</sup> The determination of indigency may be made by the public defender before arraignment, or by the court at or after arraignment. If after appointment it should appear that "the defendant or his family is able to afford counsel", the public defender shall report this fact to the court and shall not be required to continue the assignment.

The statute specifically provides that the existence of this office shall not interfere with the court's power to appoint counsel other than the public defender.<sup>13</sup> It shall also be the duty of the public defender to submit an annual report to the board of supervisors.<sup>14</sup>

Those who urge the adoption of such a program in this county, cite the benefits as affording every indigent criminal defendant competent and experienced representation at all stages of the proceedings from full-time lawyers with adequate investigatory and other preparatory facilities at their disposal. This would meet the minimum standards prescribed by the American Bar Association for a public defender system. The experience in Connecticut is often cited as a case in point. It was determined that the cost of a publicly-supported, state-wide public defender office was two cents per capita, and that the savings to the state by avoiding protracted trials by inexperienced counsel more than compensated for that

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> County Law, §718

<sup>14</sup> County Law, §720

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grand jury is finding indictments, annual assignments average five per volunteer attorney. While many of these cases result in the entry of a guilty plea, thus foregoing the necessity of trial, the investigation and preparation required before such disposition can consume a considerable amount of the attorney's time and effort. Clearly then, this considerable burden falls on less than ten per cent of the local bar. There is no statutory authority for the county to compensate these attorneys except in capital cases.<sup>6</sup>

A pioneer program was instituted in 1961 by the Criminal Law Committee of this Association to furnish volunteer counsel to indigent defendants at arraignment on a felony in the Nassau County District Court sitting as committing magistrates. In response to a solicitation of the 1300 association members, seventy-four attorneys volunteered to participate in the program. An additional twenty-one agreed to represent such defendants on appeal to the Appellate Division. This list supplemented a list of some local attorneys who had previously volunteered their services to the presiding justice.

Another endeavor to solve the problem of furnishing adequate representation to indigents was initiated by the Women's Bar Association of Nassau County by having a staff of their volunteer members in regular attendance at the Arraignment Part of the District Court to provide advice and, if desired, representation to indigent defendants. This program has functioned on a limited basis and may be merged with the activities of this Association.

The Nassau County Criminal Courts Bar Association is presently engaged in promoting a plan to expand the present list of assigned counsel and to equalize the burden of these assignments.

The vigor and determination which local lawyers individually and collectively have mustered to meet this challenge reflects the deep sense of responsibility which lawyers have traditionally felt, and is an encouraging example of the daily efforts of members of the legal profession to discharge an important public service obligation. Yet, despite this unselfish and many-times unappreciated effort, the defendant's poverty of means continues to prevent his

<sup>6</sup> Code Crim. Pro., §308

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cost. Its supporters insist that a public defender is not charity but rather is a means of insuring that all citizens will have access to legal process, a basic ingredient of justice. They urge that if the guarantee of the Fourteenth Amendment is to be meaningful for those who cannot afford to retain competent counsel, the community must undertake the responsibility of providing and paying necessary defense counsel just as it provides and pays prosecution staffs.

On the other hand, opponents of this proposal contend that it is improper for government to undertake both the defense and prosecution of defendants, and that such a system is another agency of socialism and tends to socialization of the Bar. The proponents of the system, however, contend that this is an unfair criticism, a totally unwarranted and emotional charge without basis in history, which obscures the essential problem. They claim that the label of socialism is inept since the term, in its generally accepted sense, implies exalting the state at the expense of the individual. Yet this proposed system was developed out of the realization that the individual needs to be protected from the state.

Others have the more practical concern that the institution of such a system and its general availability to defendants would siphon off a substantial part of their general practice. In addition they directly challenge the loyalty which may be shown by a public defender to all of his clients. Some public defenders candidly admit that "there is a sifting of the deserving from the non-deserving case" by the defender. They claim that a feeling of despair often arises in a defendant from the doubted loyalty of his counsel when he sees the public defender often hobnobbing with the district attorney, both being government employees.

The alternatives to this proposed system are either (1) a further development of the present program under which the courts operate; or (2) a quasi-public defender system such as has been successfully attempted in the city of Rochester, which has been encouraged by additional legislation enacted last year. By an

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amendment to section 224 (10) of the County Law, the county board of supervisors may now appropriate such sums of money as it deems proper toward the maintenance of a private, legal-aid bureau organized for the purpose of furnishing legal assistance in criminal matters to needy persons residing, or charged with a crime, in this county. Those who urge this as a preferred course, point out that it would provide for the local government to contribute part of the cost of furnishing counsel to indigents, but would place the responsibility for budgeting and policy-making in the hands of the agency itself, free from the influence of politics or other pressures. Such an organization could look to the community for additional funds in the form of support from voluntary contributions or community chests or united funds, much the same as the manner in which the local legal-aid society operates. This system has found wide acceptance in the larger cities of upstate New York.<sup>15</sup>

There is no ideal system, but only a preferred system for each community, depending on the size and nature of the community. A number of approaches to the problem have proven successful. The real problem is to select the method best suited to the community. In addition to the selection of a system, a solution cannot be realized without community participation and the continued support of the Bar. There is a rigid, unsympathetic public attitude toward persons accused of crime despite the presumption of innocence doctrine in American jurisprudence. There is also a lack of understanding among lawyers as well as laymen as to this need, and there is wide disagreement among lawyers and judges as to specific methods for meeting the needs.

Samuel Johnson is reported to have referred to members of the legal profession as "a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled."<sup>16</sup> The constitution guarantees that all who come before the Bar of Justice are entitled to the aid of one schooled in that art and power regardless of their material means. A community blessed with our abundance cannot afford to ration justice—a condition which may well result from a failure to establish an adequate defender system.

15 "A Decade of Progress: Legal Aid and Defender Services." 47 A.B.A.J. 867

16 Boswell. *Life of Johnson*