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CRIMINAL JUSTICE

ATTORNEY GENERAL ROBERT F. KENNEDY

Thirty years ago, Mr. Justice Sutherland wrote that the interest of the Government "in a criminal prosecution is not that it shall win a case, but that justice shall be done." We must ask ourselves today whether justice is being done in American courts and American society to the very large number of citizens who cannot afford to defend themselves against criminal charges—or against society.

Criminal justice is a subject that ought to be of primary concern to all working in the law, and yet it has become the neglected stepchild of legal practice. I believe a deep and general resurgence of interest in criminal justice is needed today. The legal profession, which proclaims that rich and poor are equal in the eyes of the law, must act better to translate that rhetoric into reality.

There are deep stirrings of such a resurgence, prompted in large part by the Supreme Court's decision last year in *Gideon v. Wainwright*, which resulted in Clarence Earl Gideon's subsequent re-trial and acquittal after two years in prison. The impact of the Gideon decision has been to suggest that appointed counsel for indigent defendants will now be required in all courts, state as well as federal—that all courts now will have to face the problems with which federal courts have been dealing for years.

We should ask, why was it necessary for there to be a Gideon case in the first place? The principle it established is central in the law. The same result should have been present long ago, springing from our consciences rather than our courts. But now the principle has been enunciated and our present need is to see that the momentum for equal justice is maintained and developed into those reforms for which just and thoughtful men have been calling for decades.

The appointment of an attorney for an indigent defendant, after all, is a mere starting point. The question presented immediately is whether such an appointment alone provides fair representation. Our experience in federal and state courts demonstrates that it does not. As the law now stands, court-appointed defense attorneys receive no investigative or expert help. They often are not appointed soon enough, with the result that the trail of evidence and witnesses is muddy or missing. Those appointed often lack trial experience, and, even if they have it, they receive no pay for their services, not even reimbursement for out-of-pocket expenses.

These conditions impose a dual hardship, first on lawyers and then, inevitably, on the indigents they represent. Every judicial district provides its own illustrations:

—One Virginia attorney, for example, was required to serve in a case for 18 continuous days, including seven night sessions, in defense of an indigent defendant charged with a federal liquor tax violation. He received not a cent for his efforts.

—A young Salem, Oregon, attorney was appointed to defend a mail fraud case on the day of his admission to the bar of the federal court. The trial alone—preparation time aside—took 11 weeks. The young lawyer was employed by two attorneys who consequently had to hire someone else for the period, at a cost of \$2,300.

—In Detroit, a 25-year-old attorney was appointed to a case which took 10 weeks to try. He was not, however, associated with a firm which could support him in the process, and had just opened his own office. By the end of the 10 weeks, he had to spend Saturdays and Sundays selling real estate to try to cover his office expenses.

A system which regularly makes such demands of lawyers is unfair to the legal profession. What should be of even greater concern is that such a system inevitably is unjust to those poor defendants whom the system is intended to benefit. The final result of this system, despite the dedication of many conscientious individual attorneys, is that poor defendants stand less chance of obtaining full justice than do defendants with means.

Several recent studies have demonstrated that defendants with appointed counsel enter guilty pleas much more frequently. They stand less chance of getting the charges against them dismissed. If they go to trial, they have less chance of acquittal. And if convicted, they have less chance of securing probation rather than prison terms. We are not talking about a handful of defendants. In the federal system alone, 10,000 defendants have court-appointed counsel. This is nearly one-third of the total.

Because of our great concern over these difficulties, I appointed a committee three years ago, headed by Professor Francis A. Allen of the University of Chicago Law School, to investigate the problems faced by the poor in federal courts. After two years of detailed analysis, the Allen Committee submitted an outstanding report. As the result of its recommendations, legislation is now pending in Congress to help us restore the balance of the scales.

Corrective legislation has been before the Congress since 1939 and although several bills passed the Senate, none was approved by the House until this session. In early 1963, President Kennedy sent to Congress the proposed Criminal Justice Act of 1963, based in large part on the Allen Committee report. The measure was passed by the Senate last August. In January of this year, the House took favorable action for the first time, though with significant departures from the Senate bill. Thus, a measure soon could be enacted, following a conference of the two chambers.

As introduced, the Criminal Justice bill would provide that court appointed defense attorneys be paid for their services, and it would permit each federal judicial district and circuit to choose the most suitable plan for appointing a defense counsel. There would be four choices: private attorneys, a public defender, local legal aid societies and defender organizations, or any combination of those three.

In its definition of "adequate defense," the bill includes whatever auxiliary services are required in preparing a sound case—the use of investigators, experts, and other special witnesses. It

also would provide that counsel be guaranteed at every stage of the proceedings, from the time of a defendant's first appearance before a commissioner. Finally, it avoids the term "indigent" and provides for assistance to all persons unable to afford an adequate defense—thus aiding the man who may be able to pay part but not all of his legal fees.

The enactment of this legislation would be a significant step forward, but it would only be a step and, in any event, a step only in federal courts. A great deal more needs to be done and federal interest or legislation alone cannot do it.

The obvious next step would be similar legislation in the various states, where unpaid court-appointments could result in just as heavy burdens on lawyers and defendants as they have in the federal system of unpaid representation so far.

Of parallel injustice and parallel importance is the whole broad question of bail, which also was explored by the Allen Committee and by the National Conference on Bail and Criminal Justice in Washington this spring.

The historic purpose of bail has been to insure the presence of the accused at trial. Recent studies demonstrate, however, that there is little, if any, relationship between appearance at trial and ability to post bail. A current experiment in New York City, the Manhattan Bail Project, undertaken by the Vera Foundation, discloses that of 2,400 defendants released on their own recognizance, only 19—less than 1 percent—failed to appear. This percentage is at least as small as that for persons who jump bail.

Thus, in New York City at least, the philosophy of financial bail is plainly outmoded. It is also grossly unjust. Because he is forced to remain in jail pending trial, the man unable to afford bail is subjected to emotional scars and a record as a "jailbird," irrespective of his guilt. While he is in jail, he is unable to assist in securing the witnesses or evidence for his defense, even though he is often the person best able to do so. By remaining in jail and thus losing time at work—or more likely his job—his poverty is compounded.

A dramatic aspect of the problem is that of young adults accused of crime. They usually lack the kind of money necessary even to buy a bail bond. Their resulting pre-trial imprisonment often throws them into the company of hardened criminals. This time in jail—prior to trial—is equivalent, in the words of Justice Douglas, “to an M.A. degree in crime.”

The literal injustice is evident from statistics compiled by the Manhattan Bail Project. Of the first 1,214 persons released on their own recognizance in the experiment, 620 either were acquitted or had their cases dismissed. Of the 590 who were convicted, 415 received suspended sentences. And 120 others paid fines in lieu of prison terms. The rest, 65 persons, ultimately went to jail—5 percent of the original 1,214 defendants. Save for the experiment, the other 95 percent would have had to go to jail in lieu of bail. The lesson of this experiment for the bail system is evident.

We have sought to respond to such injustice at the federal level. In March, 1963, I instructed all United States Attorneys to recommend the release of defendants on their own recognizance when no substantial risk was involved. This policy has been followed throughout the country, without problem.

The National Bail Conference is a joint effort to seek reform at the state and local level as well, bringing together hundreds of judges, attorneys, bondsmen, law enforcement officers and other experts from all over the country. But no conference, no matter how many experts are involved, can conquer the problem, any more than federal legislation providing for an adequate, compensated defense for federal prisoners can solve the nationwide representation problem.

These are problems that require the wholehearted involvement of the legal profession, starting with law students and reaching to the topmost ranks of our largest law firms. As we see ourselves as leaders in the arena of public affairs, as officers of our courts, and as agents of justice, so it is our clear responsibility to work for solution to these problems, starting at the community level.

And even this kind of involvement is narrow and superficial. We, as a profession, have a responsibility for a larger social effort on behalf of the poor. We have not fulfilled this larger responsibility. Indeed, we have not even recognized it. We secure the acquittal of a poor man only then to abandon him to a world of eviction notices, wage attachments, repossession of his automobile, or termination of his welfare benefits.

That world is one for which the poor have scant equipment. To the poor man, "legal" has become a synonym not for that which is to be respected, but simply for technicality and obstruction.

What is our responsibility toward the general problems which stem from poverty, and not only those which may surface in the form of crime? What is our responsibility concerning that phenomenon of massive privation to which our nation is now, at last, awakening? First, lawyers must bear responsibility for permitting the development of two systems of law, one for the rich and another for the poor. Without a lawyer, what is the benefit of an administrative review procedure in a welfare program? Without a lawyer, what is the effect of the right to a refund of payments already made on a repossessed car? The point, simply, is that unasserted, unknown, unavailable rights are no rights at all.

Too often, the fundamental spirit of the poor is helplessness. It does not stem from the absence of theoretical rights. But it can stem from an inability to assert real rights. It seems to me that the legal profession has a special responsibility to help citizens at all levels to assert those rights. We can begin to do so by practicing law on behalf of the poor. Some of the necessary jobs are not very different from what lawyers do all the time for those who can pay—and well. The problems may be more difficult, but they involve essentially the same skills. The fees are less; the rewards are greater. Just as the corporate lawyer seeks to guide company policy away from an anti-trust or a fraud violation, so too can the individual be guided regarding leases, installment purchases, or any of the variety of common dealings under which he can be exploited.

To some extent, this is the kind of assistance legal aid societies can provide. But the job is not going to be done simply by creating or supporting such agencies. The job takes more than an annual check of \$100 or even \$1,000. It requires the combined commitment of our intellectual and our ethical energies to donate, not once or twice but continuously, the resources of our profession. Why should not large law firms assign attorneys to work in this area, perhaps on a rotating basis? Why should not more law students spend summers helping attorneys in indigent cases, working with juvenile delinquency programs or in settlement houses? The range of methods by which we can accept our responsibility and meet these problems is as diverse as the number of communities in which the problems exist.

Last October, President Kennedy said at Amherst College:

“There is inherited wealth in this country and also inherited poverty. And unless the graduates of this college and other colleges like it who are given a running start in life—unless they are willing to put back into our society those talents, the broad sympathy, the understanding, the compassion—unless they are willing to put those qualities back into the service of the Great Republic, then obviously the presuppositions upon which our democracy are based are bound to be fallible.”

Our profession has a particular responsibility to prove those presuppositions. Our professional obligation extends to championing the presumption of individual sanctity of all citizens, rich and poor alike. This obligation stems from our system, from the rule of law, and, above all, from justice.