

BOOK REVIEWS

DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT, VOLUME I: NATIONAL REPORT. By Lee Silverstein.† Chicago: American Bar Foundation. Pp. vii, 280. \$7.00.

Events concurrent with the writing of a book are seldom as interesting and important as the book itself. Nonetheless, such is the case here. This book stems from the decision of the House of Delegates of the American Bar Association in 1962 to give fresh impetus to providing an adequate defense for indigent defendants in criminal cases. A special committee was formed by the ABA "to study present practices and to initiate, coordinate and accelerate efforts to assure adequacy of the defense provided indigent persons accused of crime in the United States."¹

The next step was the appointment of state "reporters" to undertake a thorough examination of local court systems in their treatment of criminal cases and indigent defendants. Through the cooperation of local bar associations, state advisory committees were formed for the purpose of assisting these reporters. This audit has now been completed.²

A short time after the study commenced, the Supreme Court added a sense of urgency to the problem by its decision in *Gideon v. Wainwright*.³ The furnishing of counsel for an indigent defendant charged with a felony in a state court proceeding was no longer a matter of grace; it was now a constitutional requirement.

Under the pressure of *Gideon* and of the subsequent Supreme Court decision in *Escobedo v. Illinois*,⁴ and the urging of the American Bar Association, Congress enacted the Criminal Justice Act of 1964.⁵ In general, the act provides for the payment and furnishing

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¹ Resolution of August 9, 1962; 87 A.B.A. REP. 468.

² Volumes 2 and 3 were published in July 1965 and consist of the reports gathered from the fifty states and District of Columbia as written by the various state reporters. This material provides the research background for Volume I.

³ 372 U.S. 335 (1963).

⁴ 378 U.S. 478 (1964).

⁵ 18 U.S.C. § 3006 (a) (1964).

of counsel as well as investigators and services of others needed to prepare an adequate defense.

Congressional concern for the indigent was also expressed in the Economic Opportunity Act of 1964.⁶ Funds were appropriated for a broad scope of social services. Here too, legal services for the poor were provided for, but not restricted to criminal matters. Current with and after passage of the "War on Poverty" legal writers began to ponder those problems which poverty poses for the legal profession beyond that of the indigent criminal defendant.⁷

In July 1964 a preliminary report of the research project was presented to the ABA House of Delegates by the special committee. In approving the report, the House of Delegates resolved that "the legal profession of the United States has no more important or pressing task than to see to it that adequate provision is made everywhere to insure that competent counsel are provided for indigent defendants."⁸ The book reviewed here, being the final study, superseded the preliminary report.

Although this book and the research upon which it is based are related only to criminal matters, the dimensions of the problems in this limited area alone are staggering. In state court felony prosecutions, which exceed 300,000 per year, at least half of the defendants were unable to hire a lawyer, and of the 40,000 convicted each year,

⁶ 78 Stat. 508, 42 U.S.C. §§ 2701-2981 (1964).

⁷ Compare *Report by Committee on Group Legal Services, California State Bar Association*, 34 CAL. S.B.J. 318 (1950), and comment thereon by Sterling, *id.* at 807, with *Progress Report by Committee on Group Legal Services, California State Bar Association*, 39 CAL. S.B.J. 639, 725-27 (1964), and *Resolution of Board of Governors, California State Bar Association*, 40 CAL. S.B.J. 325 (1965), disapproving certain conclusions and recommendations of the 1964 report. See Symposium, *Availability of Counsel and Group Legal Services*, 12 U.C.L.A.L. REV. 279 (1965). See also BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951, Supp. 1961); Berry, *The Role of the Federal Government*, 51 A.B.A.J. 746 (1965); Bethel & Walker, *Et Tu Brute*, 1 TENN. B.J. 11 (1965); Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Cheatham, *A Lawyer When Needed*, 63 COLUM. L. REV. 973 (1963); CONFERENCE PROCEEDINGS, *THE EXTENSION OF LEGAL SERVICES TO THE POOR* (Dept. of H.E.W. 1964); Frankel, *Experiments in Serving the Indigent*, 51 A.B.A.J. 460 (1965); Llewellyn, *The Bar's Troubles, and Poultices—and Cures?*, 5 LAW & CONTEMP. PROB. 104 (1938); McCalpin, *The Bar Faces Forward*, 51 A.B.A.J. 548 (1965); Powell, *Response of the Bar*, 51 A.B.A.J. 751 (1965); Tweed, *The Changing Practices of Law*, 11 RECORD OF N.Y.C.B.A. 751 (1956); Symposium, *Lagging Justice*, 328 ANNALS (1960); WALD, *LAW AND POVERTY* (Report to Nat. Conference, Dept. of H.E.W. 1965). There were numerous pertinent addresses given at the August, 1965 convention of the American Bar Association. Special consideration should be given the address of S. Sargent Shriver, director of the "War on Poverty." See also *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

⁸ Resolution of Aug. 10, 1964, 89 A.B.A. REP. 378.

about two-thirds were indigents. Hence, the potential number of appeals in state courts from felony convictions of defendants who may have been without adequate counsel at the trial level could be 25,000. The number of defendants in state misdemeanor prosecutions cannot be estimated reliably because of inadequacy of records, but 5,000,000 a year is a reasonable guess. Of these, the available statistics seem to indicate that 70,000 of those brought to trial are in prison. Thus the statistical record as to state criminal cases only is overwhelming, and the need for defender plans is glaringly shown.

This book analyzes three types of systems for providing counsel for indigent defendants in criminal cases: (1) the assigned counsel system; (2) various public defender systems; and (3) various combinations of these two. The book considers the needs for counsel, not only at the trial level but also at various stages in advance of trial. It further considers the need for counsel at hearings on sentencing, for appeals and for various post-conviction remedies. The book concludes by proposing a set of standards for a defense system based upon data incomparably more trustworthy than any previously available. Thus, this book should play a very important role in the provision of counsel for indigents throughout the United States.

The author presents all this very interestingly. It should only be added here that, in the words of the chairman of the special committee, Whitney North Seymour, a major contributing factor in the results obtained from the project has been the author's display at every stage of the project of "industry, imagination and catalytic skill."

PAUL CARRINGTON*

CONFERENCE ON SECURITIES REGULATION. Edited by *Robert H. Mundheim*.† Chicago: Commerce Clearing House, 1965. Pp. xvi-232. \$12.50.

This volume is a fitting and useful epilogue to a splendid conference on securities regulation held in the Fall of 1964 at Duke

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University School of Law. Having attended a number of comparable and well-intended but actually dreary conferences, it was refreshing to find that this conference sparkled from inception to conclusion in terms of participant personalities and substantive contributions. The sparkle even emerges from the cold printed words of this volume which is a tribute to its editor, Professor Robert H. Mundheim, who resisted the temptation to "over-edit" what was actually said.

The conference was divided into two broad and important areas—"Regulation of Broker-Dealers" and "Growing Importance of the Institutional Investor in the Equity Market." The timeliness of these subjects is reflected in three significant recent developments. The first was the completion and public release of the monumental Report of Special Study of Securities Markets¹ by a specially recruited staff of the Securities and Exchange Commission pursuant to Congressional direction.² Next was the partial implementation of some recommendations of the Special Study by enactment of the Securities Acts Amendments of 1964.³ Finally, the Commission, either by itself or through the judiciary, was rapidly generating a series of decisions with far reaching implications. These decisions made it plain that regulation of the securities industry was not to be subject to an undeveloping dogma.⁴

Timeliness does not necessarily create usefulness, however. Securities regulation has been discussed and dissected to a point of seeming infinity for years by those within or having an interest in the fraternity. Fruitful discussions have been altogether too rare. What distinguished this conference was its organization, its emphasis and the uniformly high quality of the participants. The editor, for example, did not permit the discussion of broker-dealer regulation to wander generically to topics which have been common

¹ H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963) [hereinafter cited as *Special Study*].

² As a result of an analysis by the Commission of questionable practices within the American Stock Exchange, Congress added § 19(d) to the Securities Exchange Act of 1934, directing the Commission to make a broad study of the securities markets and, in general, the adequacy of existing investor protection. H.J. Res. 438, 87th Cong., 1st Sess. (1961), which became 75 Stat. 465 (1961), 15 U.S.C. § 785 (1964).

³ 78 Stat. 565 (1964), 15 U.S.C. § 78 (1964). For a comprehensive analysis of the amendments see Phillips & Shipman, *An Analysis of the Securities Acts Amendments of 1964*, 1964 DUKE L.J. 706.

⁴ E.g., SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963); Berko v. SEC, 316 F.2d 137 (2d Cir. 1963); Heft, Kahn & Infante, Inc., SEC Act Release No. 7020 (Feb. 11, 1963); Cady, Roberts & Co., SEC Act Release No. 6668 (Nov. 8, 1961).

professional knowledge for over thirty years. Rather, his emphasis was on the impact of the development of new information, concepts and laws on the industry itself, including the economic impact.

Sponsors of federal regulation are almost invariably highly motivated. Their zeal, however, can blind them to practical effects just as the targets of regulation may react blindly to the specter of any federal inhibitions on their activities. But from the conference and from this volume one receives the distinct impression of a thoughtful, objective search for a proper balance. No participant rejected the necessity of high standards in the securities industry. Yet neither did any, including two who each head important governmental regulatory agencies, advocate pervasive regulation.⁵ There seemed to be an awareness that the reverse twist of over-regulation can be erosion of the securities business to a degree where the investor is more harmed than protected.⁶ And no participant was naïve enough to suggest that solutions are easy.⁷

The second segment of the volume is to this reviewer the more important part because it probes a relatively untouched area—the impact of the institutional investor⁸ on securities markets. There is an unfortunate scarcity of published information on institutional investors, their market activities and related phenomena. For example, who other than a close knit group of initiators were aware of the existence of the “Third Market” prior to publication of the Special Study.⁹ The fact that more information is vitally needed

⁵ These were Manual F. Cohen, Chairman, Securities and Exchange Commission, and Charles E. Rickershauser, Jr., Commissioner of Corporations, California.

⁶ This thought was put differently but more articulately by Commissioner Rickershauser in response to a question as follows: “The result may be an undue burden on the business without a compensating benefit to the public . . .” MUNDHEIM, CONFERENCE ON SECURITIES REGULATION 59 (1965).

⁷ To the contrary, see the remarks of Chairman Cohen, *id.* at 12-13, and Commissioner Rickershauser, *id.* at 34. And for a particularly informative discussion illustrating the difficulty in applying solutions even where the Commission has issued guidelines through definitive decisions, see the vigorous interchange among Chairman Cohen, Harry Heller, Thomas A. O’Boyle, Donald T. Regan and Marc A. White. *Id.* at 82-90.

⁸ Such institutional investors include life insurance companies, fire and casualty insurance companies, investment companies, college endowment funds, foundations, non-insured private pension funds, bank common trust funds, variable annuity funds, bank administered personal trust funds, and investment management accounts in the hands of banks and investment counselor firms. *Id.* at 136.

⁹ Indeed, the Special Study invented the phrase “Third Market.” *Special Study* pt. 2, at 870. The phrase refers to over-the-counter trading in listed securities by institutional investors.

registered solidly when participant Gordon D. Henderson,¹⁰ estimated that the institutional share ownership of New York Stock Exchange listed stocks is between thirty and forty per cent of the total value of all such stocks and is rapidly increasing.¹¹

If, as Mr. Henderson estimates, the figure may amount to fifty per cent¹² by 1980,¹³ what does this forebode in terms of market domination? What are the consequences to the individual investor whose proportionate share of available securities is constantly squeezed? Is it healthy for individuals to rely increasingly upon institutional investors to accumulate their wealth?¹⁴ If moving the savings of America into "professional hands" is "increasing the probability of investment success,"¹⁵ what happens if the trend increases and nearly all funds available for investment are in "professional hands?" In view of the typically low portfolio turnover rates of most institutional investors other than investment companies,¹⁶ will available shares for trading result in stagnation of the auction market? And if institutional investors continue the pattern of investing predominantly in "blue chips," will this combined with low turnover rates cause totally unrealistic pricing in the auction market?

These were among the problems present either directly or implicitly in the formal presentations and often spirited interchanges. The participants as a whole did not seem unduly concerned, which is not surprising. Their mix, a skillful blend of a former SEC regulator,¹⁷ a banker,¹⁸ an investment company executive,¹⁹ an insurance company executive,²⁰ a New York Stock Exchange econo-

¹⁰ Formerly Special Counsel to the Securities and Exchange Commission on Investment Company Act Matters, a role which required thorough grounding on institutional investors generally.

¹¹ MUNDHEIM, *op. cit. supra* note 6, at 138.

¹² *Ibid.*

¹³ My personal view is that Mr. Henderson's estimate is conservative. To illustrate by reference to only two types of institutional investors, the total net assets of open-end investment companies increased by almost \$4 billion in 1964. WIESENBERGER, INVESTMENT COMPANIES 24 (1965). Bank common trust fund assets increased almost 30% in the same year. Silverberg, *Growth and Performance of Common Trust Funds in 1964*, 2 THE NAT'L BANKING REV. 363 (1965).

¹⁴ Remarks of Charles W. Buek, President, U.S. Trust Company of New York. MUNDHEIM, *op. cit. supra* note 6, at 147.

¹⁵ *Id.* at 158.

¹⁶ *Id.* at 187.

¹⁷ Mr. Henderson.

¹⁸ Mr. Buek.

¹⁹ Fred E. Brown, President, Tri-Continental Corporation.

²⁰ Frank J. Hoenemeyer, Senior Vice President, The Prudential Insurance Company of America.

mist,²¹ an educator²² and a prominent "Third Market" dealer,²³ made inevitable a large amount of both promotion and defense of existing institutions and practices. This was not objectionable, for the very process of promoting and defending produced valuable practical information on the nature of these institutions and practices.

The mix of participants had a happy effect as a matter of sheer reader interest. A remarkably articulate group, they were also deft in injecting the needle on occasion. Mr. Weeden, the "Third Market" proponent, in a deceptively courtly manner, expressed appreciation for "all the help the stock exchange [his arch competitor] has been giving us on regulation."²⁴ Mr. Kendall of the New York Stock Exchange found an opportunity to respond in kind while discussing a sensitive area to the Exchange, its minimum commission rate structure. He said, "Even with quantity discounts Mr. Weeden has demonstrated that he's clever enough to find another way to provide services for the people he's been serving all these years."²⁵

The participant mix also revealed strikingly different points of view. In the course of rather deep discussions of the policy question whether institutions, alone or as a group, should or could use their economic and voting power to influence managements of companies whose securities they hold, Mr. Buek remarked: "We rarely have an opinion as to whether a merger is desirable or whether the terms are fair. We certainly don't know whether an acquisition is desirable or undesirable."²⁶ By way of contrast Mr. Brown stressed the necessity for institutions to subject proxy solicitation material to careful analysis. He said:

[T]he institutional investor is perhaps better qualified than any other type of investor to evaluate the significance and reasonableness of a proposed stock option plan The breadth of experience of such an investor, plus the sources of information ordinarily available to the institution, can provide the basis for *intelligent*

²¹ Leon T. Kendall.

²² Dr. Roger F. Murray, S. Sloan Colt Professor of Banking and Finance, Columbia University.

²³ Frank Weeden, President, Weeden & Co., Inc.

²⁴ MUNDHEIM, *op. cit. supra* note 6, at 176.

²⁵ *Id.* at 188.

²⁶ *Id.* at 157.

*appraisal of such matters as merger proposals or proposals for diversification of a portfolio company's business.*²⁷

There is, of course, a limit upon how much can be covered—and how extensively—in a two day conference of oral presentations, no matter how carefully prepared. Inevitably this volume will leave the reader dissatisfied and hungry for more information in many areas. This does not detract from the fact that the volume is a lode of both not easily accessible information and fresh thought. It will be useful for present and future reference. It will be more useful if it is read *in toto* before being relegated to the library racks.

ALLAN F. CONWILL*

DEFERRED COMPENSATION FOR KEY EMPLOYEES. By Clark C. Havighurst.† Mundelein, Illinois: Callaghan & Company, 1964. Pp. xi, 383.

The stated dual purpose of this book is to provide "a guide for businessmen seeking to educate themselves on a matter of business planning and a lawyer's introduction to the technical aspects of deferred compensation."¹ This is no small order for any single volume work, especially one of such compact proportions. Having taught a graduate law course in the tax aspects of deferred compensation, this reviewer can well appreciate the multitude of problems the author faced with the task of providing lawyers with an insight. Undoubtedly, these problems were compounded by the author's attempt to bridge and satisfy the needs of both the businessman and the lawyer. The book falters and just misses the mark by reason of its attempt to be all things to all men. Possibly, this dual purpose was dictated by the fact that the book is one of a series of investigations into legal problems of small businesses which were undertaken as the result of a grant from the Small Business Administration. If this be the case, one can only speculate whether it would not have been wiser to publish two companion books—

²⁷ *Id.* at 215. (Emphasis added.)

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¹ HAVIGHURST, DEFERRED COMPENSATION FOR KEY EMPLOYEES at iii (1964).