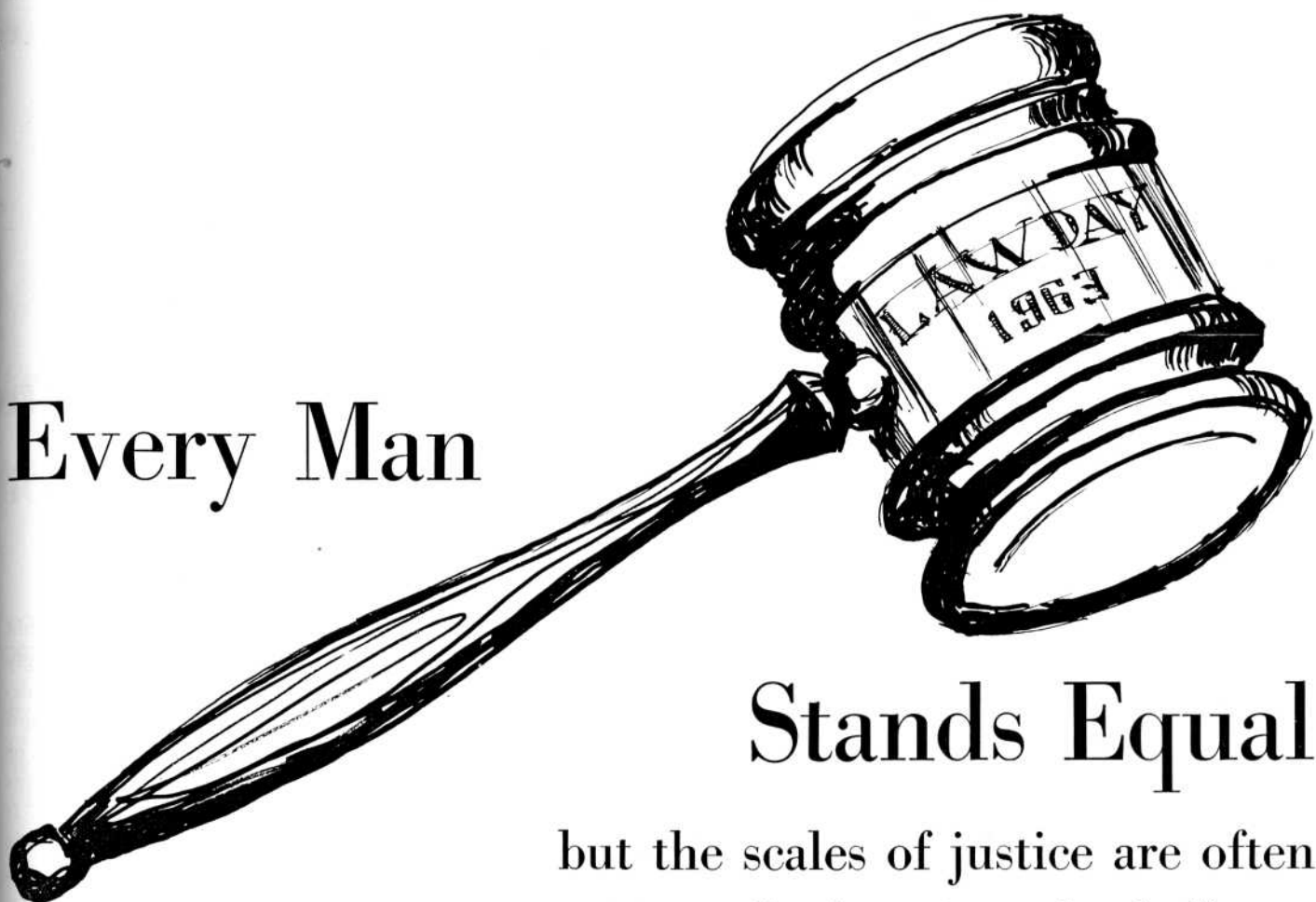




Every Man



Stands Equal

but the scales of justice are often
tilted against the indigent

By ORISON S. MARDEN

A FEW years ago a popular play opened on Broadway under the title "A Visit to a Small Planet." The title prompted me to wonder what a visitor to our planet might think of the administration of criminal justice here—particularly for those defendants without funds to hire a lawyer. I would have our visitor land on the most enlightened nation on earth, our own United States. What would he find?

No doubt, back in his homeland, our visitor had heard radio signals from America which expounded, in ringing phrases, the great principle of equality of justice; that every man, regardless of his station in life or the money in his pocket, stands equal before the law. The rights of the poor man, we have said repeatedly, will be protected just as completely and as surely at the bar of justice as will the rights of the man who can afford to hire a lawyer. Will our visitor find these claims to be true in practice?

Looking over the United States today he would see this scene in many a courtroom: the prisoner is led before the bench by the

sheriff or police officer. He gives his name. The judge inquires whether he has a lawyer. If he answers that he cannot afford a lawyer, and further questioning shows his claim to be true, the judge then casts an eye over the faces in that courtroom.

The judicial eye may come to rest on a young man who has been admitted to the bar for only a few weeks. Or upon the "fringe" lawyer who depends for his bare existence upon such crumbs as he is able to extract from the relatives or friends of indigent defendants to whom he is assigned. Or the practitioner whose experience lies mainly in the corporate or real estate field.

Whoever is assigned to defend that prisoner will probably be asked to do so gratuitously. Moreover, if he does a conscientious job he may have to spend his own money for investigation, witness fees, and other expenses. While there is now statutory provision for compensation in a number of states, it is usually so inadequate that only inexperienced or unsuccessful practitioners are interested; or it is re-

garded as political patronage requiring only token service.

In most instances, I want to believe, the lawyer assigned is reasonably competent and conscientious. Many times, as we all know, he will represent his client with a fervor and skill that accords with the best tradition of our profession. Is it fair, however, to expect that lawyer, who has his office overhead to think of, and perhaps a wife and family to provide for, to accept the defense of an unknown indigent, without compensation and without provision for any of the tools he may need to give an adequate defense? The pressures are strong, especially in the larger cities where law practice is highly competitive and costs are relatively high, for assigned counsel to give more or less perfunctory attention to the so-called charity case.

On the other side of the table are arrayed the forces of the prosecution. Experienced in the criminal law, alert to all the technicalities and nuances of this specialized field.

continued



the need for organized defender is acute in almost every section

More important still, the prosecutor has at his command police officers, investigators, money with which to search out witnesses in far places and to produce them at trial.

Truly, one might reasonably say that the contest is barely equal even if the defendant is able to hire the best lawyer in town and to provide all funds needed for investigation and other expenses.

It is sometimes argued that asking lawyers to serve on these cases is expecting no more than the public expects of doctors serving on a charity basis in our hospital clinics. The comparison is not apt. All of the lawyer's time, and sometimes that of an associate, must be devoted to the trial of a criminal case. If the lawyer has a so-called one-man office, he is required to neglect his regular clients for the duration of the trial. A doctor, on the other hand, volunteering for duty at the clinic, may treat charity patients without neglecting any of his paying patients, either at his office or at the hospital.

Let us search our hearts and look at the situation which confronts us dispassionately and objectively with eyes unclouded by platitudes and generalities.

Six weeks ago, the Supreme Court of the United States, in overruling its 1942 decision in *Betts v. Brady*, held squarely that the Federal constitution requires each state to provide the assistance of counsel to indigent persons accused of crime. On the same day the court held that the State of California was required to provide a convicted defendant with counsel to present his appeal to the appellate court and that federal habeas corpus is available to review,

in the federal courts, state convictions no longer reviewable in the state courts.

These and other recent decisions have made an already acute problem even more critical. We now have 110 defender offices in the United States of which 92 are public defenders, 11 are private defender organizations and 7 receive their support from both public and private sources. Most of these offices are manned by experienced trial lawyers, familiar with criminal law practice, who give good representation to their clients, but there are only 110 in the entire country and many of these are in sparsely populated areas. Some 36 counties with populations of 400,000 or more have no organized service whatsoever. All too few of the existing offices have sufficient funds to provide the legal and investigatory services which should be provided in order to meet the needs of the community.

THE truth, as our visitor from Mars no doubt discovered, is that we are operating on a "horse-and-buggy day" basis so far as the defense of indigent persons accused of crime is concerned. We speak of providing equal justice but too frequently we give less than full measure. We are using volunteer fire departments to put out fires in the big cities.

It would be wrong to blame the courts and lawyers for this unhappy situation. Judges strive to assure equal justice but, with our adversary system, they cannot also be counsel and investigator for the defense. Nor should the lawyers be required to assume the whole burden of what is essentially a community problem.

The private bar cannot carry, and should not be expected to carry, the increasingly heavy load of *ad hoc* appointments to defend the thousands of indigent persons who each year will be accused of crime, or to brief and argue appeals from convictions or to pursue post conviction remedies. It is perfectly obvious that the defense side must be organized along the same lines as the prosecution side and this is the spirit of the proposed Criminal Justice Act of 1963 now pending in Congress. This legislation would provide compensated counsel and investigatory facilities in the Federal court system through (1) an appointed public defender, or (2) contract arrangements with a private defender or Legal Aid Society, or (3) appointments of individual lawyers, or (4) a combination of two or more of these methods, as local conditions may dictate. This legislation has significant bipartisan support in Congress and was introduced with a special message from the President of the United States.

The need for organized defender systems is even greater in the state courts where there is larger volume of criminal business. Pressures must be exerted by the bar in every section of the country to assure the setting up of adequate defender facilities. Such offices may receive their financial support from tax funds contributed by state, city or county, or they may be supported by the Community Fund or by both. The important thing is that these offices be established and that they be manned by decently compensated competent lawyers with necessary investigatory help who will be available as needed to defend indigent

Systems for the poor in the United States

persons accused of crime and to prosecute appeals and other post conviction remedies.

The bar must lead the way. As stated by the first—and the greatest—Chairman of the Standing Committee on Legal Aid Work of the American Bar Association, Charles Evans Hughes:

“Whatever else lawyers may accomplish in public affairs, it is their privilege and obligation to assure a competent administration of justice to the needy so that no man shall suffer in the enforcement of his legal rights for want of a skilled protector, able, fearless and incorruptible.”

I HAVE come to believe that the year 1963 will mark the beginning of a revolution in the administration of criminal justice in this country. Let us make a tally of pertinent events of the past few months:

First: The President of the American Bar Association, by authority of its House of Delegates, has appointed a special committee to conduct a state by state audit of defender facilities and of methods now being used to provide counsel in criminal cases. This audit, which has been financed by the Ford Foundation, is now being conducted by the American Bar Foundation with the active cooperation of the American Bar Association and all state bar associations. The results of the national survey will be of substantial significance and help in planning the future development of various types of defender services to be suggested for communities of varying size. However, no audit or survey is needed to demonstrate the immediate need for de-

fender offices in the larger counties and cities.

Second: The Supreme Court of the United States, as has already been noted, has just held that each state must provide counsel to indigent persons accused of crime, that counsel must likewise be provided on appeal and that federal habeas corpus is available to review state convictions even though the time within which state remedies could be pursued has expired. The need for competent counsel to handle these matters, already acute, will make the establishment of organized facilities imperative and existing defender offices will have to be greatly strengthened.

Third: For the first time in history, the President of the United States in his annual message to Congress urged the enactment of defender legislation for the federal courts and later, by special message, presented the Criminal Justice Act of 1963 now being processed in Congress with significant bipartisan support.

Fourth: The National Legal Aid and Defender Association which, in partner-

ship with the American Bar Association, has for so many years earnestly advocated the establishment of defender facilities throughout the country, has received a grant of \$2,300,000 from the Ford Foundation with which to conduct demonstration programs for the establishment of new defender services and for the improvement of existing defender services.

Thus we have the converging, in one brief period of time, as though by divine guidance, of four highly significant events. With the help and guidance of Bench and Bar, these events will surely turn the tide in most dramatic fashion. That happy day when we can truly proclaim that justice is equal for all in this country is not far off.

On this Law Day 1963 let each of us resolve, with Mr. Justice Holmes, that:

“Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.”

ABOUT THE AUTHOR—Orison S. Marden, featured speaker for O.U.'s 15th annual Law Day, has served the bar in many capacities. A partner in the New York firm of White and Case, he is vice president of the New York State Bar Association and past president of both the Association of the Bar of the City of New York and the National Legal Aid and Defender Association.

