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# Book Review [How Can You Defend Those People?]

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## BOOK REVIEW

HOW CAN YOU DEFEND THOSE PEOPLE? James S. Kunen. New York, N.Y.: Random House. 1983. 263 Pp. Hardcover. \$15.95.

*Reviewed by Jenny D. Smith\**

James Kunen disclaims any attempt to present an academic treatise on criminal law or jurisprudence: "I don't hold myself out as an expert on either jurisprudence or trial technique. But I do know as much as anyone about *becoming* a defense attorney, getting to *be* one—and acquiring the attitudes peculiar to that line of work."<sup>1</sup>

And so begins his effort to answer the question posed by the title of the book: "How can you defend those people?" The particular question is frequently asked of defense attorneys in a way which the author feels suggests "that it is not so much a question as a demand for an apology . . . . Because the question presumes that 'those people' accused of crimes are guilty, and that people who are guilty of crimes ought not to be defended, it reflects a profound misunderstanding of our criminal justice system and the defense attorney's role in it."<sup>2</sup> This fundamental misunderstanding makes the question an important one which, to Kunen's way of thinking, deserves an answer.

The answer he gives does not employ elaborate abstract concepts arranged in complex logical arguments; instead, in his words, it explains "the systemic function of the defense attorney and suggest[s] some of the personal factors that motivate, and enable, a person to perform the defender's role."<sup>3</sup> He places this explanation in the context of the lives of the people who were his clients during his term as a law student practicing in New York City's Criminal Court and his two and one-half years as a staff attorney at the Public Defender Service for the District of Columbia.

My clients were fairly typical of what people think of when

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1. J. KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE?* xi (1983).

2. *Id.*

3. *Id.*

they think of criminal defendants. They weren't corporations, or the officers of corporations, who calculatingly sent people to their deaths in faulty automobiles; they weren't urbane conservative intellectuals caught with a hand in the company. till. They were poor people in the inner city, and they were virtually all black, because in Washington, virtually all poor people in the inner city are black; and those who were guilty had committed crimes in the street, because they didn't have any better place to commit them.<sup>4</sup>

Kunen stresses that the cases he describes were not extraordinary, but that "they typify what goes on in criminal court every day."<sup>5</sup>

This perspective—which one might label as one "from the trenches"—contains valuable lessons for lawyers and lay persons alike. The author illustrates how the fundamental concepts of criminal and constitutional law both protect the innocent from false conviction and sort from among the guilty those who should be incarcerated from those who may be treated with leniency. These principles are not simply formulae recited in classrooms and in appellate court decisions; they are concepts which work in their own human and imperfect way to keep the system "reasonably just:" "most of the guilty are convicted, and nearly all of the innocent go free."<sup>6</sup>

Kunen's very first client, as it turns out, was one of the innocent. "Judy Hoffman was a gum-cracking little eighteen-year-old in platform shoes, breathtakingly tight jeans, a slinky jersey, and pink sunglasses with a sequined star on the one lens that was not covered by her cascading brown hair. She would not have been mistaken for a Campfire Girl, but she was well within community standards of dress for criminal court."<sup>7</sup> She had been arrested on charges of "loitering for purposes of prostitution" while standing at a pay phone across the street from a disco looking through her purse for a dime to make a call to her sister.

After Kunen became convinced of his client's innocence—by her indignation and her lack of any prior arrests—it became his job to convince the judge. He describes the courtroom encounter:

'Let's get rid of this,' the judge said. 'Plead her guilty, and I'll let her go with a fine.'

'She's not guilty, Your Honor.'

. . .

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4. *Id.*

5. *Id.*

6. *Id.* at afterward.

7. *Id.* at 3.

'All right,' the judge continued. 'I'll take a disorderly conduct.'

'No. She won't plead to anything,' I insisted.

'C'mon,' the judge said. 'She has to plead to something—a dis con, no fine, she can walk out of here right now.'

Things seemed to be going against me. Then I was seized by inspiration. 'But Your Honor,' I whispered intently, my eyes blazing into his, '*she's not a prostitute.*'

'She's not?'

'No, Your Honor, she's not.'

'Oh well, in that case, she can go. Case Dismissed.'<sup>8</sup>

Kunen attributes his success in his first appearance in part to:

my passion for justice, . . . my gift for the felicitous phrase, and in the remaining ninety-eight parts to luck. I had been able to make reference—'she's not a prostitute'—to the world outside the courtroom, where Ms. Hoffman either *was* or *was not* a prostitute, depending upon what she did for money; as opposed to the world *of* the courtroom, where she was either *guilty* or *not guilty* of being a prostitute, depending upon the evidence that the prosecution would be able to introduce." This Kunen describes as " 'playing up the justice angle,' a tactic to which . . . one may not often have recourse."<sup>9</sup>

The author's self-ascribed "gift for the felicitous phrase" is apparent throughout the 263 pages of his book. He focuses his sharp wit and incisive descriptive ability on every aspect of his criminal law practice. He describes his first impression of New York City Criminal Court in action: "The court reminded me of a package express terminal. Each defendant was a package. The prosecutor and defense counsel were shipping clerks, who argued perfunctorily over where the package should be shipped, then accepted the determination of the black-robed dispatcher. Papers were stamped and tossed in a wire basket. The package was removed. The next package was brought in."<sup>10</sup>

When his first two potential clients failed to show up for court, he observes "[t]hey had both probably elected the 'Cleveland defense,' which is asserted by boarding a bus to any city that is preoccupied with its own problems."<sup>11</sup>

Kunen's depiction of his student efforts at legal research— a

8. *Id.* at 5.

9. *Id.* at 6 (emphasis in original).

10. *Id.* at 5.

11. *Id.* at 1.

task which he likens to handling snakes—should give any law clerk a chuckle.

An appellate lawyer must construct and rebut arguments within a self-referential system comprising *all* the legal arguments and resolutions that have preceded his. He has to retrace everyone else's steps before he can take a single step of his own

Trying to pin down what constitutes 'ineffective assistance of counsel,' I read case A. The decision in case A held that the issue had been settled in cases B and C. I looked up case C. It wasn't on the shelf. This was not unusual. On each of the thirty-eight tables sat dozens of books, used and abandoned by—whom?

I had my suspicions. On those occasions when duress or necessity drove me to the library, I noticed that certain individuals were *always* there. They did strange, incomprehensible things with index cards and multiple colored pens; they aired out their socks; they *lived* there, and they knew where every book was, and had no need of systematic shelving, having little systems of their own.

I looked up D. It said E, F, and G were dispositive. After walking around with my nose parallel to the floor for half an hour, I found case E on a table. It said F and G *seemed* to support each other, but didn't really, in light of case H.

I looked up case H. It didn't seem to have anything to do with "ineffective assistance of counsel." I went back to case F. It said that a good overview of the issues could be found in a legal encyclopedia. I got that, and found that it had been revised since case F was written. I looked up the new encyclopedia article. It said the real lowdown would be found in case A.

The room started to spin . . . .<sup>12</sup>

Like many in the profession, Kunen found the telephone ever-present: "I spent so much time on the telephone every day that I experienced inevitable moments of dissociation, during which I found myself sitting alone in a room with a black plastic dumbbell pressed against one ear, talking to the wall."<sup>13</sup>

In the midst of the anecdotes and satirical critiques of the criminal justice system, the reader of Kunen's book learns some interesting facts, gets an idea of the ethical conflicts experienced by public defenders, and is told in understandable language some of the basic

12. *Id.* at 21.

13. *Id.* at 67.

principles of criminal and constitutional law. Most of the statistical information and the explanations of legal principles are placed in footnotes—a format which allows the narrative to flow undisturbed by cumbersome detail and yet gives the reader convenient access to facts supporting assertions made in the text.

One learns, for instance, just how rarely the defense of “not guilty by reason of insanity” is successful. Of 934 felony cases handled by the Public Defender Service in fiscal 1980, *one* ended with a verdict of not guilty by reason of insanity; in five other cases insanity pleas were simply accepted by the prosecution. This is barely one-tenth of one percent! As for the exclusionary rule—often the subject of vociferous public criticism as a legal technicality which permits criminals to go free—we learn the results of a National Institute of Justice study of felony cases in California between 1976 and 1979. Of 520,993 felony cases presented to prosecutors, 4,130—.78 percent—were rejected for prosecution because of search and seizure problems. Of felony cases that were presented in court, only four-tenths of one percent were dismissed because of search and seizure issues.<sup>14</sup>

Kunen airs familiar criticisms of the arbitrary tendencies of the traditional system of criminal sentencing and parole, as well as the increasingly popular alternative of mandatory sentencing. He takes a strong position in favor of retention of the exclusionary rule. And he reminds the reader of the important principle espoused by John Adams when defending British soldiers accused of committing murders at the Boston Massacre, that it is better that many guilty persons should escape punishment than that one innocent person should suffer.

We find in the rules laid down by the greatest English judges, who have been the brightest of mankind, [that] we are to look upon it as more beneficial that many guilty persons should escape unpunished than one innocent person should suffer. The reason is because it is of more importance to [the] community that innocence should be protected than it is that guilt should be punished, for guilt and crimes are so frequent in the world that all of them cannot be punished, and many times they happen in such a manner that it is not of much consequence to the public whether they are punished or not. But when innocence itself is brought to the bar and condemned, especially to die, the subject will exclaim, “[i]t is immaterial to me whether I behave well or

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14. *Id.* at 166.

ill, for virtue itself is no security." And if such a sentiment as this should take place in the mind of the subject there would be an end to all security whatsoever.<sup>15</sup>

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15. LEGAL PAPERS OF JOHN ADAMS 242 (L. Wroth & H. Zobel eds. 1965).