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Student Counsel--New Aid for Indigent Criminal Defendants

CRIMINAL LAW COMMENTS AND ABSTRACTS

EDITORIAL

Student Counsel—New Aid for Indigent Criminal Defendants

If the proposition were put to them, how many of those interested in the fair and impartial administration of criminal justice in America would disagree—that a fundamental truth, perhaps the most fundamental, is that a defendant ought not stand alone to face the awesome power which the government may bring to bear in a criminal case. And yet, ironical as it may seem, we who have debated and urged new concepts in the field of criminal law—pretrial discovery, prompt arraignment, state appeal, transcripts for indigents, and a host of procedural reforms—have lost sight of some fundamentals. Everyday in this country, through poverty or ignorance, Americans by the thousands stand before courts empowered to deprive them of their liberty without the aid of counsel.[1]

This is not so much a problem in the federal system, for by the constitution,[2] the case law,[3] and the federal rules,[4] those who are unable to secure private counsel may receive the services of court-appointed attorneys. In the states, however, it is a different story.

The bedrock guarantees of fourteenth amendment due process will guard the young,[5] the ignorant,[6] or the defendant who faces a capital[7] or a complex case[8] in a state court. However, only 25 states, *as a matter of state law*, provide for court-appointed counsel for indigent defendants in all cases, 12 do so in capital cases and all felonies, 3 only in capital cases and some felonies, and 8 in capital cases only.[9] Other agencies, of course, have tried to fill the void. Public defender programs have been initiated, but often they handle only felony cases. The organized bar has entered the field with private, voluntary programs, but they are similarly handicapped by time and financial problems.

This rent in the otherwise protective cloak with which we clothe American criminal defendants so

[1] See generally, BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED (1959). For a fascinating study of how unrepresented defendants fare in some courts, see Dash, *Cracks In The Foundation Of Criminal Justice*, 46 NW. U. L. REV. 385 (1951). *Compare* Betts v. Brady, 316 U.S. 455 (1942) and Bute v. Illinois, 333 U.S. 640 (1948) *with* Martinez v. State, 318 S.W.2d 66 (Tex. 1958).

[2] U.S. CONST. amend. VI.

[3] Johnson v. Zerbst, 304 U.S. 458 (1938).

[4] FED R. CRIM. P. 44.

[5] Cash v. Culver, 79 Sup. Ct. 432 (1959).

[6] Gibbs v. Burke, 337 U.S. 733 (1949); Rice v. Olson, 324 U.S. 786 (1945).

[7] Powell v. Alabama, 287 U.S. 45 (1932).

[8] Rice v. Olson, *supra* note 6.

[9] BEANEY, *supra* note 1.

zealously[10] is by no means limited to trial situations. In fact, the absence of counsel is felt even more keenly in appeal and post-conviction situations, with the result that state and federal courts are today literally flooded with the *pro se* petitions of convicted persons.[11] Not only are these usually vague, rambling and ill-prepared petitions by "jail-house lawyers" ineffectual in protecting the rights of the petitioners, but their growing incidence has also led to demands that the jurisdiction of the courts be severely limited in an effort to stem the tide.[12] Closing the court door may be the easy solution, but it is not a wise, or even a constitutional one.[13] We should not seek to prevent the indigent convict from receiving his day in court; rather we should strive to make that day in court *effective.*

If the current programs of governmental agencies and the organized bar are inadequate in the trial, appeal, and post-conviction areas—and they plainly are—what steps can be taken to provide relief? One such step, it is submitted, should be to provide indigent persons in these cases with the aid of *student counsel*—second and third year law students, working under the supervision of faculty advisers and representatives of the bar associations, who would be empowered, by statute or rule of court, to represent indigent misdemeanants at the trial level. Such students could also lend effective aid in drawing, and in some instances prosecuting, appellate and post-conviction petitions.

Why should not law students be allowed to do this kind of work? A third year student has received all the basic courses, e.g., criminal law, procedure, evidence, that the work demands. Though we must have standards to measure fitness for the general practice of law, a diploma and a license are, by no means, magic wands which will overnight turn the eager graduate into a seasoned lawyer. What a law student lacks in experience he may make up in enthusiasm and a conscientious, idealistic devotion to the cause of his indigent client. Oftentimes his research facilities, with the growth of modern and extensive law library collections, are superior to those of the practising lawyer. The student may be able to devote more time to these cases than the lawyer who must keep up his paying practice; certainly this would be true during the summer months.

Current practice in some American law schools would seem to show that the program outlined above can be made to work effectively—from the viewpoint of both the indigent defendant and the law student.

On the strength of a dictum in *Opinion Of The Justices*[14] that "The gratuitous furnishing of legal aid to the poor and unfortunate without means in the pursuit of any civil remedy, as matter of charity . . . (does) not constitute the practice of law," the Harvard Legal Aid Bureau has represented, through student counsel appearing in court, indigent litigants in civil cases for some years. The Supreme Judicial Court of Massachusetts has recently adopted a new rule which specifically authorizes law students to represent indigent defendants in criminal cases—in and out of court.[15] Under this rule, student members of the Harvard Voluntary Defenders will resume their practice of representing such defendants as they once did for a while under the Massachusetts case noted above.

The experience of the University of Denver College of Law should be noted here. Under the "Justice Court Practice" program at that school, second and third year students are assigned to the

[10] See Judge Hand's lament in United States v. Garsson, 291 Fed. 646, 649 (1923). "Under our criminal procedure the accused has every advantage . . . Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

[11] Schaefer, *Federalism And State Criminal Procedure,* 70 HARV. L. REV. 1 (1956).

[12] Pollak, *Proposals To Curtail Federal Habeas Corpus For State Prisoners: Collateral Attack On The Great Writ,* 66 YALE L. J. 50 (1956).

[13] See cases like Young v. Ragen, 337 U.S. 235, 239 (1949) which hold that persons must be given "some clearly defined method by which they may raise claims of denial of federal rights."

[14] 289 Mass. 607, 615, 194 N.E. 313 (1935).

[15] Rule 11—*Legal Aid to Indigent Criminal Defendants,* adopted by the Supreme Judicial Court of Massachusetts on October 28, 1958, provides: "A senior student in an accredited law school in the Commonwealth with the written approvement of the dean of the said law school of his character, legal ability and special training, may appear without compensation in behalf of an indigent defendant in any District Court, provided that the conduct of the case is under the general supervision of a member of the Bar of the Commonwealth assigned by a court or employed by a recognized legal aid society or voluntary defender committee to represent an indigent defendant in a criminal case as a matter of charity. Such written approval for a student or group of students shall be filed with the Clerk of the Supreme Judicial Court for the County of Suffolk and shall be in effect for a period of twelve months after filing unless withdrawn earlier. The expression 'general supervision' in this rule shall not be construed to require the personal attendance in court of the supervising member of the bar."