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## Gideon's Army: Student Soldiers

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## GIDEON'S ARMY: STUDENT SOLDIERS

HENRY P. MONAGHAN\*

Ours is a nation that takes great pride in the manner in which it administers justice to its citizens. To us, "equal justice under law" is not simply hollow rhetoric; it gives expression to some of our most fundamental values, and it proclaims that every man should be treated fairly and equally in the administration of the laws. It is, of course, of no small moment that we hold such an ideal, for a nation invites judgment on how well its performance comports with its professions of faith.<sup>1</sup>

In the administration of our laws there is much to which we can justifiably point with pride, but it is a commonplace that there remains a long road to travel before ideal and reality meet. In particular, we recognize that a poor man's lack of resources all too often determines the quality of justice he receives. At the turn of the century Mr. Martin Dooley, the great bartender-social critic, observed, "Don't I think a poor man has a chanst in coort? Iv coorse he has. He has the same chanst there that he has outside. He has a splendid, poor man's chanst."<sup>2</sup> While observations of this character are applicable to both civil and criminal cases, they stir especially deep feelings in the latter context, for we profess particular concern that a man not be branded a criminal and deprived of his freedom because of an empty pocketbook.<sup>3</sup>

Had Mr. Dooley been at his post on March 18, 1963, I suspect that even he would have heartened. On that day Gideon's trumpet blew, and a bright new banner was unfurled; it proclaimed that in every serious criminal case the government must provide an accused with counsel if he is too poor to hire one.<sup>4</sup> Thus was a significant step taken to narrow the

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<sup>1</sup> But since ideals are never perfectly attainable, "we must not exaggerate the significance of deviations from the perfect norm." *Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co.*, 253 N.Y. 382, 392, 171 N.E. 579, 582 (1930) (Cardozo, J.).

<sup>2</sup> *Bender, Mr. Dooley on the Choice of Law* xxii-xxiii (1963).

<sup>3</sup> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Smith v. Bennett*, 365 U.S. 708, 710 (1961); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

<sup>4</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). The leading commentary on the case is, of course, *Lewis, Gideon's Trumpet* (1964); see also *Kamisar, Book Review of Gideon's Trumpet*, 78 *Harv. L. Rev.* 478 (1964), which points out that Gideon's

gap between ideal and reality, because, as an eminent judge has noted: "Of all the rights that an accused person has, the right to . . . counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."<sup>5</sup> The logistical problems occasioned by the new principle are, however, substantial. Gideon's little regiment had no real difficulty in running up its colors,<sup>6</sup> but it is quite apparent that an army—a very large one—must be raised if the victory is to be a lasting one. My question is simply whether student soldiers may be part of that army.

## I

A brief sketch of the relevant constitutional doctrine is appropriate. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.<sup>7</sup>

Originally this provision was understood as merely recognizing that, unlike the English practice, a criminal defendant had a right to appear with counsel, but not as obligating the government to provide him with one.<sup>8</sup> However, in 1938 the Court, in *Johnson v. Zerbst*,<sup>9</sup> held that this amendment imposed an obligation upon the federal government to provide counsel for indigents. "The Sixth Amendment," said Mr. Justice Black, "withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."<sup>10</sup>

While *Johnson* represented a major innovation, it was not without significant precedent. Several years before *Johnson*, the Court had occasion to consider the relationship of the absence of counsel to the "due process" which, under the fourteenth amendment, each state must accord

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companion, *Douglas v. California*, 372 U.S. 353 (1963), may well prove to be of more lasting significance than Gideon itself. For commentary on who qualifies as an indigent under Gideon, see Hall & Kamisar, *Modern Criminal Procedure: Cases, Comments and Questions* 88-89 (1965).

<sup>5</sup> Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956). Indeed, "even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value." *Reynolds v. Cochran*, 365 U.S. 525, 532-33 (1964).

<sup>6</sup> Kamisar, *supra* note 4, at 480-82 points out that Gideon merely toppled a "shaky bridge."

<sup>7</sup> U.S. Const. amend. VI.

<sup>8</sup> E.g., Beane, *The Right to Counsel in American Courts* 27-33 (1955); Grant, *Felix Frankfurter: A Dissenting Opinion*, 12 U.C.L.A.L. Rev. 1013, 1030 (1964). "[U]ntil the decision . . . in *Johnson v. Zerbst* . . . there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist the accused in his defense, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired." *Bute v. Illinois*, 333 U.S. 640, 660-61 (1948).

<sup>9</sup> 304 U.S. 458 (1938).

<sup>10</sup> *Id.* at 463. It should be noted, however, that prior to this decision the general practice in the federal courts had been to appoint counsel for indigents.

to "all persons."<sup>11</sup> In *Powell v. Alabama*,<sup>12</sup> the famous Scottsboro case, seven poor, illiterate Negroes who allegedly raped two white girl hoboes appealed to the high court from convictions carrying a death sentence. On appeal, they argued in part that their convictions resulted from a denial of the assistance of counsel and a denial of due process. The convictions were set aside, the Court holding that the absence of counsel violated due process. The Court stressed in its opinion that an accused "requires the guiding hand of counsel at every step in the proceedings against him" in order to insure the reliability of the guilt-determining process.<sup>13</sup>

*Powell's* sweeping language was easily capable of supporting a requirement of counsel for indigents in *all* serious state criminal proceedings, or, to put the matter differently, of fastening upon the states the same requirements which *Johnson* later imposed on the national government.<sup>14</sup> Such was not to be the case, however, for in *Betts v. Brady*<sup>15</sup> a sharply divided Court refused to push *Powell* to its furthest point. The false considerations of federalism which moved the Court to refuse to so extend *Powell* have been examined many times, but they need not detain us here.<sup>16</sup> Suffice it for our purposes to note that the Court declared that the sixth amendment is a restriction on the national government alone and is not, "as such," applicable to the states by virtue of the due process clause of the fourteenth amendment;<sup>17</sup> and, said the Court, due process requires the appointment of counsel only if it appears that the defendant is at a serious disadvantage by reason of the lack of counsel, which was to be "tested by an appraisal of the totality of facts in a given case."<sup>18</sup> Of course, implicit in this holding is an assumption that in most situations it does not make much difference whether an accused has counsel or not.<sup>19</sup>

<sup>11</sup> U.S. Const. amend. XIV.

<sup>12</sup> 287 U.S. 45 (1932). See generally Beaney, *op. cit. supra* note 8, at 151-57.

<sup>13</sup> *Id.* at 69.

<sup>14</sup> This is particularly true when *Powell's* language was read with similar language in *Johnson*, which remarked on the "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

<sup>15</sup> 316 U.S. 455 (1942).

<sup>16</sup> See, e.g., Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 De Paul L. Rev. 213, 230-31 (1959). Brief for Petitioner, pp. 28-42, Brief for American Civil Liberties Union as Amicus Curiae, pp. 29-37, *Gideon v. Wainwright*, 372 U.S. 335 (1963) demonstrate that *Betts v. Brady*, *supra* note 15, had the inevitable effect of increasing, not decreasing, tensions in the federal system.

<sup>17</sup> *Betts v. Brady*, 316 U.S. 455, 461-62 (1942). But see *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>18</sup> *Betts v. Brady*, *supra* note 17, at 462.

<sup>19</sup> *Id.* at 472. This assumption was roundly criticized by commentators long before it was formally abandoned in *Gideon*. 372 U.S. at 342-45. Indeed, in *Betts* itself there are substantial grounds for believing that the lack of counsel resulted in prejudice to the defendant. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on the Most Pervasive Right of an Accused*, 30 U. Chi. L. Rev. 1, 42-56 (1962). Part of this assumption was obviously grounded on a

In any event, *Betts v. Brady* gave birth to the "special circumstances" rule; that is, counsel need not be appointed unless there are "special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."<sup>20</sup>

No sooner was *Betts v. Brady* decided than it came under an unremitting barrage of criticism. It was not difficult to challenge its basic rationale that an accused needs counsel only in "special circumstances," and it became a favorite academic pastime to discover new areas of inconsistency between it and other established doctrine.<sup>21</sup> More importantly, its foundations were soon eroded by the Supreme Court itself. As the commentators were quick to note, decisions which were fundamentally inconsistent with its rationale were handed down,<sup>22</sup> and, most significantly, its "special circumstances" rule was sapped of all life.<sup>23</sup> *Gideon* in fact did little more than inter the dead.<sup>24</sup> But the formal ceremony was important because, as Mr. Justice Harlan observed, the fact that *Betts v. Brady* had quietly died "appears not to have been fully recognized by many state courts."<sup>25</sup>

*Betts v. Brady* rested, in part, on the premise that the due process clause did not fasten the sixth amendment "as such" upon the states. This was but one way station in the yet unsettled battle over the precise relationship between the due process clause of the fourteenth amendment and the Bill of Rights.<sup>26</sup> But in *Pointer v. Texas*,<sup>27</sup> a case involving the applicability to the states of another portion of the sixth amendment, a substantial majority of the Court seems to have finally agreed upon a single underlying theory, that the due process clause at least "incorpo-

belief that in "routine" criminal cases the trial judge will adequately protect the defendant's rights. See *Betts v. Brady*, 316 U.S. 455, 472-73 (1942). But compare *Powell v. Alabama*, 287 U.S. 45, 61 (1932). Powerful arguments were advanced against this position in Brief for Petitioner, pp. 20-22, Brief for American Civil Liberties Union as Amicus Curiae, pp. 23-24, *Gideon v. Wainright*, 372 U.S. 335 (1963).

<sup>20</sup> *Palmer v. Ashe*, 342 U.S. 134, 135 (1951). Later decisions made it clear that in capital cases there was an absolute requirement that counsel be appointed. See, e.g., *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Bute v. Illinois*, 333 U.S. 640, 676 (1948).

<sup>21</sup> See, e.g., Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L. Rev. 219 (1962).

<sup>22</sup> E.g., *Kinsella v. United States ex rel Singleton*, 361 U.S. 234 (1960); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Chandler v. Fretag*, 348 U.S. 3 (1954). See Brief for Petitioner, pp. 22-28, Brief for American Civil Liberties Union as Amicus Curiae, pp. 24-29, *Gideon v. Wainright*, 372 U.S. 335 (1963).

<sup>23</sup> See *Gideon v. Wainright*, supra note 22, at 350-51 (Harlan, J., concurring).

<sup>24</sup> Kamisar, supra note 4, at 480-82.

<sup>25</sup> *Gideon v. Wainright*, 372 U.S. 335, 351 (1963). For a list of the state court decisions applying—and misapplying—the special circumstances rule, see Brief for American Civil Liberties Union as Amicus Curiae, Appendix 11, *Gideon v. Wainright*, supra.

<sup>26</sup> See generally Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74 (1963).

<sup>27</sup> 380 U.S. 400 (1965).

rates" the major provisions of the Bill of Rights and fastens them "as such" upon the states.<sup>28</sup> For our purposes this means that the measure of the state's obligation to provide counsel is the same as that of the national government,<sup>29</sup> which, as will be seen below, requires that counsel be appointed in all cases except those involving "petty offenses."

It labors the obvious to do more than point out that the obligation of a state to provide counsel poses an enormous administrative problem.<sup>30</sup> Counsel must be found. Our question is the extent to which law school students may provide "Assistance of Counsel." Several states now have provisions permitting students to so act.<sup>31</sup> In particular, however, the

<sup>28</sup> *Id.* at 406. I take *Pointer* as embodying the triumph of the doctrine of "selective incorporation." There remains the question whether the due process clause of the fourteenth amendment imposes restrictions on the states in addition to those contained in the Bill of Rights. See the concurring and dissenting opinions in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>29</sup> That is to say, a "watered down version" of the amendment will not be the measure of the states' obligation. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964); *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

<sup>30</sup> In this respect, it should be noted that there are areas of state law which pose problems which, for their federal counterparts, are less pressing. This is, outside of the District of Columbia, particularly true of the right to counsel in proceedings involving juveniles, sexual psychopaths, defective delinquents and other "civil" proceedings which may result in some form of "commitment." I am not here suggesting that all these proceedings present the same problems, from the right to counsel or any other point of view. But the problems they do present have been generally brushed aside with the verbalism that they are "civil" not "criminal" proceedings (the sixth amendment, it will be recalled, applies only to "criminal prosecutions"), and accordingly, the safeguards of the "criminal" process are inapplicable. E.g., *Commonwealth v. McGruder*, 1965 Mass. Adv. Sheets 495, 205 N.E.2d 726 (1965). For a vigorous criticism of this practice see Allen, *The Borderland of Criminal Justice* 14-24; Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 *Nw. U.L. Rev.* 383 (1962). In response, one might say that any proceeding which results in an indefinite loss of liberty has enough of the penal in it to be considered a "criminal" proceeding for constitutional purposes. Allen, *op. cit. supra*. See Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 *U. Chi. L. Rev.* 290 (1965) (hereinafter cited as "Punitive Legislation"). Compare materials at notes 50 & 51, *infra*. Or, one might despair of any attempt to draw meaningful distinctions between "criminal" and "civil" proceedings, noting that while the constitution conditions many of its guarantees on the existence of criminal proceedings, the Supreme Court has never satisfactorily come to grips with the meaning of "crime." Hart, *The Aims of the Criminal Law*, 23 *Law and Contemp. Prob.* 401, 431 (1958). See *United States v. Brown*, 381 U.S. 437 (1965); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). Compare Comment, "Punitive Legislation," *supra*. But in any event it seems to me that even if all or some of these proceedings are "civil" in nature, many of the same policies which call for the assistance of counsel in "criminal" proceedings are applicable whenever a man's liberty is at stake. *Dooling v. Overholser*, 243 F.2d 825, 826 (D.C. Cir. 1957). See also *Juelich v. United States*, 342 F.2d 29, 32 (5th Cir. 1965). I recognize, of course, that it is often urged, especially in juvenile proceedings, that the presence of counsel might go far to destroy the beneficial aims of "civil" proceedings, and I do not believe that this view can be dismissed out of hand. *Kent v. United States*, 343 F.2d 247 (D.C. Cir. 1964), cert. granted 381 U.S. 902 (1965), may throw some light on the measure of the constitutional guarantees to be accorded juvenile offenders.

<sup>31</sup> The New York Times reports that at least a half dozen states now have some provision for student representation of indigents. *N.Y. Times*, July 20, 1965, p. 1, col. 7. See also Silverstein, *The Continuing Impact of Gideon v. Wainwright*

Roxbury District Court in Massachusetts, in co-operation with Boston University School of Law, has an extensive pilot project now in operation, and it is appropriate to examine that program.

## II

Massachusetts has a dual system of trial courts.<sup>82</sup> The superior court is the court of general trial jurisdiction, but there are also district courts. The district courts sit without jury and possess limited jurisdiction. On the civil side, for example, they have no equity jurisdiction; on the criminal side their jurisdiction is confined to the trial of misdemeanors and "lesser" felonies and to holding "probable cause and binding over" hearings on other felonies.<sup>83</sup> On conviction in the district court a defendant may appeal for a trial *de novo* in the superior court.<sup>84</sup> The theory of the district courts is, of course, that they will dispose of the multitude of minor matters over which there is relatively little dispute, thereby preventing the superior court from becoming clogged.

In response to *Gideon*,<sup>85</sup> the Supreme Judicial Court amended its general rule 10 to provide counsel for any "defendant charged with a crime for which a sentence of imprisonment may be imposed."<sup>86</sup> More to the point here, the court also gave its imprimatur to a plan by which qualified law students could "appear on behalf of an indigent defendant in any district court." Rule 11 provides:

A senior student in a law school in the Commonwealth, with the written approval of the dean of the said school of his character, legal ability, and special training, may appear without compensation on 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 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 from the date of 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.<sup>87</sup>

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on the States, 51 A.B.A.J. 1023, 1024 (1965).

<sup>82</sup> See generally Mottla, *Massachusetts Practice, Civil Practice* (3d ed. 1962); *Massachusetts State Government: A Citizen's Handbook* 297 (1956).

<sup>83</sup> Mass. Gen. Laws Ann. ch. 218, §§ 26-37 (1958).

<sup>84</sup> Mass. Gen. Laws Ann. ch. 278, § 18 (1959).

<sup>85</sup> And to its own decision in *Commonwealth v. O'Leary*, 347 Mass. 387, 198 N.E.2d 403 (1964).

<sup>86</sup> Prior to the amendment, rule 10 restricted the assignment of counsel to non-capital felony cases. *Crane, Court Rules Annotated* 117 (1961).

<sup>87</sup> Mass. Sup. Ct. R. 11 was amended by order dated April 27, 1965 and reads as set out in the text.

The major utilization of rule 11 has been in the Roxbury district of Boston. Roxbury is a large community, with a population estimated at 85,000. At the turn of the century it was a fashionable middle-class district; but it is now predominantly a lower income, heavily Negro community, where more than forty percent of the adult population have not gone beyond elementary school, and where one-third of the children have only one parent living at home. "It is an area where domestic relations, debts, landlord-tenant and criminal cases are numerous, and where low income and lack of education leave the average resident at a disadvantage in coping with the law. There are over 30,000 criminal complaints filed in the Roxbury District Court each year. Presiding Justice Elwood S. McKenney estimates that in excess of seventy percent of these defendants are not represented by legal counsel."<sup>88</sup> This, then, is an appropriate laboratory for putting to the test our commitment to the *Gideon* principle, because here is the criminal law in its characteristic posture in the twentieth century—"justice" administered on a mass basis.

With the assistance of foundation grants, the *Gideon* principle is being implemented in the following manner: Two attorneys from the staff of a public defender organization have been assigned to represent indigent defendants in probable cause hearings, felonies over which the district court takes jurisdiction and certain "serious" misdemeanors. Thirty specially selected law students at Boston University, working in teams of two, pick up the remainder of the cases, including proceedings in juvenile courts, a function which the Massachusetts district courts perform. The distinction between serious and non-serious misdemeanors is apparently made on a non-rigid basis, for there are many instances where the students have represented indigents who have been exposed to jail sentences of a year or more.

The role which student counsel play in the program is, however, a carefully delimited one. A specially selected member of the law school faculty, Mr. James Bailey, has been assigned full time to supervise the actual operation of the program. When the district judge decides that a case is properly assignable to "the Roxbury defenders," he formally assigns it to Mr. Bailey. Once Mr. Bailey receives the case he in turn assigns it to one of the fifteen two-man teams and thoroughly discusses it with these students in terms of the legal, evidentiary and tactical problems it presents. The students then conduct whatever research is necessary, secure and interview witnesses and draft whatever motions and special pleas are appropriate. The case is generally called for trial one week after it has been assigned, and motions and special pleas are heard

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<sup>88</sup> Spangenberg, *The Boston University Roxbury Defender Project*, 17 *J. Legal Ed.* 311, 313 (1965). This article contains a detailed description of the Roxbury Defender Project.



before trial; continuances are, of course, granted for cause. At the trial, one of the two students conducts the proceeding, from the presenting of motions through argument on disposition. Mr. Bailey is, however, personally present at each trial; he sits at the counsel table and is permitted by the court to examine any witness if he deems it advisable to do so.

In addition to the close supervision they receive in the courtroom, the Roxbury defenders receive special course instruction. They receive a series of preliminary lectures on Massachusetts criminal procedure, including lectures from the district judge, Mr. Bailey and various court officers. In addition, various members of the Massachusetts bar conduct seminar-type discussions concerned with criminal procedure. Finally, each student is required to take a special advanced course in criminal procedure. This course is primarily concerned with the recent "federalization" of state criminal procedure, and accordingly, its major emphasis is on the reach of the fourth, fifth and sixth amendments.

### III

The question is, of course, whether the Roxbury project is consistent with the *Gideon* mandate. If it is, it and programs like it may make a significant contribution to the administrative problems created by *Gideon*.

At the outset, it is desirable to consider in some detail the potential scope of *Gideon*. While *Gideon* was a felony case, it is difficult to believe that the "felony-misdemeanor" distinction has much relevance to its reach.<sup>88a</sup> Rather, it seems to me that, correctly interpreted, *Gideon* imposes an obligation on the states to provide counsel in all "serious" criminal cases.<sup>89</sup> But, conversely, if an offense can be fairly characterized as a "petty" crime, there is no obligation to afford counsel. Accordingly, in those situations where the Roxbury defenders are involved in "petty" offenses, the state affords the indigent assistance beyond what the constitution compels.<sup>40</sup>

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<sup>88a</sup> *Callan v. Wilson*, 127 U.S. 540, 549 (1888); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965). But see *Kamisar*, supra note 21, at 260-66. Professor Kamisar argues in substance that if a state denominates a crime a "felony" ex hypothesi, it is an offense serious enough to warrant the assistance of counsel.

<sup>89</sup> The lower federal courts have been reluctant to extend the constitutional right of counsel to habeas corpus and other collateral relief, often characterizing them as "civil" proceedings. But see *Foster v. United States*, 345 F.2d 675, 676 (6th Cir. 1965). Whatever the merits of a refusal to extend the right of counsel, it is difficult to believe that the result should be determined by a label of this sort. The due process clause should not be overlooked. *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir. 1965). In any event, whether constitutionally required or not, assistance of counsel in these situations might be afforded through legislation. This would open still another area for student representation.

<sup>40</sup> This is subject to one qualification. It is possible to conceive of a situation where the student counsel is so ineffective that a court could conclude that due process was violated because the "assistance" rendered by the student left the accused far worse off than if he were thrown upon his own resources.

*The Petty Crime Concept*

Nearly forty years ago Felix Frankfurter and Thomas Corcoran observed that there had been "progressively imposed upon the federal [district] courts an intolerable amount of trivial business," involving them in a great many minor criminal matters.<sup>41</sup> Their concern was whether the constitution demanded that defendants be accorded trial by jury in minor criminal cases, but their inquiry is relevant here as well.

Article III of the constitution gives an accused a right to a jury in the "trial of all crimes," and the sixth amendment reiterates the same right "in all criminal prosecutions." The difference in language does not seem to be significant,<sup>42</sup> and the authors argued vigorously that both clauses were drafted against a long and well established practice of excluding the right to jury trial from "minor" or "petty" offenses. While the Court has never had occasion to interpret the sixth amendment's "in all criminal proceedings" in the context of its guarantee of assistance of counsel, the Court has accepted the view that this same language does not require a jury trial where the accused is charged with petty crimes.<sup>43</sup>

One might question whether the sixth amendment's introductory language "in all criminal prosecutions" need or should have the same content for all the guarantees it qualifies. That this should be the case is, of course, textually satisfying; and it seems highly likely that those proverbial sages, the founding fathers, assumed that the amendment's introductory phrase embodied a unitary conception of a "criminal prosecution," however imprecise its limits. Yet the point is not free from difficulty, for the policies that demand a jury trial are not at all identical with those which call for the appointment of counsel, which, unlike the jury, is essential to insure the accuracy of the guilt-determining process. To put the matter somewhat differently, if the introductory clause, "in all criminal prosecutions," be given a single content for all that follows in the sixth amendment so that, like the right to a jury trial, the provision for "Assistance of Counsel" is inapplicable to petty crimes, the due process clauses of the fifth and fourteenth amendments may, in many situations, require the

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<sup>41</sup> Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 *Harv. L. Rev.* 917, 976 (1926). This article is criticized in Kaye, *Petty Offenders Have No Peers*, 26 *U. Chi. L. Rev.* 245 (1959). See also Comment, *The Availability of Criminal Jury Trials Under the Sixth Amendment*, 32 *U. Chi. L. Rev.* 311 (1965).

<sup>42</sup> Frankfurter and Corcoran, *supra* note 41, at 968-75, 978-79. Corwin, *The Constitution of the United States of America* 638 (1952). This is, of course, subject to the limitation that article III is a limitation only on the federal courts, where the sixth amendment now applies "as such" as a restriction on the states. See notes 26-29 *supra*.

<sup>43</sup> *District of Columbia v. Clawans*, 300 U.S. 617 (1937); see also *United States v. Barnette*, 376 U.S. 681, 740 (1964) (dissenting opinion).

"Assistance of Counsel" in order to insure the accuracy of the guilt-determining—or liberty depriving—process.<sup>44</sup>

To the extent that the sixth amendment's "Assistance of Counsel" and the fifth and the fourteenth amendments' due process clauses are looked upon as insuring the reliability of the guilt-determining process, it is analytically difficult to maintain any distinction based upon degrees of crimes. But, nonetheless, I think that the essential idea embodied in the petty offense concept is sound and, accordingly, that there are a great many offenses for which counsel need not be provided, given their "minor" nature and the high social cost in attempting to provide counsel.<sup>45</sup> Due process, assistance of counsel, etc., are, after all, more than just disembodied ideals alone concerned with insuring the reliability of the guilt-determining process; they do not demand the impossible. "Due process," notes Judge Schaefer, "at any given time includes those procedures that are fair and *feasible* in the light of then existing values and capabilities."<sup>46</sup> A perfect system would provide counsel for every offense; indeed, it would go much further and provide the defendant with every resource necessary to permit him to make his defense.<sup>47</sup> But few believe

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<sup>44</sup> *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965). See *Gaskins v. Kennedy*, 350 F.2d 311 (4th Cir. 1965) (due process did not require the appointment of counsel in a parole revocation hearing where facts not disputed). *Juelich* involves a somewhat amusing aspect of the right to counsel cases. Cases like *Gideon* justify imposing a constitutional right to counsel because legal proceedings are too complicated for the untutored. "In *Gideon v. Wainwright* . . . we recognized a fundamental fact that a layman, no matter how intelligent, could not possibly forward his claims of innocence, and violation of previously declared rights adequately." *Linkletter v. Walker*, 381 U.S. 618, 639 n.20 (1965). But it is also firmly settled that the right to counsel embraces the right to proceed without counsel (*Juelich v. United States*, *supra* at 31), despite the fact that the accused is ex hypothesi in desperate need of such assistance. This apparent anomaly results from the fact that the constitutional provisions are multi-valued, not single-valued systems; and our respect for the dignity of the individual compels us to permit an accused "to go it alone" if he so chooses. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *Yale L.J.* 319, 347 (1957). However, in *Juelich*, the Fifth Circuit indicated its acceptance of the rule that, while a defendant entitled to counsel under the sixth amendment has an absolute right to waive that assistance, a person entitled to counsel under the due process clause has no such absolute right. The distinction between the two situations does not seem sound to me, and I suspect that it is really bottomed upon a dissatisfaction with the waiver rule of the sixth amendment cases.

<sup>45</sup> *Kamisar*, *supra* note 21, at 267-72. But Professor *Kamisar* would void any conviction for a petty offense if the absence of counsel resulted in a specific showing of prejudice. "Q. So, we come back to the *Betts* rule after all? A. Yes, when the charge is dumping ashes in the harbor of New York 'not robbery or burglary.'" *Id.* at 272.

<sup>46</sup> *Schaefer*, *Federalism and State Criminal Procedure*, 70 *Harv. L. Rev.* 1, 6 (1956).

<sup>47</sup> This raises a whole range of issues commencing with pre-trial discovery of the prosecutor's case (see *Traynor*, *Criminal Discovery*, 39 *N.Y.U.L. Rev.* 228 (1964); *Paulsen & Kadish*, *The Criminal Law and Its Processes, Cases and Materials* 1078-95 (1962)) through providing assistance to the accused in addition to counsel. "The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary

that, in terms of the social cost, a "perfect" system is presently feasible.

That the "petty crimes" exception, even if applicable, has no precise boundary is not surprising. The difficulties in evolving a precise definition are deep and pervasive. In part these difficulties reflect problems inherent in the present criminal law, which has not come to grips with the substantive nature of crime in the twentieth century.<sup>48</sup> This is, in part, due to the rise of the rehabilitative philosophy with its emphasis on the correctional process,<sup>49</sup> and partly because the criminal law has been saddled with the enforcement of a tremendous volume of policies growing out of the industrial and technological revolutions, as well as out of the increase in social welfare legislation. The result is that there are "crimes and crimes," and there is lacking a single unifying concept.<sup>50</sup> However, in attempting to measure the limits of "petty crimes," the "traditional" attempt to classify as "criminal" that which warranted the moral condemnation of the society certainly has relevance here;<sup>51</sup> "we cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not."<sup>52</sup> And, on this basis, "reckless driving" which carried only a thirty-day sentence or a one hundred dollar fine was held not to be a petty offense because it was an act of "obvious depravity,"<sup>53</sup> whereas the offense of unlicensed dealing in secondhand goods was characterized as "petty" even though punishable by a ninety-day sentence or a three hundred dollar fine.<sup>54</sup>

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document, or that of an expert accountant or mining engineer or chemist." *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting). Accordingly, it has been suggested that the denial of the requisite funds to an indigent is a denial of due process (Note, 78 Harv. L. Rev. 1434, 1440 (1965)), or more narrowly, a denial of the effective assistance of counsel. *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 334-41 (1964); see also *Kent v. United States*, 343 F.2d 247, 257 (D.C. Cir. 1964), cert. granted 381 U.S. 902 (1965). The latter ground has the advantage of not requiring the extension of its principle as a matter of constitutional law into the civil area. See *Betts v. Brady*, 316 U.S. 455, 473 (1942). See generally Note, *Aid in Addition to Counsel for the Indigent Defendant*, 47 Minn. L. Rev. 1054 (1963). The underlying assumptions of *Douglas v. California*, 372 U.S. 353 (1963), may represent a major doctrinal breakthrough and become the first step in requiring as a matter of constitutional law assistance to indigents in addition to that of counsel. See *Kamisar, Book Review of Gideon's Trumpet*, 78 Harv. L. Rev. 478, 481, 486 (1964). Compare *Kamisar*, *supra* note 21, at 267-77.

<sup>48</sup> Hart, *supra* note 30, at 431.

<sup>49</sup> Allen, *op. cit. supra* note 30, at 25-41. See also Packer, *Two Models of the Criminal Process*, 113 U. of Pa. L. Rev. 1, 67 (1964).

<sup>50</sup> Allen, *op. cit. supra* note 30, at 3-5. For recent evidences of the lack of unifying concepts, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); Comment, 32 U. Chi. L. Rev. 290, 311-14 (1965). See also *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *United States v. Brown*, 381 U.S. 437 (1965).

<sup>51</sup> See *Morrisette v. United States*, 342 U.S. 246, 250-60 (1952); Hart, *supra* note 30.

<sup>52</sup> *Frankfurter and Corcoran*, *supra* note 41, at 981.

<sup>53</sup> *District of Columbia v. Colts*, 282 U.S. 63 (1930).

<sup>54</sup> *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

Moreover, the presence or absence of social condemnation (assuming that it can be ascertained as a fact) cannot be taken as the sole standard. Some offenses which might not involve any real social disapprobation (e.g., some "white collar" crimes) carry with them the possibility of significant penalties. It hardly seems possible that they could be classified as "minor" for constitutional purposes.<sup>55</sup> Of course, this line of inquiry throws open the whole question of what is a "significant" penalty. Can an offense which carries with it the possibility of any jail sentence, however brief, be said to lack a significant penalty? Or must the jail sentence be above a certain minimum level? It will be noted that the Court has characterized a statute which carried a possible ninety-day jail sentence as a "petty offense," but one wonders whether that offense would receive such a classification today. In *Harvey v. Mississippi*,<sup>55a</sup> the Fifth Circuit recently held *Gideon* applicable in striking down a guilty plea to "possession of whiskey," although the maximum punishment was five hundred dollars and/or ninety days.<sup>56</sup>

If an offense carrying either a significant stigma or a significant penalty cannot fairly be characterized as a "petty offense," does this mean in substance that *Gideon* has no applicability unless an offense carries with it "the possibility of a substantial jail sentence"?<sup>57</sup> If an offense provides for a fine alone, or a fine coupled with a brief jail sentence, does the minor penalty compel the conclusion that the offense is a minor one?<sup>58</sup>

#### *Students and the Effective Assistance of Counsel*

However generous one is with the concept of petty or minor offenses which do not constitutionally require the "Assistance of Counsel," the

<sup>55</sup> Frankfurter and Corcoran, *supra* note 41, at 981; Kamisar, *supra* note 21, at 270 n.212.

<sup>55a</sup> 340 F.2d 263 (5th Cir. 1965).

<sup>56</sup> Professors Hall and Kamisar are inclined to view Harvey as representing an extension of the *Gideon* principle into the area of "petty offenses." Hall and Kamisar, *op. cit. supra* note 4, at 86. This seems to me most doubtful. Under our present standards, a ninety-day sentence seems quite substantial. But see McDonald v. Moore, — F.2d — (5th Cir. 1965), 34 U.S.L. Week 2295.

<sup>57</sup> *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). Justice Harlan leaves open what is a "substantial" jail sentence. Harvey, of course, represents the view that a ninety-day sentence is "substantial"; in fact, it may prestage the applicability of *Gideon* to offenses carrying the possibility of any jail sentence, however brief. See also, *Evans v. Reves*, 126 F.2d 633, 638 (D.C. Cir. 1942). But it hardly seems realistic to require the appointment of counsel for the routine drunk or breach of the peace cases. *McDonald v. Moore*, *supra* note 56.

<sup>58</sup> It may be argued that a simple fine case is unrealistic since the indigent defendant will simply be unable to pay a fine. But imprisonment for non-payment of fine is still common. E.g., *McDonald v. Moore*, — F.2d —, 34 U.S.L. Week 2295. If constitutional under present equal protection concepts (see materials collected in *Criminal Law Bulletin*, Vol. 1, No. 8, pp. 52-53) this practice could reduce all fine cases to jail sentence cases. Moreover, the state might require a convicted indigent to repay the fine in installments. And even a conviction carrying only a fine might have significant "extralegal" consequences to the accused.

fact is that the Roxbury defenders are involved in many cases which are serious by any standard; they have, for example, been assigned matters carrying potential prison sentences of up to two and one-half years. Thus, we are squarely faced with the question whether the Roxbury soldiers may be a part of Gideon's army.

One might insist that, as constituted, the Roxbury defender program is manifestly constitutional. After all, Mr. Bailey, not a student, is counsel of record; and his participation is by no means merely formal. He discusses each case with the student team in terms of its legal, evidentiary and tactical problems; he supervises the drafting of motions and special pleas; and he personally supervises the trial of each case, sitting with the student counsel at the counsel table and, under a special arrangement with the court, examining witnesses when he thinks it advisable. In one sense, it is Mr. Bailey who is counsel, aided and abetted by a large team of law clerks and investigators; in short, the capacities of one man have been enlarged thirtyfold—with the "slight exception" that his law clerks and investigators are permitted a carefully controlled participation in the trial process itself. Such a program poses no threat to the policies which lie at the core of the requirement of "Assistance of Counsel";<sup>59</sup> indeed, it is at least as consistent with those policies as permitting relatively inexperienced members of the bar to represent indigents. In addition, no substantial harm can be done at the district court level, at least where a convicted indigent utilizes his right to appeal to the superior court for a trial de novo.

This analysis is not quite satisfying, however. The Roxbury Project's utilization of law students was conceived of as making a substantial contribution to the problems created by *Gideon*. Yet, for constitutional purposes the role of student counsel is sought to be minimized, and an attempt is made to characterize the problem as though it involves no more than representation of indigents by experienced counsel who is aided by (a) student assistants, and (b) an automatic appeal to the superior court for a trial de novo. Moreover, even if this characterization be substantially correct, the program is of limited utility since its validity depends on the actual presence of Mr. Bailey in the courtroom. But if this program is to be expanded—if more than a limited number of students are to participate—it is doubtful whether such program can be tied to the perpetual personal attendance of experienced counsel in the courtroom. The significant problem is, therefore, whether a program similar to the Roxbury Project but without the inevitable courtroom attendance of a Mr. Bailey complies with *Gideon*; in sum, the issue is

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<sup>59</sup> Such an analysis would seek shelter from the state court decisions which lend no objection to representation by unlicensed practitioners who are assisted by licensed practitioners. See Annot., 68 A.L.R. 2d 1141, 1150 (1959).

the constitutionality of rule 11 as written, since it provides that the "expression 'general supervision' . . . shall not be construed to require the personal attendance in court of the supervising member of the bar."

*Gideon* requires that in all serious criminal cases the defendant be accorded "Assistance of Counsel." No attempt was there made to enlarge upon the content of that requirement; and, accordingly, one must look elsewhere to determine the measure of the obligation imposed. An argument that nothing in the constitution prohibits a state from admitting third-year law students to its bar, either generally or for limited purposes, does not conclude the inquiry because it is certainly possible to construe the sixth amendment as prohibiting these students from representing indigents "in all criminal prosecutions." Yet such an interpretation seems to me hard to justify, and results from framing the inquiry in the wrong terms.<sup>60</sup> The question is not whether the accused has been represented by a member of the bar, but whether he has had the "Assistance of Counsel." As will be seen, membership in the bar does not conclude the latter question; and neither should absence of such membership be decisive.<sup>61</sup>

In seeking to define the content of the sixth amendment's requirement of "Assistance of Counsel," I doubt that anything of value is to be gained by rummaging through the writings of the colonial fathers in search of enlightenment.<sup>62</sup> Nor is anything gained by a minute analysis of the history of lay representation in the civil or the criminal courts.<sup>63</sup> Mean-

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<sup>60</sup> There are, however, some state court cases which assume that the right to counsel embraces the right to be represented by a fully licensed practitioner. See Annot., 68 A.L.R.2d 1141 (1959). The decisions generally lay heavy stress upon the representation provisions of the state constitutions involved, and moreover, many of the cases involve wholly ineffective representation by untutored laymen. These cases do not, of course, conclude the question of the scope of the sixth amendment. The federal precedents are scanty. See, for example, the passing dictum in *Achtien v. Dowd*, 117 F.2d 989, 992 (7th Cir. 1941). In *Re Shibuya Jugiro*, 140 U.S. 291 (1890), a petitioner for habeas corpus asserted, *inter alia*, that his representation by an unlicensed practitioner was a violation of due process. The issue was not decided since it was "non-jurisdictional" in nature and, at that time, habeas corpus was available only to reach "jurisdictional" questions. Compare *Fay v. Noia*, 372 U.S. 391 (1963).

<sup>61</sup> As has been observed, there are now over a half dozen states which make some provision for representation of indigent defendants by law school students. See note 31 *supra*.

<sup>62</sup> For an example of what seems to me to be history of little moment, see *Kaye*, *supra* note 41, at 261-68. Moreover, even if this history were more definite than it is, it would not preclude the need for a fresh look. E.g., *School District v. Schempp*, 374 U.S. 203, 237-41 (1963) (Brennan, J., concurring); *Bickel*, *The Original Understanding and The Segregation Decision*, 69 *Harv. L. Rev.* 1, 59 (1955).

<sup>63</sup> It is common knowledge that during a significant part of our history there was—and there yet remain traces of—lay representation in both civil and criminal causes. Massachusetts still permits non-lawyers to appear in small claim proceedings. *Mass. Dist. Ct. R. 12*. Student counsel seem to have been involved in *Baker v. State*, 130 Pac. 820 (Okla. Crim. App. 1912); *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938). The scanty, inconclusive and essentially irrelevant nature of the precedents make it clear that the issue must be examined *de novo*.

ingful history begins with *Powell v. Alabama*,<sup>64</sup> which held that "Assistance of Counsel" meant "effective" assistance of counsel. *Gideon*, no more than *Mapp v. Ohio*,<sup>65</sup> "sounded [a] death knell for our federalism,"<sup>66</sup> and it seems to me that any program bearing reasonable promise of providing indigents with the "effective" assistance of counsel satisfies the constitutional mandate. And I suggest that carefully constructed student defender systems do provide indigents with effective assistance of counsel, as the briefs in *Gideon* clearly assumed.<sup>67</sup>

There is no longer any question that constitutionally "ineffective" counsel will render a conviction void. There have, moreover, been several exhaustive studies on the rapidly mushrooming case law concerning whether counsel has been constitutionally "ineffective."<sup>68</sup> However, we need not here attempt to delineate the precise contours of that still-evolving standard. Our inquiry is a narrower one, for we assume the standard and ask whether the performance of carefully trained and supervised third-year students, most of whom are but a few months away from admission to the bar, should be measured by that standard, or whether these students should be conclusively presumed to be ineffective; that is, does student "assistance" present so great a probability that the students will commit the kind of errors that render the assistance of counsel "ineffective" that their participation should be condemned *in*

<sup>64</sup> 287 U.S. 45, 71 (1932). Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289, 293-95 (1964), discusses *Powell v. Alabama*, *supra*, in this respect and collects other cases.

<sup>65</sup> 367 U.S. 643 (1961).

<sup>66</sup> *Ker v. California*, 374 U.S. 23, 31 (1963); *Beck v. Ohio*, 379 U.S. 89, 92 (1964). In *Gideon* Counsel for the petitioner, the now Mr. Justice Fortas, observed: "In other words, the states will remain at liberty to experiment and to adopt a system for the appointment of counsel consonant with community needs and resources, subject only to the requirement that the system adopted fulfill the constitutional imperative and guarantee effective legal aid to all persons accused of a serious offense who do not competently and intelligently waive such assistance. We believe that this is an instance of federalism in operation in an appropriate form: Under our system, we submit, the demands and the benefits of federalism should take the form of a diversity of method. Federalism properly considered does not demand or permit a negation of basic constitutional principle." Brief for Petitioner, *Gideon v. Wainwright*, 372 U.S. 335 (1963). In the Brief for American Civil Liberties Union as Amicus Curiae, pp. 33-38, Brief for State Attorneys General as Amicus Curiae, pp. 21-23, *Gideon v. Wainwright*, 372 U.S. 335 (1963), it was recognized that there was tremendous room for experimentation.

<sup>67</sup> Brief for Petitioner, p. 35, Brief for American Civil Liberties Union as Amicus Curiae, p. 35, Brief for State Attorneys General as Amicus Curiae, p. 35, *Gideon v. Wainwright*, 372 U.S. 335 (1963), assumed the validity of at least carefully constructed student programs. Implicit in this argument is the assumption that use of student counsel for an indigent is not the kind of invidious distinction between rich and poor in the administration of the criminal law which is condemned by *Griffin v. Illinois*, 351 U.S. 12 (1956), and its progeny.

<sup>68</sup> Waltz, *supra* note 64; Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434 (1965); Note, Effective Assistance of Counsel, 49 Va. L. Rev. 1531 (1963).



*limine* as inherently prejudicial. This latter approach seems required by decisions such as *Estes v. Texas*,<sup>69</sup> where the Court recognized that:

It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.<sup>70</sup>

On the face of the matter, representation by carefully trained third-year students does not render the criminal process a "farce" or a "mockery of justice," the generally verbalized standard for determining whether counsel has been constitutionally ineffective;<sup>71</sup> or, as I think the standard should be framed, student representation does not make it unlikely that a fair trial could be had in accordance with the applicable constitutional principles.<sup>72</sup>

More specifically, one cannot presume that carefully trained students are appreciably more likely, at any stage, than members of the bar to commit those errors which have rendered counsel constitutionally "ineffective." *First*. At the pre-trial stage, counsel must concern himself with the applicable substantive and procedural law, and make an adequate investigation of his client's case. In these respects, I suggest, the indigent may be better off with student counsel. We are all familiar with the too common practice of many lawyers hastily preparing the cases of their less affluent clients on the courthouse steps. The students, bustling with enthusiasm, have taken this part of their task very seriously, as all those who have had any contact with the Roxbury Project will attest.

*Second*. At the trial itself the law school student is in a position essentially no different from the relatively young member of the bar, except that he has had more careful supervision and ideally will have had at least his first trial supervised by a "Mr. Bailey." Unless we condemn out of hand criminal defense by young lawyers, I fail to see that student lawyers are to be presumed ineffective here. Perhaps in an ideal system only experienced lawyers should represent criminal defendants. But,

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<sup>69</sup> 381 U.S. 532 (1965).

<sup>70</sup> *Id.* at 542.

<sup>71</sup> See, e.g., *Rivera v. United States*, 318 F.2d 606 (9th Cir. 1963).

<sup>72</sup> An articulation which requires only that a "fair trial" be had seems too narrow. Some of the constitutional rules developed in the criminal area (for example, the rule requiring the exclusion of evidence obtained from an unconstitutional search and seizure) have little to do with the reliability of the guilt-determining process; they are, instead, designed to deter illegal police conduct. *Linkletter v. Walker*, 381 U.S. 618 (1965). Since the evidence obtained as a result of an illegal search is not "inherently unreliable," it is clear one could receive a "fair trial" even though counsel did not attempt to exclude such evidence, but counsel is still held to be "ineffective" if this ground for exclusion was evident. See *People v. Ibarra*, 60 Cal. 2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963). See also *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964).

plainly, we are far from that millennium; our society simply cannot afford to read the sixth amendment, or any other constitutional provision, as mandating "the assistance of experienced counsel." Moreover, such a view wrongly equates experience with competence and, more importantly, inexperience with incompetence. Accordingly, it is hardly surprising that "no court has gone so far as to hold erroneous the appointment of a fledgling lawyer in the absence of demonstrated prejudice to the accused attributable to his counsel's inexperience."<sup>73</sup>

I am not, however, prepared to push logic to its breaking point. While I think that *given the interests at stake* every criminal trial does not require the appointment of a Clarence Darrow for the defense, and that third-year students do not give the lie to the constitutional promise of a fair trial and effective assistance of counsel, I am nonetheless troubled by inexperienced trial lawyers (and, therefore, students) being assigned to cases carrying heavy penalties. I am not, after all, suggesting that we should assume that all lawyers are fungible, that youthful vigor is a complete substitute for experience. While we desire methods designed to insure reasonable reliability in the guilt-determining process, I suggest that it is consistent with our constitutional notions of due process and effective assistance of counsel to permit the inexperienced advocate to plead causes, subject to a showing of prejudice rendering his representation "ineffective." But where the stakes are higher, where the penalties which can be imposed are more severe, perhaps we can now afford the luxury of demanding an additional safeguard—the presence of experienced counsel at the very outset.<sup>74</sup>

*Third.* The threat of post-trial ineffectiveness does not seem to me to be greatly increased by use of student counsel. The student, like the experienced lawyer, must consider whether to move for a new trial and/or to advise an appeal (in the Roxbury Project a trial de novo). The danger of "ineffective" action here is not appreciably increased, unless it is thought that the "practical" judgment of experienced trial counsel is of constitutional dimension. In the Roxbury Project Mr. Bailey plays a determinative role in the advice given to the client at this stage, and presumably so would his counterpart in other programs.

#### IV

Carefully constructed programs for student representation of indigents seem to me to pose no threat to the policies embodied in the sixth

<sup>73</sup> Waltz, *supra* note 64, at 307. See *MacKenna v. Ellis*, 280 F.2d 592, 604 (5th Cir. 1960), which indicates that the trial judge must assume an active role in "protecting the defendant . . . from the obvious errors of inexperienced appointed counsel."

<sup>74</sup> The essential relationship between this topic and the consideration lying at the heart of the "petty crime-serious crime" distinction is obvious.

amendment. Quite to the contrary, they give real meaning to the amendment's salutary aims. I should, perhaps, end on this positive note, but it seems to me appropriate to comment briefly, if negatively, on two additional aspects of the Roxbury Project which have been suggested in support of its constitutionality.

*First*, it is argued that the indigent himself consents<sup>76</sup> to student representation and thus he waives any right he might have to "more effective" counsel. This is hardly tenable. If an indigent is entitled to have the assistance of "more effective" counsel, his consent to student representation is not a "waiver" of that right, under the rigorous conception of waiver operable in this area.<sup>76</sup> The waiver form carefully refrains from indicating that the indigent has a different choice available, and the harried, troubled defendant cannot be compelled to read between the lines. Accordingly, I conclude that any argument based on the defendant's "consent" is a makeweight.<sup>77</sup>

*Secondly*, under the Massachusetts practice a defendant who is convicted in the district court is entitled to appeal to the superior court for a trial de novo.<sup>78</sup> Thus, it is said, even assuming the worst, a convicted defendant has not been materially prejudiced because he is entitled to a trial de novo. Accordingly, for constitutional purposes, student counsel in Roxbury at most presents a case of harmless error. This line of reasoning has, in another context, apparently commended itself to the Supreme

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<sup>76</sup> The form of consent is as follows:

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. \_\_\_\_\_ Court

No. \_\_\_\_\_

COMMONWEALTH

v.

REQUEST FOR APPOINTMENT OF STUDENT-COUNSEL

I, \_\_\_\_\_, have been informed of my right, pursuant to General Rule 10 of the Rules of the Supreme Judicial Court, to have counsel appointed by the court to represent me at every stage of the proceedings in this case. I have been advised that I may at my election be represented by a Senior Student in an accredited law school in the Commonwealth under the 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. I elect to be represented by a Student designated by the court and request said appointment by the court.

Signed:

\_\_\_\_\_, 19--

\_\_\_\_\_  
Signature of Defendant

<sup>76</sup> *Fay v. Noia*, 372 U.S. 391, 439-40 (1963); *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Williams v. Alabama*, 341 F.2d 777 (5th Cir. 1964).

<sup>77</sup> In evaluating waiver arguments, it is well to bear in mind the "lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

<sup>78</sup> *Mass. Gen. Laws Ann. ch. 278, § 18* (1955).

Judicial Court.<sup>79</sup> Moreover, it draws some support from those cases which, despite *Hamilton v. Alabama*,<sup>80</sup> refuse to conclude that there is an absolute right to counsel at arraignment absent a showing of prejudice, and the Supreme Court's recent dicta in *Pointer v. Texas*<sup>81</sup> keeps the arraignment question open. The argument would be that the arraignment cases show that an accused may not complain of the absence of counsel unless his legal rights have been impaired, and even following his conviction in the Roxbury District Court, a defendant has all of his defenses available to him de novo in the superior court. In fact, he has had the benefit of ascertaining the prosecution's case, a sort of pre-trial discovery.

While it is true that an appeal to the superior court opens the whole case anew, the Supreme Judicial Court has not considered whether an appeal renders the proceedings in district court a total nullity. For example, if the defendant had taken the stand in the district court trial, has he "waived" any right to refuse to do so in the superior court? Can testimony given by the defendant in the district court be used to impeach him in the superior court? And in any event, the defendant's counsel may have made tactical errors in the district court which exposed weaknesses in the defendant's case, which, in turn, the prosecutor may seize upon in the superior court. In sum, it is doubtful that the proceedings in the district court can realistically be viewed as never having occurred, although in some cases the defendant might be hard put to *prove* actual prejudice.<sup>82</sup>

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<sup>79</sup> *Commonwealth v. O'Leary*, 347 Mass. 387, 198 N.E.2d 403 (1964). However, in *O'Leary*, the defendant was not on trial for a misdemeanor or a lesser felony over which the district court had trial jurisdiction. Rather, he appeared before the court on a probable cause hearing and pleaded not guilty. The district court found probable cause, and the defendant was bound over for the grand jury. Following his conviction, he argued to the Supreme Judicial Court that he should be discharged since counsel was not provided to him at the probable cause hearing. The contention was rejected, the court saying in part that: "As matters transpired, the defendant was no worse off in the District Court than if he had had counsel. There is no intimation that counsel would have done something that the defendant did not do or that he would have refrained from doing something which the defendant did do. The course the defendant pursued was intelligent and one which might be reasonably expected even where a defendant was represented by counsel. He did not plead guilty and so was not prejudiced in any of the respects his brief outlines as would have befallen in that event. He was not held upon oppressive bail, as his brief suggests might have been possible. Nothing was waived. The defendant was not barred from raising any defence whatsoever. An unimpaired opportunity still remains to move to suppress evidence should there be any need to do so, a fact as to which we are uninformed. In short, no right of the slightest value has been lost." *Id.* at 389, 198 N.E.2d at 405. Perhaps the court would limit *O'Leary* to non-trial proceedings in the district court, although the language of the opinion suggests no such limitation.

<sup>80</sup> 368 U.S. 52 (1961). Cf. *White v. Maryland*, 373 U.S. 59 (1963). See generally National Legal Aid and Defender Association, II Defender Newsletter, No. 4, July 6, 1965.

<sup>81</sup> 380 U.S. 400, 402 (1965). See also *United States v. Fay*, 350 F.2d 214 (2d Cir. 1965).

<sup>82</sup> Most courts, however, seem disposed to consider the question in terms of a

Moreover, it is not at all apparent that a defendant entitled to "effective" counsel should be first required to submit to the ordeal of a trial with "ineffective" counsel. In *Callan v. Wilson*,<sup>83</sup> for example, the defendant was convicted without a jury for the petty offense of "conspiracy" and sentenced to pay a twenty-five dollar fine or serve thirty days. The statute provided that a convicted defendant could appeal for a trial de novo. The Supreme Court held that conspiracy was not a petty offense and that a procedure which refused defendant a jury trial until appeal after a conviction violated the sixth amendment. The Court said that the jury trial guarantee "secures to [the defendant] the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offence charged."<sup>84</sup> The relevance of this decision received additional support from cases like *Escobedo v. Illinois*<sup>85</sup> which fix the accused's rights of counsel at a time well in advance of any formal judicial proceedings. Once the right to counsel attaches, it seems hardly plausible that a state can provide "ineffective" counsel until there has been a showing of "actual" prejudice.<sup>86</sup> I conclude, therefore, that neither "waiver" nor the trial de novo argument adds anything to the constitutionality of student representation programs. Their constitutionality cannot rest on such frail supports.

## V

There has been considerable agitation from every angle to reawaken interest in the criminal law, and it has been rightly observed that the law schools must shoulder a major burden in this hoped-for renaissance. There is no doubt that there has been a general quickening of interest in the law schools;<sup>87</sup> and the Roxbury Project is but one facet of this process. That such a program has advantages in terms of stimulating student interest in the whole area of criminal law and its administration is readily apparent. And, I submit, it provides an acceptable corps for "Gideon's Army."

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showing of prejudice. If the "effectiveness of the legal assistance ultimately furnished an accused is likely to be prejudiced by its prior denial, the earlier period may be deemed a critical stage in the judicial process." *DeToro v. Peppersack*, 332 F.2d 341, 343-44 (4th Cir. 1964); *United States v. Fay*, supra note 81, at 215. In view of *Escobedo v. Illinois*, 378 U.S. 478 (1964), "prejudice" seems not capable of being limited to "legal prejudice," that is, a loss of ascertainable legal rights, but to include tactical and evidentiary losses as well.

<sup>83</sup> 127 U.S. 540 (1888).

<sup>84</sup> *Id.* at 557. This would not be true in respect to "petty offenses." Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 466 (1959).

<sup>85</sup> 378 U.S. 478 (1964).

<sup>86</sup> As has been pointed out, supra note 19, *Gideon v. Wainwright*, 372 U.S. 335 (1963), discards the notion that generally the absence of counsel does not result in prejudice to the accused.

<sup>87</sup> Symposium, 43 Texas L. Rev. 271 (1965).