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The Uses and Limitations of Law Students in Prison Legal Assistance Programs

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THE USES AND LIMITATIONS OF LAW STUDENTS IN PRISON LEGAL ASSISTANCE PROGRAMS*

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I.

This conference is the first conference that has directed its principal focus on the woefully neglected problems related to adequate legal representation of prisoners. I have been asked to discuss both the uses and the limitations of law students in legal assistance programs for prisoners. This is a relatively narrow segment of where and how law students may be used in the entire field of corrections and my remarks should be so considered.

Some latter-day Cassandra will undoubtedly look back with amazement at the uneven pace that we will have followed in the almost inevitable establishment of some adequate publicly supported system under which prisoners will be provided with the effective assistance of counsel. It is quite beside the point to ponder why our fundamental commitment to equal justice under law has not been considered applicable to prisoners confined in correctional institutions; or even to convicted persons who are only in constructive custody, on probation, parole, or conditional release.

Meaningful discussion of our problem, however, must commence

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with acceptance of the candid admission made in the report of the National Defender Project to the National Defender Conference held in Washington last May that the area of postconviction problems has "only recently" been viewed as a proper area of concern even for organized legal aid and defender systems.[1] Certainly few others have registered any concern at all. The recent expression of Chief Justice Burger at the American Bar Association meeting in Dallas may mark the beginning of new consciousness on the part of the organized bar.[2]

Appropriate recognition must, however, be given to other factors in order that persons who may now become concerned in this particular facet of the administration of criminal justice understand from the outset that it is no race for the shortwinded to enter.

II.

It was twenty long years ago that the Supreme Court of the United States articulated the principle of *Young v. Ragan*[3] that every state must afford state prisoners some "clearly defined method by which they may raise claims of denial of federal rights." When *Gideon v. Wainwright*[4] and *Douglas v. California*[5] were handed down on March 18, 1963, even the most obtuse could understand that a great many lawyers were going to be needed to provide counsel for the trial and direct appeal of every future criminal case tried in every state and federal court in the land.

But nobody thought much, if anything, about whether counsel were going to be needed to represent all persons then in prison who had been denied the effective assistance of counsel at trial or on direct appeal at the time they were convicted and sentenced.

Indeed, the far greater impact of the trilogy of landmark habeas corpus cases handed down the same day, *Townsend v. Sain*,[6] *Fay v. Noia*,[7] and *Sanders v. United States*,[8] (decided a few weeks later) went

1. NATIONAL DEFENDER PROJECT OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, REPORT TO THE NATIONAL DEFENDER CONFERENCE 23-29 (1969).

2. *See* Burger, *Court Administrators—Where Would We Find Them?*, 53 J. AM. JUD. SOC'Y 108 (1969).

3. 337 U.S. 235, 239 (1949).

4. 372 U.S. 335 (1963).

5. 372 U.S. 353 (1963).

6. 372 U.S. 293 (1963).

7. 372 U.S. 391 (1963).

8. 373 U.S. 1 (1963).

virtually unnoticed. That habeas corpus trilogy, however, guaranteed all state prisoners the right to a plenary evidentiary hearing on any and all claims of denial of any federally protected right in the course of the state criminal proceeding which led to their convictions. Those cases established the principle that if the state courts refused to provide or refused to follow adequate state postconviction procedures designed to vindicate a denial of a federal claim that the United States district courts, under appropriate considerations of exhaustion, were open to the state prisoner without the procedural prerequisite of an application for certiorari to the Supreme Court of the United States.

One would have thought that the various states would have tooled up immediately to provide adequate state postconviction procedures in order that the state courts, rather than the federal, would exercise jurisdiction to discharge their primary responsibility over the administration of their own state criminal laws. In 1965, however, Mr. Justice Clark, in his concurring opinion in *Case v. Nebraska*,[9] two years after the habeas trilogy had been decided, directed attention to the fact that between the time *Young v. Ragan* was decided in 1949 and the time *Case v. Nebraska* was decided in 1965, only 13 of the states had provided any adequate postconviction procedures at all.

State prisoners, of course, had read the 1963 Supreme Court's opinions. They believed that the Supreme Court meant what it said. The rush of state prisoners to the federal courts was on. In 1963, the year in which the habeas corpus trilogy was decided, state prisoners filed a total of 2,146 applications for habeas corpus and other relief in all the United States district courts in the entire federal system.[10] That figure has continued an upward spiral every year since. In 1968, 10,889 state prisoner cases were filed.[11] Better than one out of every seven civil actions filed in a federal district court today is filed by a state prisoner.[12] But that is only a fraction of the story.

III.

Since *Case v. Nebraska* was decided in 1965, agitation over proposed limitations on the exercise of federal habeas corpus jurisdiction decreased substantially as more rational light was thrown on the

9. 381 U.S. 336 (1965) (concurring opinion).

10. Oliver, *Postconviction Applications Viewed by a Federal Judge—Revisited*, 45 F.R.D. 199, 201 (1968).

11. *Cf. id.* at 200.

12. *See id.* at 199.

necessity for more effective postconviction procedures in the States. The history of the efforts made by my own state of Missouri reflects that when a particular state approaches the discharge of its responsibility seriously it can indeed establish and operate an effective postconviction procedure.[13]

An essential part of such a system, however, as the Supreme Court of Missouri appropriately concluded in 1967,[14] includes the mandatory appointment of counsel to represent the indigent prisoner in his postconviction proceeding in both the state trial and appellate courts.

All this means, of course, that in addition to postconviction counsel required for the some 11,000 postconviction cases filed by state prisoners in the federal courts, still additional thousands of counsel must be appointed in the state court postconviction proceedings throughout the country as an increasing number of States make appropriate provision for their own postconviction proceedings.

I do not think it is necessary to cover in any detail the sharp increase in federal tort claim prisoner actions and in federal civil rights cases filed in the federal courts against the officials of state and federal correctional institutions. Such discussion would simply underline the number of lawyers needed to represent indigent prisoners.

IV.

But there are factors much more important than numbers to be considered. In regard to the quality, as distinguished from the quantity of legal assistance needed, I suggested to the National Defenders Conference last May that:

> Federal experience with its Section 2255 procedure establishes that any adequate postconviction proceeding requires a more specialized legal talent than that involved in the defense and direct appeal of a newly filed criminal case. The questions of law presented on postconviction proceedings, both state and federal, are frequently new and novel. Factual investigation is difficult not only because court records are sometimes lost or missing but because witnesses are dead or unavailable.
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> It is unrealistic to assume that constitutional standards relating to the effective assistance of counsel can be met by a lawyer, to say nothing of a law student, who is virtually untrained and totally inexperienced in the

13. *See id.*; Oliver, *Postconviction Applications Viewed by a Federal Judge*, 39 F.R.D. 281 (1965).

14. ANN. MO. RULES § 27.26 (Supp. 1968).

> trial, direct appeal and subsequent postconviction proceedings incident to a criminal case. One does not for a moment assume that an experienced and competent general practitioner is, or could in a relatively short period of time, become qualified to try a patent, admiralty, or complicated antitrust case. And those cases only involve money. Such an assumption cannot properly be made in regard to the trial of any stage of a criminal case where someone's liberty is involved.[15]

The willingness to entertain the notion that prisoners do not need effective legal assistance, or at best, they need only what minimal assistance a law student might render, is undoubtedly associated with the notion that all, or at least the vast and commanding majority of all prisoners' claims are frivolous and filed only to harass the courts. One of the most important projects that the law schools, using law student manpower, could undertake is research that would collect the hard factual data concerning the effectiveness of postconviction litigation.

Such a project should not be undertaken on the theory that the factual data is easy to collect. The difficulties arise out of the fact that no one has thought it important to keep proper, if indeed any, records of the cases. In those jurisdictions, however, in which both the federal district court and the state trial and appellate courts all comply both with the letter and the spirit of the Supreme Court's 1963 habeas corpus trilogy, the data can be collected from the original court records in the state and federal courts.

In Missouri, for example, there is no longer much talk about the frivolous nature of all state prisoner postconviction proceedings. As I have noted elsewhere in detail,[16] the Supreme Court of Missouri, by its 1967 amendment of its postconviction Rule 27.26, insisted that the Missouri state trial courts appoint counsel and conduct the required postconviction evidentiary hearings in accordance with the Constitution. Last year I was able to report the results of the first group of State postconviction proceedings in which evidentiary hearings were ever conducted by the circuit court of Jackson County, Missouri, in which Kansas City is located.[17]

Data was then available on 26 cases filed between September 1, 1967,

15 Address by Judge John W. Oliver, National Defender Conference, Plenary Session 4, 16 May 1969, at 10, 22 (on file in Washington University Law Library).

16. Oliver, *Postconviction Applications Viewed by a Federal Judge—Revisited*, 45 F.R.D. 199, 211-19 (1968).

17 *Id* at 216

the effective date of Missouri's amended Rule 27.26, to July 1, 1968. In the 17 cases which had been decided on the merits during that short period of time, relief was granted in eight.[18] I suggested to the Ninth Circuit Judicial Conference in San Francisco last year that:

> I have yet to find a judge, state or federal, who is not surprised to learn that almost half of all postconviction motions properly processed by evidentiary hearings in one metropolitan state trial court during less than a year's time resulted in the granting of some form of relief to the petitioner. I have found that judges, both state or federal, who have actually conducted a number of postconviction evidentiary hearings are not as surprised as judges who have not had that experience. The assumption that only rarely will a case of merit be uncovered would seem to be placed in doubt by the first sampling reported by one Missouri trial court which is conscientiously making application of the principles of the trilogy.[19]

Additional doubt about the number of cases of merit to be uncovered by appropriate postconviction proceedings was presented by the records made in the same state trial court in postconviction cases processed between July 1, 1968, through July 31, 1969.[20] Thirty-six cases were processed on the merits during that period; considerably more cases than in the first period. Evidentiary hearings were held in 33 of those 36 cases; three cases were submitted on stipulated facts. Prisoner's counsel, of course, were appointed in all the cases. Relief was granted in 13 of the 36 cases.

The larger sample now available from one metropolitan state trial court shows that in less than the two-year period involved, some form of postconviction relief was granted in 21 out of the 53 cases processed between September 1, 1967, and July 31, 1969.[21] One need not add that during that same period of time at least three of the state prisoners who were unsuccessful in their state court postconvictions were eventually granted federal habeas corpus.[22] The sample would indicate that the ratio of prisoner success in one metropolitan state court is greater in postconviction proceedings than it is on direct appeal. No one would

18. *Id.*

19. *Id.* at 217.

20. Letter from former Kansas City, Missouri Assistant Prosecuting Attorney Joel Pelofsky to Judge John W. Oliver, 7 August 1969.

21. *Id.*; Oliver, *Postconviction Applications Viewed by a Federal Judge Revisited*, 45 F.R.D. 199, 216 (1968).

22. This figure only represents cases filed in the author's division.

seriously suggest today that there is no necessity for counsel on direct appeal. Indeed, the rationale of why counsel is constitutionally required on direct appeal is but another facet of the general postconviction problem which has been generally ignored.

V.

Assistance of counsel cases over the past 37 years have for the most part generally stemmed from the Supreme Court decisions of *Powell v. Alabama*[23] and *Johnson v. Zerbst*.[24] Particular attention has been given Mr. Justice Sutherland's recognition in *Powell* that a defendant in a criminal prosecution "requires the guiding hand of counsel at every step in the proceedings against him."[25] The steady flow of sixth amendment decisions by the Supreme Court since those two cases were decided in the 1930's shows that, with one exception, the Supreme Court has never shown any inclination to depart from the fundamental proposition that the sixth amendment means what it says and that it must be appropriately recognized in the administration of criminal justice in all state and federal courts.[26] The exception, of course, was the Supreme Court's divided opinion in *Betts v. Brady*,[27] which was expressly overruled by *Gideon v. Wainwright*.[28]

On the same day that *Gideon* was decided, the Court made clear in *Douglas v. California*[29] that an indigent defendant was entitled to counsel on direct appeal if all defendants in all criminal cases are granted a right of at least one direct appellate review by the laws of a particular state. I know of no state where this is not true.

It is of paramount importance to recognize, however, that *Douglas v. California* was not based on the sixth amendment. *Douglas v. California* based its decision on the equal protection and due process

23. 287 U.S. 45 (1932).

24. 304 U.S. 458 (1938).

25. *Id.* at 463.

26. *See, e.g.*, Orozo v. Texas, 394 U.S. 324 (1969); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Moore v. Michigan, 355 U.S. 155 (1957); Chandler v. Fretag, 348 U.S. 3 (1954); Von Moltke v. Gilles, 332 U.S. 708 (1948); Hawk v. Olson, 326 U.S. 271 (1945); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Glasser v. United States, 315 U.S. 60 (1942); Avery v. Alabama 308 U.S. 444 (1940).

27. 316 U.S. 455 (1943).

28. 372 U.S. 335, 339 (1963).

29. 372 U.S. 353 (1963).

clauses of the fourteenth amendment as those clauses had been earlier applied in the landmark case of *Griffin v. Illinois*.[30] *Douglas v. California* does not so much as even mention the sixth amendment; that case was based on the fundamental premise that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between the rich and poor."[31] That principle was established back in 1956 by *Griffin v. Illinois*.[32]

Griffin v. Illinois and its ever increasing progeny, including but certainly not limited to *Douglas v. California*, struggle with the fundamental problem of whether "Equal Justice Under Law" is more than a slogan chipped in marble above the entrance to the Supreme Court building in Washington. Mr. Justice Frankfurter significantly stated in his concurring opinion in *Griffin* that should the Court "sanction . . . a money hurdle erected by a state, it would justify a latter-day Anatole France to add one more item to his ironic comment on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread!' "[33]

The question of whether prisoners are constitutionally entitled to the effective assistance of counsel, in my judgment, will not turn on whether the sixth amendment rationale of *Gideon v. Wainwright* will be extended beyond the right to have counsel at later stages of the criminal proceeding, such as the revocation of probation, for example, to which the right of counsel under the sixth amendment was indeed extended in *Mempa v. Rhay*.[34] The question, as I see it, will be determined by deciding whether proper application of due process and equal protection principles articulated in *Griffin v. Illinois* and its progeny, and in cases such as *Baxstrom v. Herold*,[35] *Pate v. Robinson*,[36] *Specht v. Patterson*,[37] and most recently, in *Johnson v. Avery*,[38] is going to require the legal profession in the United States to make as fundamental a reappraisal of the needs of counsel for the

30. 351 U.S. 12 (1956).
31. 372 U.S. 353, 357 (1963).
32. 351 U.S. 12, 18-19 (1956) (concurring opinion).
33. *Id.* at 23 (concurring opinion).
34. 389 U.S. 128 (1967).
35. 383 U.S. 107 (1966).
36. 383 U.S. 375 (1966).
37. 386 U.S. 605 (1967).
38. 393 U.S. 483 (1969).

convicted as it was required to make when it decided that counsel for the prosecution should be publicly, rather than privately, supported.[39]

VI.

The Supreme Court came very close to the appointment of counsel in postconviction proceedings question when it decided *Long v. District Court of Iowa*.[40] The Iowa trial court had refused to appoint counsel for a state prisoner in the state habeas corpus proceeding and it also refused to furnish the indigent prisoner with a transcript of the habeas corpus proceeding for purpose of appeal. Certiorari was granted in regard to the latter question only. On the merits, the Iowa Supreme Court was reversed under "the fundamental principle of *Griffin v. Illinois*" as that principle had been applied in the earlier free transcript cases of *Smith v. Bennett*,[41] and *Lane v. Brown*.[42]

Lane v. Brown, of course, was decided on that same March 18, 1963, day that *Gideon, Douglas*, and the habeas corpus trilogy were decided and, as the Court pointed out in *Long, Lane v. Brown*, had expressly stated in 1963 that the principles enunciated in that case "were not to be limited to direct appeals from criminal convictions, but extend alike to state postconviction proceedings."[43]

The rationale of *Griffin v. Illinois* and *Long v. District Court of Iowa* was further extended this year to California's outmoded habeas corpus proceedings in *Gardner v. California*.[44] The Supreme Court held in that case that "so long as this system of repeated hearings exists [in California] and so long as transcripts [of the initial state habeas hearing] are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished those who can afford them and denied those who are paupers."[45]

39. 42 AM JUR *Prosecuting Attorneys* § 2-8 (1942), notes that "the office of prosecuting attorney is of comparatively recent origin" and that "at common law, criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment found and the case laid before the grand jury, and took charge of the trial before the petit jury." Full time prosecutors were unknown to the federal system until comparatively recent times; many state jurisdictions do not have full time prosecutors today.

40. 385 U.S. 192 (1966).

41. 365 U.S. 708 (1961).

42. 372 U.S. 477 (1963).

43. 385 U.S. 192, 194 (1966).

44. 393 U.S. 367 (1969).

45. *Id.* at 370.

The Supreme Court has not yet decided the question of counsel presented but not reached in *Long v. District Court of Iowa*. Other courts have dealt with very similar problems. Chief Judge Murrah's recent opinion in *Earnest v. United States*,[46] for example, is much more than a straw in the wind. Indeed, that case must, in my judgment, be considered as significant as *Johnson v. Avery* in regard to its impact on the problem of counsel for the convicted. The question presented was whether a federal mandatory release parolee was entitled to counsel at his parole revocation hearing. Such a claim, based on the sixth amendment, had been made and denied many times before Earnest's case was decided. Earnest, however, perhaps because he had met a bright law student while out of prison, based his claim on the idea that because the board of parole procedures permitted persons who could afford it to be represented by counsel that he, as an indigent, was denied equal protection when the board of parole refused to provide him with free counsel.

Chief Judge Murrah stated that "at issue here is the question whether an agency of the federal government can administratively afford counsel at revocation hearings to those financially able to retain one while refusing appointed counsel to those financially unable."[47] In sustaining Earnest's contention, the court of appeals for the Tenth Circuit stated:

> To pose the question is to answer it, for Griffin and its progeny have made it clear beyond doubt that where liberty is at stake a State may not grant to one even a non-constitutional, statutory right such as here involved and deny it to another because of poverty.[48]

The court conceded that neither the parole board nor the district court had any statutory authority to appoint counsel. It nevertheless held that "So long as the Board allows retained counsel at revocation hearings it must provide such for those financially unable to hire one."[49]

The obvious implications of that decision are most far reaching. The laws of many States expressly provide that a convicted person may be represented by counsel of his own choosing in all sorts of postconviction proceedings, including but not limited to parole

46. 406 F.2d 681 (10th Cir. 1969).
47. *Id.*
48. *Id.* at 683.
49. *Id.* at 684.

revocations. The custom and practice of still other states have long permitted employed counsel to appear in those postconviction proceedings. It would seem certain that the basis upon which prisoners will insist upon their right to effective assistance of counsel will, in the future, be shifted from reliance on the sixth amendment to reliance on the fourteenth amendment.

VII.

The likelihood that the rationale of *Griffin v. Illinois* and cases such as *Earnest v. United States* will be expanded rather than contracted would suggest that temptation to substitute law student prison projects for experienced counsel prisoner assistance should be resisted.

But the fact that there are obvious limitations on the exclusive use of law students in prisoner assistance projects does not mean for one minute that law student participation in those projects should be discouraged. There are particular areas that can be covered as well, if not better, by students than by any other presently available source. And there are by-products of student participation in prison projects which may well prove to be more valuable in the long run than the benefits received by the convict population.

The first obvious contribution that law students can make is to provide experienced counsel with thorough and complete legal research in a rapidly changing area of law. *Johnson v. Avery* makes clear that if a State elects to prohibit mutual assistance among inmates it must provide some satisfactory alternative that will adequately meet the needs of the prisoner.[50] That case stated the obvious when it said that "while the demand for legal counsel is heavy, the supply is light" and that "legal aid, public defenders, and assigned counsel has been spread too thinly to service prisons adequately."[51]

An energetic and dedicated group of law students, under appropriate guidance of a law professor or experienced counsel, can do the excellent job of legal research required in order that experienced counsel may spread his time more effectively among more inmates. The judges of the federal court for the Western District of Missouri have had the benefit of such law student work, as the reports of our cases show by our expression of gratitude to the University of Missouri Schools of Law at both Columbia and Kansas City.

50. 393 U.S. 483, 490 (1969).
51. *Id.* at 493.

Law students, however, in my judgment, should not limit their research to purely legal questions. I have a case pending now which presents the question of whether it is cruel and unusual punishment, within the meaning of the eighth amendment, to keep a prisoner waiting capital punishment on death row under the circumstances of the physical facilities presently provided in the Missouri penitentiary. The data on whether or how the various states hold their prisoners under similar circumstances has never been gathered. The questions of what prison regulations exist, how they are applied, and the reasons for their promulgation present similar questions that call for like research. I have already mentioned the research project to determine the effectiveness of postconviction procedures.

Such questions, and many more like them, as Eugene Barkin suggests in his excellent papers in the Nebraska Law Review and in the Prison Journal,[52] need the calm and objective examination that can be afforded only by a competent research team. I know of no reason why law students, perhaps working with students of different disciplines, could not and should not do that sort of work.

VIII.

The greatest long-term benefit, however, that is likely to flow from the participation of law students in prison legal assistance projects may be the number of law students who will learn enough about the administration of criminal justice and about correctional institutions to want to help make some badly needed and widely recognized changes. It will be, I believe, from the group of law students who participate in prison assistance projects who will later insist that the attention of the public, the bar associations and the legislative bodies of the appropriate governmental units make a more systematic attack on the problems of crime and punishment that are now, for the most part, kept out of sight and therefore out of mind.

In summation, the Council on Legal Education for Professional Responsibility is to be highly commended for its sponsorship of this conference on the role of the law student in the correctional process. It has wisely selected the National Council on Crime and Delinquency

52. Barkin, *Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669 (1966); Barkin, *Impact of Changing Law Upon Prison Policy*, 49 PRISON J. 3 (1969).

to lend its knowledge and experience to the project. Best of all, we have law students in actual attendance who will make us all speak the truth as we see it so that, tomorrow, we will be able to do a better job than we are doing today.