

SCOTTSBORO BOYS IN 1991: THE PROMISE OF ADEQUATE CRIMINAL REPRESENTATION THROUGH THE YEARS

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Despite an announcement in last Thursday's *Cornell Chronicle* that two people would appear from the Law School — "Charles Wolfram and Charles Frank Reavis Sr," I am the only representative of the Law School on this morning's program. Reavis was a two-term Congressman from Nebraska who held office at the turn of this century. He was also the father of two distinguished alumni who graduated from this law school seventy years ago. Congressman Reavis, you will understand, is unable to be with us today.

Another Cornell alumnus had a more direct role in the historical developments that underlie today's general topic. In the 1930's, a legal *cause célèbre* that drew intense national and international attention was the so-called "Scottsboro Boys" case.¹ Seven black youths² were accused of raping a white woman on a train in Alabama. Those of you who have visited the office of Associate Dean Neimeth, I am sure, have noticed the model train that graces a shelf over his desk. The model was used in the retrial of the Scottsboro defendants by their lawyer, Samuel S. Leibowitz. A recent Cornell Law graduate, Leibowitz was just beginning a career in which he would eventually establish a reputation as a preeminent litigator. Despite the litigational efforts of their young advocate, however, all of

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¹ *Powell v. Alabama*, 287 U.S. 45 (1932).

² The seven defendants were Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, Haywood Patterson, Charley Weems, and Clarence Norris although nine defendants were originally charged. The State of Alabama tried the defendants in four separate groups: first, Charley Weems and Clarence Norris; next, Haywood Patterson; and then five other defendants. Those eight were found guilty. The last trial, of Roy Wright, resulted in acquittal. See 287 U.S. at 45, 74 (Butler, J., dissenting). Haywood Patterson escaped from prison and thus did not have his case heard by the Supreme Court. He was arrested in Michigan by the F.B.I. as a fugitive in 1950. When Michigan Governor G. Mennen Williams refused to sign an extradition order, the charges against Patterson were dropped. See H. PATTERSON & E. CONRAD, SCOTTSBORO BOY 248 (1950).

the defendants were convicted on retrial. But there were stark differences between the retrial and the original trial.

For the full details of the first trial, you should read the chilling account in the Supreme Court's 1932 opinion in *Powell v. Alabama*.³ Justice Sutherland wrote the opinion — a Justice whose liberal inclinations, if he had any, were among the best-guarded secrets in the history of the Court. The alleged crimes occurred on March 25, 1931. Those interested in speedy criminal trials might be pleased to know that oral argument in the Supreme Court on review of the convictions and death sentences came little more than a year and a half later, in October 1932. One of the very reasons for the dispatch was, however, also the problem: the Alabama town of Scottsboro, where the defendants were seized from the train and then tried, had been turned into an army camp because of intense public hostility toward the defendants. When the defendants appeared for trial, the presiding judge recognized that a lawyer who had accompanied some of the defendants earlier for their arraignments was admitted only in Tennessee and was not prepared to defend them. The solution, according to the judge, was to appoint "every member of the Scottsboro bar" as counsel for the defendants.⁴

The defendants were then tried, convicted, and sentenced to death in one-day trials that speedily occurred in the absence of any counsel. The appointment of the bar, as it turned out, was symbolic only — sort of a pro bono gesture that, then, as now, fell far short of providing actual assistance. With responsibility defused, indefinite, and impersonal, the appointment of all led to the effective appearance of no one who could provide a real defense. The court imposed the death sentences on April 9, barely two weeks after the alleged offenses.

Powell v. Alabama, decided almost 140 years after the adoption of the Bill of Rights, was the first Supreme Court decision to give legal effect to what had, until then, been the empty promise of the Sixth Amendment. The Sixth Amendment has provided all along that the "accused" in "all criminal prosecutions" shall enjoy the right "to have the assistance of counsel

³ 287 U.S. 45 (1932). *Powell v. Alabama*, argued before the Supreme Court by Walter H. Pollak, was just the first phase of the celebrated "Scottsboro Boys" cases. The other cases were *Patterson v. Alabama*, 294 U.S. 900 (1935), also argued by Pollak, and *Norris v. Alabama*, 294 U.S. 587 (1935), argued by Samuel S. Liebowitz.

⁴ *Id.* at 49.

for his defense."⁵ The Court in *Powell* held that the Due Process clause of the Fourteenth Amendment requires that every defendant have a specific lawyer appointed to provide a defense.⁶

The Supreme Court hemmed and hawed in subsequent decisions; the Court backed off rather quickly from anything like a general right to appointed counsel, holding that counsel was required only in capital cases and in other cases in which the absence of appointed counsel denied fundamental fairness.⁷ By contrast, in *Johnson v. Zerbst*,⁸ the Court held that an accused held for trial in federal court was constitutionally entitled to appointed counsel in all felony cases as a matter of routine. Many states had similar laws, either by statute or decision. Indeed, Alabama had a statute requiring the trial judge to appoint counsel in felony cases at the time the trial of the Scottsboro boys began.⁹ However, as indicated in *Powell*, that instruction was often ignored.

The closing of the circle, for doctrinal purposes, came in decisions in 1963 and 1972. Abe Fortas, aided by Lawrence Tribe, a bright Arnold, Fortas, and Porter summer law clerk,¹⁰ made the argument to the Court in the first case, *Gideon v. Wainwright*.¹¹ The Court in *Gideon* held that a right to appointed counsel existed in every felony case in which the defendant could not afford counsel. The second decision, *Argersinger v. Hamlin*,¹² extended *Gideon* to any criminal charge, even a misdemeanor, if imprisonment was in fact imposed as a sanction.

In the ensuing twenty years, the struggle has been to elaborate ideal systems by which to provide counsel to those accused of crimes. Two models emerged and remain the gener-

⁵ U.S. CONST. amend. VI.

⁶ 287 U.S. 45, at 71.

⁷ *Betts v. Brady*, 316 U.S. 455 (1942).

⁸ 304 U.S. 458 (1938).

⁹ Ala. Code § 5567 (1923). The modern analogue to this is Ala. Code §§ 15-12-2 and 15-12-3.

¹⁰ The case and its presentation has been vividly portrayed in the best book I have read about any case: *Gideon's Trumpet* (1964) by Anthony Lewis, now a foreign policy guru, but then a non-law school student of the law and still one of its most perceptive observers.

¹¹ 372 U.S. 335 (1963).

¹² 407 U.S. 25 (1972).

al, polar models — the appointed-counsel system, in which private practitioners are appointed by the court as counsel, with or without compensation; and the staff-counsel or public defender system, in which lawyers are hired specifically to devote their time to providing assistance to indigent accused persons. The public defender may be a state employee, as in Minnesota, or a nominal employee of a private foundation, as in New York City.

That struggle to develop systems of criminal defense has revolved around the familiar conflict in the law between the desire for fairness and the demands of efficiency. The fairness ideal concerns the most hardy and yet unrealized of constitutional doctrines — the concept, at least as old in our legal culture as the Magna Carta, that justice should not be meted out according to the litigant's wealth. It cannot be doubted that correcting for the impairment of poverty is the critical element in the constitutional underpinnings of the right to counsel. If Michael Milken had appeared at his recent criminal trial without counsel, he would not have been entitled to appointed counsel. Such a right exists only if the defendant is unable to afford counsel. Michael Milken, who has sufficient wealth to afford self-retained counsel, and others like him have no constitutional right to court-appointed counsel.

What, then, about the poor — or "the indigent" as they are called in this arena? Is the ideal of equality one of true equality? Are the poor to have the same counsel — at least the same kind of counsel — as the rich? The doctrinal and practical answers to that critical question have always differed. The doctrinal answer is that both rich and poor are entitled to adequate counsel. But adequacy is measured differently by the Sixth Amendment than by the market. For Sixth Amendment purposes, the "staffing" requirement is minimal; one is entitled only to the assistance of a lawyer, and it seems apparent that just about any lawyer will do.

The Supreme Court at last confronted the question of the adequacy of representation only in 1984 in *Strickland v. Washington*.¹³ Justice O'Connor's opinion for the Court majority announced a test that has proved very difficult to fail. Counsel need only provide a reasonably competent representation, measured by a highly deferential standard that recognizes, as to almost all decisions by counsel, a wide range of supposed competence. The Court explicitly rejected applying specific guidelines

¹³ 466 U.S. 668 (1984).

or rules. In addition, a defendant attacking a conviction is required to demonstrate "prejudice." In effect, a defendant must prove that the errors or failings of counsel deprived him or her of a fair trial, a trial whose result is reliable. Only in extreme and rare situations will prejudice be presumed (blatant conflict of interest situations, for example). In all other situations, the accused must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹⁴

The practical reality, then, is that an indigent accused will not receive the same type of assistance as Michael Milken. The indigent defendant will receive only the minimal defense, at least only that much is guaranteed. Milken will receive the best defense his money can buy, and that almost certainly will be better, probably very much better.

What the Constitution minimally requires, of course, is delineated in practical application by more than words in a competence standard. Here, efficiency intrudes. In providing counsel, as with every other aspect of the criminal-justice system, both the public and the politicians have generally been unwilling to open their pocketbooks to the extent that constitutional rhetoric would seem to require. Michael Milken undoubtedly spent more for his lawyers in his one criminal case in the Southern District of New York than some mid-sized states appropriate in a year for the representation of all criminal defendants combined. The resource expenditures made by persons able to hire their own lawyers in criminal cases do not match the level of resource expenditures that the federal, state, or local governments have been willing to make for the same purpose.

Several states provide counsel through a system that costs the government nothing.¹⁵ In those states the "right to counsel" requirement is met entirely by court-appointed lawyers — lawyers from private practice who are enlisted to defend one case and who are unpaid for their work. The adage, "you get what you pay for," applies here. Just a cut above are the systems found in the majority of court-appointment states — systems that provide for compensation, but at a ridiculously low level, usually due to a statutory ceiling on the amount of fee

¹⁴ *Id.* at 694.

¹⁵ Charles W. Wolfram, MODERN LEGAL ETHICS § 14.3.5. (1986).

that can be paid. In a few states, however, judicial doctrine threatens to force the ceiling higher. A 1989 Florida Supreme Court decision¹⁶ held that in capital cases at least, the statutory maximum compensation of \$3500 might prove too low to warrant the conclusion that it was buying the constitutionally required minimal representation. The federal courts are another area of disgrace. Under a statute whose lofty name now sounds merely cynical, the Criminal Justice Act¹⁷ currently provides for compensation at \$40 per hour for out-of-court work or \$60 for in-court work, which probably does not even pay for office overhead for most lawyers.

Is the public defender system much better? In many ways, it would seem calculated to lead to higher quality representation. The lawyers are, after all, full-time, compensated, and — at least after a time — presumably highly skilled in and knowledgeable about their chosen career. In fact, however, many "PD" operations are severely hobbled by two realities, the second flowing both from the first and from the source of the funding.

The first problem is that of caseload. Most PD operations impose a per-lawyer caseload on public defenders that is utterly unrealistic when measured by a model of reasonably competent representation as supplied by privately retained lawyers. The second problem is credibility. An established mindset among inmates is reflected in the often-heard lament, "I don't want a public defender, I want a real lawyer." In part, the resistance to PDs arises from the perception that an accused will spend very little time with his or her PD, that the work is done perfunctorily and quickly, and that conviction will almost certainly ensue. In large measure, the suspicion is based on the inmate perception that whoever pays the piper calls the tune — the government who pays PDs will surely restrain them in their advocacy. In most, but hardly all, public defender offices, I suspect such a view is much more mistaken perception than reality. In some, unfortunately, it is probably accurate. Overall, however, surely the problem of caseload is the most critical problem. From first to last, that is a problem of funding. Additional funds would enable the system to hire more assistant public defenders and support staff, resulting in a more workable caseload.

¹⁶ *White v. Board of County Commissioners*, 537 So. 2d 1376 (Fla. 1989).

¹⁷ 18 U.S.C. § 3006A (1986).

Will the American public ever provide for adequate funding of either court-appointment or public defender systems? I am not sure, but I am not too hopeful. The history of criminal due process and its present reality have been consumed by the struggle to make the presumption of innocence a reality. It has never been perfectly realized. For too many people, due process is acceptable only as lofty sentiment, not as a practical, and expensive, reality. The presumption of innocence is warm eyewash. The practicalities intrude. We can trust the police (who are horribly underpaid). If they fall short, we can trust our judges. (Our judges are even worse paid than the police — and measured by the compensation received by lawyers in private practice, who are roughly similarly situated.) Public opinion polls have consistently demonstrated that the man or woman in the street are more interested in convicting a "guilty criminal" than in ensuring that an indigent defendant has all the procedural safeguards promised in the Bill of Rights. And they are certainly not willing, in the best of budgetary times, to provide abundant funding for its requirements.

Here, as elsewhere, government operates just over the edge of theoretical respectability. The realities of politics, public opinion, and fiscal constraint conflict with our dream of perfect justice — of equal justice under the law. The gaps between reality and theory are filled by lawyers, both court-appointed and public defenders. When noticed, their efforts are likely to bring forth suspicion and resentment — a strange reaction to a function that is constitutionally required. On the whole, those defense lawyers work incredibly hard in pursuit of that ideal and at a high level of professional standards.

In the process, PDs and court-appointed lawyers acquit all of the rest of us of what would otherwise be unbearable guilt, the guilt that should accompany anyone who walks into a courthouse to try a civil or criminal case as a privately retained lawyer or indeed who functions further from the actual arena of criminal justice but under the title of "lawyer." Those hard-working people permit us to hold our heads high as fellow and sister servants of justice and as officers of the court. For the most part, they function day-to-day, alone and unsupported by the private bar. They should receive more understanding, an important product of today's conference, and more widespread recognition and support by both the law schools and the bar.

One way to start thinking about how to do that might entail a trip to Dean Neimeth's office. Let me invite all of you to visit Dean Neimeth's office to see lawyer Leibowitz's model train.

Think about the unfairness that it was designed to correct — the spectacle of eight black men — penniless travelers from out-of-state, uneducated, young, without friends or supporters — confronting quick justice in a town dominated by a white mob in the deep South at the beginning of the Great Depression. The only thing that stood between them and execution was a young Cornell lawyer. That, it seems to me, speaks volumes about the right to counsel. It also speaks volumes about a life worth living in the law. More soberly, it speaks volumes about the difficulties of bringing the right to counsel from misty-eyed constitutional mythology into the drab trappings of everyday reality in the criminal justice system.