FAIR PLAY AND DECENCY

*Tom C. Clark**

> *We are not deciding the fate of a country but of its people. Yes, by Heaven, there are rules. Rules dictated by friendship, by common bond, by fair play and decency.*
>
> —GEORGE MASON

One of the rules of "fair play and decency" of which George Mason spoke at the Virginia Convention to ratify the United States Constitution was that of counsel in criminal cases. However, it was not until 1938 that the Supreme Court decided that "the Sixth Amendment 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."[1]

Another twenty-five years passed before that rule was extended to the states through the incorporation of the sixth amendment into the fourteenth amendment.[2] In the same year the Attorney General's Committee on Poverty and the Administration of Justice reported that "The survival of our system of criminal justice and the values which it advances depend upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process."[3]

Other healthy signs of a renaissance in the criminal law field are the action of the law schools in expanding their curriculum in the area and the growing "crime talk" in the nation. From an enforcement standpoint it is sufficient to say that the current national crime picture is not good. Crime is on the rampage. Our President, Lyndon B. Johnson, has taken firm steps to deter it, showing a determination to drive crime and criminals from our lives and make it possible for every woman and child to "walk any street, enjoy any park, drive on any highway, and live in any community at any time of the day or night without fear of being harmed." Some of the pundits reply that this cannot be done until we "elevate the rights of society at

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1 Johnson v. Zerbst, 304 U.S. 458 (1938).

2 Gideon v. Wainwright, 372 U.S. 335 (1963).

3 ATT'Y GEN. COMM. POVERTY AND ADMIN. OF JUSTICE REP. 10 (1963).

least to the level of the rights of the criminals" and that "largely as a result of appellate court decisions, criminals or criminal suspects have come to enjoy something of a privileged status . . . unreasonable restraints . . . have been imposed on law enforcement agencies in recent years."[4]

The complaint, of course, is nothing new. Professor Fred Inbau has for years characterized the criminal decisions of the Court as embracing a "turn 'em loose" philosophy.[5] Indeed, he tagged *Escobedo* as a crippling new restriction governing the taking and use of criminal confessions and the "hardest body blow the Court has struck yet against enforcement of law in this nation."[6]

It is not my purpose to answer these charges but I might point out that neither prosecutions nor convictions have declined in federal courts, where these same "restrictions" have been enforced for years. While I have dissented in practically all of the cases, including *Escobedo*, I must say that to blame the crime wave on the opinions of the Court is plain irresponsible talk. Those bent on mischief do not stop to calculate their chances of being caught or convicted. It may be that much crime is never uncovered, but of those prosecuted the overwhelming percent are convicted and serve some part of their sentence. No, the origin of the crime wave is something else.

From a study of the thousands of criminal cases that have come before the Court in the last 16 years I believe that much of the trouble originates in the lack of police training and the inadequacy of the prosecutor. The first step of both the police officer and the prosecutor is to secure a confession but in many of the cases reaching us, the use of questionable confessions or evidence resulting from unreasonable searches and seizures was entirely unnecessary. The proof was sufficiently strong without the tainted evidence. But once it is introduced into the trial there is no way to judge whether the jury's verdict was based on the illegal evidence or on the remaining valid testimony. Moreover, many of the cases are reversed on the errors of the prosecutor, some inadvertent but others intentional. Again and again they exceed the established lawful limits for the prosecution to interject some prejudice or to force the trial judge into a box where a ruling against the prosecutor is painted as public calamity, sometimes causing the defeat of the judge at the next elec-

[4] The Washington Evening Star, Sept. 24, 1965, § A, p. 8.
[5] Chicago Tribune, Aug. 10, 1964, § 3, p. 9.
[6] Chicago Tribune, Aug. 11, 1964, § 3, p. 27.

tion. Furthermore, most of the arguments in the Supreme Court by the prosecutors in state cases are ineffective. They inevitably show lack of preparation, and sometimes lack of familiarity with the basic legal concepts on which the prosecution rests. I can say this frankly as an old prosecutor. I know their shortcomings but *still* love them nonetheless. Likewise being a warm friend and supporter of police officers, I can also be critical of them. We lack effective training programs for prosecutors as well as police officers.

Moreover, we should organize a national project to awaken our people to the necessity for law and order in a democratic society. There is a zone of responsibility that only the public can shoulder. It is ruled neither by *malum prohibitum* of the law nor the concept of constitutional freedoms. It has to do with the mores of the people. We must face it, there is a loosening of morals and respect for constituted authority that might—unless arrested—lead to the destruction of our nation. However, that is a long range program in which others must take over. I only mention it and pass on to a facet of the over-all reformation in which lawyers, law schools and judges may act immediately and effectively.

The impact of the *Gideon* decision is now being felt in all of the courts of the nation. My proposal is an active program of action to unite the academics of the law with the practical. It would bring together the prosecutors, the investigators and police officers, and defense counsel into educational programs beamed at law enforcement. It would start in the law school but would encompass training programs for those already engaged in the field.

We have instituted one part of such a program in the Student Federal Defender Program in the federal courts in Chicago. That program establishes a student training project that will provide assistance to assigned counsel representing defendants in federal criminal cases pursuant to the recently founded Criminal Justice Act of 1964. This Act makes no provision for the use of students. The Student Defender Program for the Seventh Circuit has tapped this productive source to supplement the Act. We hope to extend the Program's coverage to the entire federal judiciary and, in addition, to encourage a like program in the metropolitan state courts throughout the nation.

At the outset it is well to make clear what the Seventh Circuit Program is not. None of the funds provided by the Congress in implementation of the Criminal Justice Act are available to the Stu-

dent Defender Program. The Student Defender Program in Chicago is financed by the National Defender Project of the NLADA, of which General Charles L. Decker, former Judge Advocate General of the Army, is the able Director. In my view he is the most dedicated and competent administrator in the field. Nor does the Student Defender Program pay any compensation to students. It furnishes only the experience to be gained in the representation of approximately 1500 criminal defendants in the federal courts in Chicago each year for whom assigned counsel are necessary. Moreover, all of those cases are under the direct control and supervision of licensed attorneys assigned by the courts.

The student program thus offers experience in the practical aspects of criminal litigation. Students from the six law schools in Chicago are detailed to the assigned counsel in federal criminal cases as law clerks or aides (similar to medical interns) in the trial of these cases. The extent to which the students participate depends upon their aptitude and upon the wishes of the assigned counsel and of the student program director. The judges have indicated that they will welcome student participation to the greatest extent possible. In addition, seminars led by the judges and practicing defense attorneys will be held semi-monthly on specific aspects of criminal procedure and criminal law. At the seminars, student participants as well as other interested students will be given an all-day tour of the federal courts, the offices of the Marshal, the U.S. Commissioner's, the U.S. Attorney's, the Clerk's offices and the various federal agencies, including the F.B.I., that are connected with criminal litigation. These tours will not only furnish visual opportunity, but lectures on the functions of each office and officer will be given. A criminal law newsletter, similar to that circulated by General Decker in the NLADA Defender Project, will be published for the use of the participants. It will include a digest of current federal cases.

The Student Program in the Seventh Circuit was initiated and established by the judges of the Circuit. A non-profit Illinois corportation was first chartered after an initial organization meeting which the deans of the six law schools in Chicago attended. As Circuit Justice, I was selected as Honorary Chairman of this corporation and of the program. Chief Judge Hastings of the Seventh Circuit Court of Appeals is the Chairman. Chief Judge Campbell of the United States District Court for the Northern District of Illinois is the President and the six deans of the law schools are the Direc-

tors. The Board has employed a full-time Program Director, the Honorable Raymond K. Berg. He is a distinguished lawyer and legal scholar; a former law clerk to Judge Campbell; a *cum laude* graduate of De Paul University Law School and Cambridge University; a part-time Professor of Law at De Paul; and a former Assistant United States Attorney in Chicago. He is acting as provisional professor in each of the six cooperating law schools, which enables the students working on the program to receive credit on their law degree for their work in the Defender Program. The project was launched with a press conference of the officers and directors, followed by a luncheon of all of the federal judges in the District.

The Student Program is simple in design. Each of the deans of the law schools creates a panel of students to be assigned to the Program Director. Presently two students are assigned each day from these panels, the schools taking the assignments in rotation. These students report to the Director at the federal court building and are in turn assigned to counsel who are appointed that day in federal criminal cases. It is contemplated that the students will work closely with the assigned counsel. They will interview the defendant, run down leads, prepare statements, do research and prepare moving papers, organize a trial brief, and do such other pre-trial chores as the counsel and the Director desire. It is believed that they will be able to participate in the argument of motions, attend the trial with assigned counsel, and organize the evidence and exhibits at the trial.

It is to be hoped that prosecutor schools will be organized in conjunction with state court student programs. These schools would not only afford instruction to prosecutors and public defenders, but also to students who are interested in public service. A close liaison should be maintained with the local police, sheriffs and other law enforcement officials, and existing training schools so that the students may take part in the training of the police in the most modern and effective—but legal—crime detection techniques. If possible, local F.B.I. offices would be utilized to secure the most modern and efficient instruction.

We have high hopes for this national program. Chief Judge Hastings has presented it to the Judicial Conference of the United States. Already, it has been initiated in several federal districts, including the Southern Division of the Southern District of California (San Diego). There United States District Judge James Carter is sponsoring it. First of all, it will bring needed emphasis

to the importance of the criminal law; second, it will afford an internship to law students in the practical side of the law, *i.e.*, the trial of lawsuits; third, it will afford an opportunity to prosecutors and public defenders to "brush up" on the law; fourth, it will implement the in-training of police officers. The program will serve as a training ground for those students who wish to enter public life as a prosecutor, defender, investigator, or law enforcement officer; strengthen the adversary system so vital to the judicial process and the administration of justice; and bring the law schools closer to the practical aspects of the profession, creating a lasting union between the academic and the practical.

I return to George Mason: "We are not deciding the fate of a country but of its people. Yes, by Heaven, there are rules. Rules dictated . . . by fair play and decency." It is my prayer that through such a national program these rules of fair play and decency will become known and obeyed not only by the police, the prosecutors and the students but by the public at large as well. To paraphrase George Mason and the Report of the Attorney General: Only by "constant searching," "creative questioning" and devoted service to the law can our system of criminal justice survive. It requires advocates learned in its procedures, devoted to its rules and determined to bring "fair play and decency" to its process. I hope that this suggested program will contribute to the trial bar a stalwart tribe of advocates who in due time will remedy our present dilemma.

EDITOR'S NOTE: Program Director Raymond K. Berg reports that the Chicago program has been in full operation since October, 1965. From that time until January, 1966, students have been assigned to over 400 federal criminal cases. Two students are assigned to each case and have participated in the arguing of motions before the court as well as general trial preparation and attendance at the actual trial. Mr. Berg is assisted by a Supervisory Panel of 16 noted defense attorneys. The Panel conducts a lecture program for the students and Mr. Berg intends to make reprints of these lectures available nationally.