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In his report on the Wyoming Defender Aid Program and the guiding principles for which it stands, the Project Director appraises the activities and accomplishments of the Program during its first twelve months in operation. Emphasizing the philosophy of the Program, the Director projects the Program's future and makes a call for instituting new procedures and activities which are necessary for realizing the objectives of the Wyoming Defender Aid Program.

THE WYOMING DEFENDER AID PROGRAM: SOMETHING FOR THE TIN CUP

*John J. Quinn**

INTRODUCTION

THE Wyoming Defender Aid Program (June 1, 1965 to ?) was established on a grant from the National Defender Project of the National Legal Aid and Defender Association¹ as a demonstration program for law student assistance to appointed counsel, increased education in criminal procedure and research oriented to the possible reform of criminal law and procedure. Conceptually, its chief purpose was to assist in providing the answering challenge of the accused in the adversary system upon which American criminal procedure is founded.² The ambitions to be realized were charted in the grant application: (1) student teams would be assigned to aid appointed counsel by investigation, research and in trial, at the expense of the program; (2) students, under the supervision of the faculty, would interview convicts explor-

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1. Funds are supplied by the Ford Foundation and the University.
2. "The essence of the adversary system is challenge [and response]. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process." REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10 (1963).

ing the possibilities of post-conviction relief and, without giving legal advice, render assistance in the preparation of the initiating proceedings and thereafter as appointed counsel required; (3) students and faculty would combine their efforts in the arduous tasks of compiling data and statistics on the filing and disposition of cases, bail, appointments of counsel and other information concerning criminal procedure for which the State of Wyoming has great need but no facilities to produce; (4) a comparative study would be initiated of the Federal and Wyoming Rules of Criminal Procedure and work on a Handbook for Justices of the Peace would be started; (5) eventually the program would conduct a complete survey of Wyoming criminal law with a view to possible revision.

As outlined, the program is an ambitious undertaking and the original estimates³ of student case load demonstrated that the program's capacity of 20 teams of two students would each participate in at least three felony cases and two trials. The results of the first year's operations were interesting and revealing.

THE FIRST TWELVE MONTHS⁴

Institutional Activities and Accomplishments

The College of Law as joint sponsor with the Wyoming State Bar Association of the Defender Aid Program installed Professor Glen W. Shellhaas⁵ as Program Director and set about immediately to implement the project. An Institute on the "Current Problems of Criminal Justice" was held at the college in the spring of 1965 for the benefit of the membership of the bench and bar and law enforcement agencies of the State. An annual course in criminal procedure was inaugurated as a permanent feature of the curriculum. During the summer of 1965, the comparative study of the Federal

3. These calculations are based on the results of the 1963 survey of Wyoming courts made for the American Bar Association's Study on the Defense of the Poor in Criminal Cases in American State Courts.

4. The first Annual Report of the Wyoming Defender Aid Program details the accomplishments of the first year's operations. Copies of the Report are available on request.

5. Mr. Shellhaas is now Professor of Law at the University of North Carolina. The program is indebted to him for his work in its organization and accomplishments.

and Wyoming Rules of Criminal Procedure was completed, and it is now being employed by the temporary subcommittee of the Permanent Rules Advisory Committee to the Wyoming Supreme Court in their work evaluating adoption of Rules of Criminal Procedure. Student interns completed a statistical survey of the criminal dockets of the district courts in the summer of 1966⁶ and work is underway to implement a "release on recognizance pending trial" program as a result of that study.⁷

Student Internship

The student population enthusiastically embraced the program as providing them with the opportunity to intern prior to graduation. One hundred percent of the senior class and all but six of the juniors volunteered their participation. Generally they were disappointed in the volume of available work. Despite the revolution that is taking place in state and federal criminal procedure and practice, and the consequent ever-increasing demand for assigned counsel in criminal cases, the Wyoming Bar has made little use of the program.⁸ Although unofficial estimates show that counsel were appointed in approximately 250 cases during the period June 1, 1965 to May 31, 1966,⁹ assistance of the program was requested in only 18 instances.¹⁰ In those cases in which they have been employed the students have acquitted themselves commendably.¹¹ It will be worthwhile to comment on the value of the student interns and the facilities of research and investigation which the program makes available to the Courts and Bar.

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6. The results of this work are reported in an article by Mr. Charles Aspinwall elsewhere in Volume II of the REVIEW. They are informative of the nature and disposition of cases filed.
 7. It is hoped that the Supreme Court of Wyoming will adopt a release on recognizance program similar to the Bail Reform Act enacted by the 89th Congress as Public Law 89-465, 80 Stat. 214, on June 22, 1966. It is believed that the Supreme Court has the power to adopt such a procedure as part of the rules of criminal procedure presently under study.
 8. See Appendix A.
 9. Survey of the Criminal Docket of the Wyoming District Courts, June 1, 1965 to May 31, 1966, compiled by participating law students.
 10. The student interns were more generously employed by the convicts in the state prison—assistance was given to 68 percent of the prisoners seeking post-conviction review. The program's administrators congratulate Warden Meachem and his assistants for their wholehearted cooperation and active participation in their work.
 11. The program has received unsolicited testimonials to the ability of the students from the lawyers with whom they have worked, and no complaints.

THE PHILOSOPHY OF THE TIN CUP

Since territorial days Wyoming has provided for the appointment of counsel for indigent defendants in misdemeanor and felony cases.¹² Later legislation has elaborated on the 1873 act to extend the occasions for appointment of counsel and to define the procedural steps securing this right.¹³ But, these legislative enactments are not inclusive of every occasion wherein the right to counsel is guaranteed to persons having the need and the desire for representation. In every instance of possible deprivation of personal liberty brought about by the decision of government to exert its powers for the achievement of basic governmental purposes, where the person whose liberty is so threatened is financially unable to secure counsel of his own choosing, government must provide adequate and competent representation in his behalf. And, although this right to counsel may not be understood fully and accepted by the servants of government as an indispensable ingredient, characterized as "fundamental" to the very concept of justice by the United States Supreme Court,¹⁴ the courts of the several jurisdictions have pronounced their benedictions over the graves of the "defenderless" defendants. So it was said by Chief Justice Desmond in *People v. Witenski*,¹⁵ while dismissing informations against three youthful defendants charged, tried and convicted as petty thieves before a Justice of the Peace:

It is too late to argue in this court against the fundamental right of a defendant to counsel or to argue that this right is not available in Special Sessions Courts . . . [I]n every criminal case, large

12. WYO. STAT. § 7-7 (1957).

13. Preliminary hearings, WYO. STAT. § 7-171 (1957); arraignment in district court, WYO. STAT. § 7-171 (1957); before accepting a plea in district court, WYO. STAT. § 7-183.1 (Supp. 1965); mandatory representation before accepting a plea from defendant under 18 years of age, WYO. STAT. § 7-183.3 (Supp. 1965); criminal proceedings before the Supreme Court, WYO. STAT. § 7-8 (1957); post-conviction proceedings, WYO. STAT. §§ 7-408.1-8 (Supp. 1965); involuntary hospitalization of the mentally ill, WYO. STAT. § 25-60 (Supp. 1965); taking depositions, WYO. STAT. § 7-255 (1957); extradition hearings, WYO. STAT. § 7-36 (1957).

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

15. 15 N.Y. 2d 392, 207 N.E.2d 358, 360, 259 N.Y.S.2d 413, 415 (1965). The right to counsel has been held essential in virtually all proceedings in which liberty is jeopardized; for example, *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965) (misdemeanor with maximum punishment of 90 days); *Williams v. Commonwealth*, 216 N.E.2d 779 (Mass. 1966) (revocation of probation); *In re Johnson*, 398 P.2d 420 (Cal. 1965), (traffic offense); *Kent v. United States*, 86 Sup. Ct. 1045 (1966) (juvenile proceedings).

or small, the court "must make it clear" to defendant that these rights exist and that the opportunity to have the services of counsel must be real and reasonable, not a mere formulistic recital of "law language."

In *Witenski* the Justice of the Peace had informed the defendants that they were "entitled" to counsel at every stage of the proceeding and that he would adjourn the proceedings and send for any counsel they named. To the question "Do you desire counsel?" the defendants had answered in the negative. It was held that defendants had not waived their right to counsel because they had not been informed adequately of that right.

This right to the services of counsel is not empty phraseology. It contemplates the appointment of competent and experienced representation comparable in quality at least to that of the prosecution so that equal justice might be approached if not attained.¹⁶ It assumes the appointment of counsel possessed of a minimum standard of expertise and knowledge of criminal law.¹⁷ It is not enough therefore to appoint counsel as a matter of form to satisfy this requirement of the law. Nor is it enough to appoint counsel to give general advice to the accused on the consequences of a guilty plea. The purpose in assigning counsel is to remove the inequality between the government and the accused which attaches because of economic considerations. Services of appointed counsel therefore must be equivalent to services of retained counsel. Justice does no longer depend upon the contents of a man's wallet. This obstacle of money, or the lack of it, must be overcome, although it may not be required that a state equalize economic conditions.¹⁸ But regardless of financial considerations the right to counsel must be made real and meaningful else it give support to the ironic commentary that "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."¹⁹ In brief, the Ameri-

16. *Griffin v. Illinois*, 351 U.S. 12, 22 (1956).

17. *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P.2d 487 (1963) (failure to object to introduction of evidence demonstrated counsel's unpreparedness).

18. Justice Frankfurter concurring in *Griffin v. Illinois*, *supra* note 15, at 23.

19. *COURNOS, A MODERN PLUTARCH*, 27 (1928).

can system of criminal procedure based on the accusatorial system, in which the presumption of innocence cloaks the accused, requires government to supply the legal talent and necessary funds with which to meet the challenge of authority where the defendant is without the means so to do. Equal justice in the scheme of things envisages that no man need approach the bar of justice bearing a tin cup. Regardless of his state or persuasion, he is entitled to a fair and impartial adjudication of the cause against him as a matter of right, not of grace.

The Wyoming Defender Aid Program by providing a comprehensive practical internship for law students,²⁰ assistance to trial counsel and the parties, and continuing study and research of substantive and procedural criminal law alleviates considerably the temporal and economic burden cast upon the Bar²¹ and the government by the inability of defendants to adequately finance their own defense. The Wyoming Defender Aid Program can dispel much of the concern of government and the Bar over the costs of full legal representation for all unable to pay. The least we can afford to an indigent accused is the best we have to offer. The Advisory Council to the Wyoming Defender Aid Program, concerned that the program was not being used to its fullest advantage by appointed counsel, acted on October 8, 1966, to broaden the area of student internship and to encourage the Bar and the courts to greater participation.

INTENSIFICATION OF THE PROGRAM'S ACTIVITIES

The Advisory Council to the Wyoming Defender Aid Program chaired by Supreme Court Justice Glen Parker, unanimously approved two proposals designed to broaden the scope of internship and intensify student participation: (1) county prosecutors were invited to participate in the program by using the student interns in the preparation and trial of their cases; (2) it was recommended to the District

20. The students now also train with the prosecutors.

21. Considered in the light of the very meager allowances made to court appointed attorneys, i.e., not more than \$50.00 in each case of misdemeanor, not more than \$100.00 in each case of felony and not more than \$200.00 in each capital case, WYO. STAT. § 7-9 (1957), with no allowance for out of pocket expenses necessarily incurred, the burden approaches the unreasonable.

Judges and the Judicial Council that the Program Director be appointed as co-counsel in selected cases to assist in the preparation and trial of indigent defendants.²²

Aid to Prosecuting Attorneys

To avoid any possibility of claims of conflict of interest at trial or on post conviction proceedings, student interns participating as assistants to prosecuting attorneys will work from a separate division of the Defender Program under faculty supervision. On request of a prosecutor a senior and a junior student will be assigned to the case. The students will then work directly under the supervision of the prosecutor, performing whatever pre-trial investigation and research is required. Hopefully, the senior student will be permitted to participate to some extent in the actual trial. This service to County Prosecutors has been approved by the National Defender Project of the National Legal Aid and Defender Association. It has the wholehearted approval of the County Prosecutors who responded to a letter of question transmitted in preparation for the meeting of the Advisory Council.²³ At the College of Law we know the benefit the students will reap from their work with the prosecuting attorneys. We sincerely hope that the prosecutors will join with us in the development of this phase of student training as a permanent feature of law school education.

The Direct Appointment of the Program Director as Co-Counsel

The fact that counsel assigned to represent indigent defendants sought the assistance of the Wyoming Defender Aid Program in only 18 cases during the period June 1, 1965

22. Minutes of the first regular meeting of the Advisory Council to the Wyoming Defender Aid Program. We are grateful to the judges and prosecutors who responded to our request for advice and counsel in preparation for this meeting. The comments and observations of Judges John J. Hickey and Rodney M. Guthrie were especially helpful. The Advisory Council employed their suggestions in providing assistance to prosecutors by creating a separate division of interns, and in recommending the direct appointment of the director as co-counsel to insure a broad base of internship.

23. The program director had solicited the advice and opinions of Judge John J. Hickey, 10th Circuit Court of Appeals, the Justices of the Wyoming Supreme Court, Federal District Court Judge Ewing T. Kerr, Attorney General John F. Raper, the District Judges and the County Prosecuting Attorneys on the proposals.

to May 31, 1966, and, except in two particulars, limited the requests to aid in legal research, illustrated rather dramatically that the success of the program could not be left to depend upon the voluntary requests of assigned counsel.²⁴ It appeared that the fullest student participation could be achieved only if the program were an actual participant in the defense from the time of the initial appointment of counsel. As an active participant in the initial phases of the proceedings, the student interns would gain invaluable experience and render meaningful assistance to the defendant, the courts, and defense counsel.

Precedent for this approach to the problem of student training is found in the practice of our neighboring state, Colorado. The University of Colorado Assigned Counsel Program²⁵ sponsored by The University of Colorado School of Law operates an assigned counsel system for four contiguous counties aggregating 377,000 population. Working in cooperation with the judges in each county, the program director maintains an information panel of attorneys available and qualified for criminal appointments. From these centrally maintained records the director suggests qualified appointees to the trial court. Ability and experience of the attorneys are matched to the requirements of the particular case. Student interns are then assigned to assist appointed counsel as part of a course in trial practice. The director and the assistant director, both trial attorneys, are themselves appointed to represent defendants in both the federal and state courts. Senior law students are directly appointed as counsel in cases of misdemeanor.²⁶ It will be observed that this Colorado program is considerably broader than what we are asking for Wyoming.

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24. There were 510 felony cases filed in the Wyoming District Courts during the period. Two hundred and ninety-one defendants were not immediately able to post bond. Of these, 212 eventually pleaded guilty. Defendants unable to post bond spent a total of 10,873 days in jail awaiting disposition of their cases, an average of 37.6 days per defendant. From a statistical survey of the Criminal Dockets of the District Courts conducted during the summer of 1966 by student interns at the Wyoming College of Law.
25. The Colorado project like the Wyoming Defender Aid Program was established on a grant-in-aid from the National Defender Project of The National Legal Aid and Defender Association.
26. COLO. R. CRIM. P. COUNTY CTS. 144 (1965) allows the appointment of senior law students as counsel for indigents in misdemeanor cases. COLO. REV. STAT. ANN. § 12-1-19 (1963) provides that students of the University of Colorado Law School can represent the legal aid dispensary and its clients *as if licensed to practice*. (Emphasis added.)

The recommendation of the Wyoming Program's Advisory Council that the director be appointed as co-counsel does not contemplate appointment in every case filed in the district courts. It is hoped however that the number of appointments will be great enough to permit participation by each of the student interns in at least three cases during the school year. Coupled with the expected participation by County Prosecutors in the program, the workload of direct appointments will provide the students with a practical internship that will be meaningful to them and the Bar.

CONCLUSION

The Wyoming State Bar is co-sponsor with the College of Law in the creation and continuing efforts of the Wyoming Defender Aid Program. The support and participation of the Bar and its individual members has been to a considerable degree responsible for the success of the program to date. We at the College of Law believe that the direct appointment of the director and the active participation of the County Prosecutors will enable the program to continue as a permanent phase of law school education and a valuable adjunct of the State Bar. The practical experience afforded students and the direct and valuable assistance rendered to the Bar and the courts will prove important aids to the administration and reform of Criminal Law and Procedure in the State of Wyoming. There will then come a time when no man will appear before the bar of justice bearing a tin cup.

APPENDIX A

CASE LOAD JUNE 1, 1965 TO MAY 31, 1966

Number cases where program assistance furnished assigned counsel	18
Number cases where program assistance furnished prisoners seeking post-conviction relief, pardon or parole	68
Total cases handled, pending and investigated	<u>86</u>

TYPE OF CASES HANDLED

First degree murder	5
Armed robbery	1
Breaking and entering	1
Sex offenses	1
Mail fraud	1
Dyer Act	2
Forgery and fraudulent checks	1
Extradition	1
Applications for post-conviction relief, habeas corpus, etc.	5
Cases involving student investigation for post-conviction relief	<u>68</u>

DISPOSITION OF CASES

Dismissals obtained	2
Negotiated pleas to lesser offenses	3
Post-conviction relief granted	1
Post-conviction relief denied	2
Found guilty and affirmed on appeal	3
Found guilty and pending on appeal	3
Pending investigation for post-conviction relief	15
Pending trial or hearing	4
Investigated and no grounds found for post-conviction relief	<u>53</u>