

PREFACE

In 1931, nine black youths were accused of raping two white women on a train bound for Scottsboro, Alabama. At the time, rape was a capital crime in Alabama. In that state, as in the rest of the Deep South, black men charged with raping white women were sure to evoke a vicious response from the dominant, racist, white society. The so-called "Scottsboro Boys" were no exception.

In this highly charged atmosphere, the Scottsboro defendants, some of whom were in their early teens, were brought to trial before an all-white jury. Because Alabama did not provide legal assistance to indigent criminal defendants, they were also unrepresented by legal counsel. After separate one-day trials, all of the defendants were found guilty and sentenced to death.

In an appeal of their convictions, the Scottsboro defendants persuaded the United States Supreme Court to give substance to the sixth amendment's guarantee of assistance of counsel to defendants in criminal cases. The Court finally acknowledged that criminal defendants cannot reasonably be expected to exercise their legal and constitutional rights unless they have legal representation. In *Powell v. Alabama*,¹ the Court held that the states must provide free legal counsel to indigent defendants in capital cases.

Over fifty years later, this fundamental advance has been followed by decisions guaranteeing the provision of legal counsel to all defendants charged with felonies or serious misdemeanors. Despite the broadening of the right to legal assistance, however, it is apparent to most observers of our criminal justice system that we are still far from the *Powell* Court's vision of vigorous, effective representation for indigent criminal defendants. Burgeoning criminal caseloads create institutional pressures on public defenders and court-appointed counsel to sacrifice quality of representation for expeditious turnover of cases. Moreover, public defense administrators and judges have made little progress in monitoring and evaluating the competence of those entrusted with defending the indigent. In any event, inadequate appropriations for public defender programs and outdated hourly rates for court-appointed private attorneys often make zealous advocacy economically impossible.

Motivated by our concern about these problems, the *Review of Law & Social Change* sponsored a colloquium on March 23, 1985 to examine a variety of issues involving the effective assistance of counsel for the indigent criminal defendant. The editors chose to focus attention on five primary issues: ethical perspectives on the provision of counsel to the indigent criminal defendant; the practical and constitutional implications of the standard announced in *Strickland v. Washington*² for claims of ineffective assistance of

1. 287 U.S. 45 (1932).

2. 466 U.S. 668 (1984). The editors of the *Review of Law & Social Change* are aware that

counsel; the extent to which an indigency standard is being or should be used to circumscribe the availability of counsel to criminal defendants; the model of criminal defense most responsive to the limits and burdens of the criminal justice system; and the extent to which litigation is the most effective means of ensuring the indigent criminal defendant's right to effective assistance of counsel.

"Effective assistance of counsel" is meaningless unless appropriate standards can be defined. Thus, the Colloquium's first two panels examined the suitability of the current ethical rules and constitutional standards as a measure of effective assistance. Professor Martin Guggenheim points out in his paper that institutional defenders constantly face ethical dilemmas as a result of the conflict between zealous representation of an individual client and the political realities of working repeatedly with the same prosecutors and/or judges. Professors Charles Ogletree and Randy Hertz illustrate how this conflict is intensified for the institutional lawyer who, in the context of impact litigation, seeks to represent more than one individual.

The Supreme Court indicated in *Strickland* and *United States v. Cronin*,³ that a constitutional standard of effective assistance of counsel should be responsive to the purposes of the adversarial system. The Court, in both *Strickland* and *Cronin*, identified the adversarial system as being primarily concerned with truth finding and fairness. Thus, the sixth amendment guarantee of effective assistance of counsel could be fulfilled by insisting that the basic tenets of due process be respected. In his paper, Professor Gary Goodpaster disputes the Court's singular emphasis on due process as the benchmark for ineffective assistance claims. He also laments the harsh implications of the Court's failure to recognize an equal protection component in the sixth amendment guarantee of effective assistance of counsel, given the extreme financial and time constraints which many defense attorneys face. Panelists discuss some alternative rationales for the standards set forth in *Cronin* and *Strickland*, such as the judiciary's interest in finality, the Court's inability to relieve the funding problems that plague the criminal justice system, and a general anti-defendant bias in courts today.

Once we have defined effective assistance we must ask, to whom is it guaranteed? The definition of the indigent criminal defendant was the subject of the third panel. Indigency is usually determined by guidelines applied by courts, defender agencies, or neutral third parties. Jim Neuhard proposes that an indigency standard should be abolished, and suggests that all criminal defendants should be provided with free counsel, regardless of economic status. Donna Hall and Jonathan Gradess extensively document the inadequacies of the indigency eligibility standards in New York State, but unlike Neuhard, believe that political and economic obstacles make the provision of counsel to

Washington is the proper short form citation of *Strickland v. Washington*. However, the case has come to be known popularly as *Strickland*, and will be so cited in the Colloquium.

3. 466 U.S. 668 (1984).

all criminal defendants an impossibility. Therefore, they suggest that only by developing uniform statewide indigency standards can the system for determination of indigency be improved.

An examination of the standards for effective assistance of counsel and for indigency reveals that the promise of effective assistance of counsel for the indigent criminal defendant has not been fulfilled. Panel Four explores new models for provision of counsel to indigent defendants. Much of the debate over new models centers on the comparative merits of bench trials and plea bargaining as means for ensuring effective assistance of counsel. Professor Stephen Schulhofer's paper, entitled "Effective Assistance on the Assembly Line," details the bench trial system in Philadelphia, which has successfully replaced plea bargaining as the primary means of resolving criminal cases. Professor Albert Alschuler supports Schulhofer's argument on the grounds that a plea bargaining system makes it virtually impossible for a defendant to prove ineffective assistance of counsel under *Strickland* and that the nature of the plea bargaining system leads to a decrease in the quality of representation. On the other hand, Professor Malcolm Feeley concludes that in some instances plea bargaining can provide better adversarial justice than bench trials. Finally, Professors Milton Heumann, Richard Abel, and Michael McConville all believe that to choose a plea bargaining or bench trial model as *the* best model for providing effective assistance to the indigent criminal defendant is to create a false dichotomy.

Once we determine how to define and deliver effective assistance of counsel and how to identify indigent criminal defendants, one question remains: what is the best means for enforcing the constitutional right to effective assistance of counsel? Both Richard Wilson and Suzanne Mounts believe that the judiciary holds the key to guaranteed enforcement of the right to counsel. Professor Chester Mirsky argues that litigation is not a sufficiently successful means of enforcing the right to effective assistance of counsel, and emphasizes instead that the quality of representation should be improved through better law school training and should be ensured through a certification process by the criminal bar.

William Hellerstein concludes the Colloquium by observing that the key to providing effective assistance of counsel to the indigent criminal defendant lies not just in better models, increased funding, and fairer standards. In his view, society's commitment to the rights of the poor is equally critical.

The editors of the *Review* would like to thank the many individuals who made this Colloquium possible. Dean Norman Redlich's helpful suggestions and generous support were invaluable to the Colloquium's success, which was also ensured by the hard work and enthusiasm of its participants. Thanks are especially due to Professors James Jacobs, Michael McConville, and Chester Mirsky, who worked closely with the *Review* in the planning and preparation of the event. We also wish to recognize the efforts and dedication of Andrew Kantra, Victor Merced, and William Smith, the Colloquium's editors. Finally,

we would like to express our gratitude to Davida Wittman, the *Review's* Office Manager, whose expertise, good humor, and institutional memory lightened our load considerably.

THE EDITORS