ON BECOMING AND BEING A CRIMINAL DEFENSE ATTORNEY

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ABSTRACT

Steven B. Duke grew up in a tiny farming community in Arizona. In college, he experienced injustice during an encounter with the police and decided to attend law school. As a result of his success at the University of Arizona Law School, Duke was offered a clerkship with Justice William O. Douglas for the 1959-60 Supreme Court term.

As Duke describes in this article, working for Justice Douglas was a rewarding and demanding experience. Douglas, probably the most liberal Justice ever to serve on the Supreme Court, had a dazzling intellect and wrote many books on all manner of subjects. As the Justice's only law clerk, Duke worked long hours, assisting him on cases and with speeches, articles, and books. As Duke recounts, clerking for Douglas was thankless and stressful. Nevertheless, Duke regards this year as the most rewarding professional experience of his life.

Subsequently, Duke earned an LL.M. at Yale Law School and joined the faculty, earning tenure as a tax professor. During the 1960s, he changed course, becoming a criminal defense attorney while continuing to teach at Yale Law School. As Duke describes, his summer working as a public defender in Phoenix, Arizona, was pivotal to his decision to practice and teach criminal law. Ultimately, Duke believes, the injustice concentrated in criminal law is not immutable but is subject to correction at all levels of its promulgation and administration. And as his own story set out in this article demonstrates, even a shy, nonpolitical person who is trained in criminal litigation can effect great change. Ultimately, Duke

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concludes, a competent, committed criminal defense lawyer is a savior of freedom.

I. INTRODUCTION

I became a lawyer – a profession that none of my ancestors, parents, siblings, or even distant relatives had any connection with, a profession that I entered only because of an encounter I had with a magistrate when I was a senior in college.

Because I did well in law school, I had the opportunity to clerk for Justice William O. Douglas. As I discuss in this article, working for Justice Douglas was a rewarding and demanding experience. Douglas probably was the most liberal Justice ever to serve on the Supreme Court. He had a dazzling intellect and wrote many books on all manner of subjects. As the Justice's only law clerk, I worked long hours, assisting him on cases and with speeches, articles, and books. He was brusque in our interactions at work. Working for him was thankless and stressful.

Nevertheless, I regard my year (1959-1960) as Justice Douglas's law clerk as the most rewarding professional experience of my life. I learned a great deal about federal law and the Supreme Court and became more skilled and self-confident as an attorney as a result of the experience. After the clerkship and a year of graduate studies, I began to represent criminal defendants, mostly on a pro bono basis, which I continued to do for seven decades. I am sure that Justice Douglas influenced my decision to become a criminal defense attorney while I also was teaching students, writing articles and books, and performing other responsibilities as a professor.

I have written this article to trace my journey from Arizona, where I grew up and was educated, to Washington, D.C., and then New Haven, Connecticut. My experiences growing up instilled liberal values in me; this helped me understand and apply Justice Douglas's views when working for him. In certain ways, my father's way of interacting with me and my brothers resembled the way in which Justice Douglas dealt with me at work. As a result, it did not disturb me when he was curt or gruff with me in chambers.

I was born during the Great Depression and experienced World War II through the prisoners of war quartered in the Arizona village where I grew up. My success in law school provided me the opportunity to clerk for Justice Douglas during the era of the Warren

Court. At the risk of sounding cliched, that world has vanished. Change is inevitable, and we can debate whether the changes in law, society, and the Supreme Court since the last century have been for the better. I have written this article to illuminate some of these changes, to provide insight into Justice Douglas, and to describe how clerking for him influenced my decision to practice criminal law while leading the privileged life of an academic.

II. ROOTS

A. Life in the Great Depression

My grandparents were Arizona pioneers, arriving in the Arizona Territory more than a century ago. Both my parents were born in Mesa, in 1910 and 1911, before Arizona became a state. They met in high school and were married a few years later. Neither attended college. When I was seven or eight, my mother told me that we had Cherokee blood. Forty years later, when such ancestry had acquired cachet, I asked her for the details. By then, however, her memory had weakened and she could not recall.

I was born in 1934, the second son in the family. Stanley was two years older. When I was thirteen, our younger brother John was born. When I was two, we moved to Holbrook, Arizona, where my father worked in a U.S. Department of Agriculture Inspection Station on Route 66 between Holbrook and Winslow. The function of the station was to stop cars headed west toward California and determine if they were carrying any fruits or vegetables. If they were, they would be given the choice of turning around, eating the contraband, or leaving it at the station. The purpose of the operation was to prevent the introduction of worms or insects that would be harmful to crops in areas where they had not yet spread.

We changed houses several times during the five years we lived in Holbrook. The Holbrook house where we lived most of our time had a bathtub but, oddly, no indoor toilet. We had an outhouse. We did have a telephone. When we wanted to make a call, we picked up the receiver and turned a crank, which rang up the operator. Since we shared the line with other subscribers, the line often was occupied and one so inclined could listen in. If the line was free, when the operator came on, you would tell her the number you wanted, and she would ring it. We rarely used the telephone. I do not remember that we had

a radio. The Hensley family next door had a Victrola, a machine that played thick, twelve-inch records. The Victrola operated on a spring that you wound up by turning a crank. The music produced was therefore somewhat uneven, varying with the tension in the spring, but it was a wondrous device, nonetheless.

We were still in the Great Depression. Jobs were scarce. We would often find a strange man at our door, asking for food, which he always got.

B. World War II: Prisoners of War in Arizona

On December 8, 1941, Stanley and I were walking downtown and saw the headline on a newspaper, "Pearl Harbor Attacked by Japs." I had no idea where Pearl Harbor was and had only the vaguest idea of what a "Jap" was because most of the cheap toys we saw in stores were labeled "Made in Japan." We were now at war.

Shortly after war was declared, our dad took a job – essential to the war effort – as a locomotive fireman with the Santa Fe Railroad, which had a large rail center in Winslow, up Route 66 from Holbrook.

In 1943, Daddy took a job on a farm (also essential) in Roll, Arizona, a tiny, remote farming community in the Gila River valley, fifty miles east of Yuma, surrounded by purple mountains and the Sonora Desert. Roll got its name because the postmaster was named Jack Roll. During much of my youth in Roll, there was no store of any kind for twelve miles and the nearest grocery store was fifty miles away in Yuma, known to most Americans, if at all, as one of the hottest places in the nation. We had no telephone in Roll but we did have an indoor toilet. We also had a radio around which we would gather to hear FDR's fireside chats and "Your Hit Parade," which featured popular songs.

The farmers in Roll grew only two crops, alfalfa and Bermuda grass. Rather than cutting the crops for hay, the alfalfa and the grass were brought to maturity and their seed was harvested and sold. Bermuda grass was vital to our war effort in Africa because it grew very fast and expanded with "runners" that ran across the ground and took root here and there. It also had very deep roots. Bermuda grass was invaluable in establishing airplane landing strips in the African desert. It could convert a bed of sand into solid sod in a few months.

Wartime shortages forced the Roll farmers to use horses to pull the wagons that gathered up the cut, dried alfalfa and Bermuda grass

from the field and transported it to the stationary threshing machine that separated the seed from the straw. Each harvesting operation employed a dozen or more horses, divided into pairs or teams, each of which pulled a different wagon.

We used mowing machines attached to tractors to cut the alfalfa and the grass, but we used a horse-drawn dump rake to pile the mown hay into shocks for pickup.

The iron-wheeled wagons were loaded by a crew of half a dozen men, each of whom carried a pitchfork with which he would pick up a shock of hay and pitch it into the wagon, piling up a load ten or twelve feet high before the wagon was taken to the thresher. There, a team of men would crawl on top of the pile and slowly feed the hay into the thresher with their pitchforks. The loaders and the feeders were prisoners of war.

The first prisoners of war ("POWs") to arrive in Roll were Italians. The POW camp was set up on the school's softball field located across the street from our house. (It was summer, so no kids were in school.) Stanley and I got to know several of the prisoners, and we even visited them in their camp. They taught us a bit of Italian, like "Trechendo Trenta Trenta Mila Trechendo Trenta Tre" and "Chapoleen," which they said was "grasshopper" in Italian. They also showed us a trick. If you poke a straw in a spot behind the grasshopper's knee, the grasshopper's entire leg will drop off. I proudly showed that trick to my friends until I focused on the fact that it was a slow death penalty for the grasshopper.

The Italians laughed a lot and seemed happy and were very friendly. They were delivered to the farms in a large open panel truck. As they were being delivered, they often sang Italian opera songs like "Figaro."

General George Patton's African front army trained in the valley in the summer of 1943. The trainees would often conduct "sham battles," or "maneuvers," on our farm. Stanley and I would see a group of soldiers carrying rifles running through the field toward our house, with another group chasing them. The soldiers in the lead would run into our yard, hide behind our trees, point their rifles at the approaching soldiers, and pretend to shoot at them. One of the soldiers sometimes invited me to point his rifle at the approaching "enemy." I was thus able to play "war" with real soldiers. After a bit of play, the soldiers would ask for water. We would let them turn on the outdoor faucet and they would hold their mouths under it, gulp a belly full, let the

water flow over their faces, then fill their one-quart canteens. It was 110 to 120 degrees, and the soldiers were dressed in thick clothing and carried heavy gear. They were suffering. General Patton had decreed that they would have to survive in training on only one quart of water per day because he believed that their bodies could be conditioned to get by on much less water if it were rationed. I later learned that several soldiers died from the heat and dehydration. Experts opined that a soldier under the conditions they were operating under would perspire several gallons of water a day and no amount of training could materially change that. Our water faucets probably saved several soldiers' lives.

The Italians were replaced by German POWs in 1944. Much to my disappointment, the POW camp was moved from the schoolyard across the street from our house to an open space two miles away. The Germans were much more aloof and serious than the Italians.

When the POWs worked on the farms, each six-man crew was guarded by a soldier carrying a shotgun. That seemed to my nine-year-old mind to be not only offensive but unnecessary. Why would a POW, unable to speak English fluently, want to escape in the middle of the Arizona desert during wartime? The guards apparently shared my view since they often appeared to be napping while every POW they were guarding possessed a lethal pitchfork.

With one major exception, the POWs were treated well. Relationships between the farmers and the POWs were always cordial and often friendly. Many of the farmers welcomed the POWs into their homes and developed close relationships with them that continued in some cases after the war. My father traded with some POWs for cigarettes and other items the POWs could buy that he could not. I was the delivery boy in the transactions.

Given the opportunity it provided to interact with the soldiers and the POWs, Roll was a pleasant place for a boy to experience the war. The war itself inflicted few casualties on the residents of Roll who were in the armed services. There were probably no more than two hundred residents within a 200-square-mile area, and fewer than half a dozen were in the service. Hence, there were few occasions for mourning. But one calamity occurred that demonstrated the superficiality of the affections the farmers felt for the German POWs. It also brought home to me how war can bring out the beast in people.

The German POWs went "on strike." I don't remember what their demands were, presumably shorter workdays. They were

rounded up and put out in the sun, encircled by a rope fence. The object was to make them stand in the broiling sun without food or water until they agreed to end the strike. After several hours, one of the POWs ducked under the rope and headed for the camp several yards from the circle, declaring that he was going to have some water. A soldier ordered him to return to the circle. He continued walking. The soldier shot him dead.

There were only three telephones in the entire valley, but word of the shooting spread quickly. Myron Gilmore, the *Zanjero* – the farms' water distributor – came to our house and told my father. The farmers cleaned their guns and headed for the camp. I heard them talking about what they were going to do. They seemed gleeful, eager for an opportunity to "shoot a German." Some boasted of their prowess with guns. Were it not for the talk of guns and shooting, a casual observer might think that people in the valley were preparing for a celebration of some sort. The farmers would happily shoot the same people that they had been friendly with only a few days before. That was a lesson in human nature that I have reflected upon hundreds of times.

Thankfully, the strike ended with the death of the single prisoner. Normal relations appeared to resume but I never related to the prisoners in quite the same way. I feared retribution and was ashamed of what we had done to them.

C. Riding Horses, Camping, and High School

Apart from interacting with the soldiers and the POWs, what I most enjoyed as a youth in Roll was riding horses. Another favorite pastime was camping. Groups of boys would hike up into the foothills of the surrounding mountains, hopefully, locate a fresh water "tank" in one of the dormant "washes" – a wash was a path taken by flowing rainwater into a stream bed that was dry when it was not raining – and spend a day or two in the wild.

Rattlesnakes were plentiful in the foothills where we camped. It got cold at night and the snakes would be attracted to our warmth. To keep them from joining us in our sleeping bags, we were told that if we dug a trench two or three inches deep all around us, the snakes would not cross it. It worked.

We often would encounter herds of wild horses or donkeys, doubtless attracted, as we were, by the presence of scarce drinking

water. We never disturbed them but an older boy, Joe Rider, would occasionally capture a horse or a donkey and take it home and domesticate it. When I was eleven, I bought one of the young mustangs that Joe had captured. It cost me $10. Joe's sister Wilma threw in a saddle for another dollar.

Law enforcement in the valley consisted of Roy Kelland, the deputy sheriff who made his living from farming. If anybody needed to be arrested, Roy handled it. The only arrest that I ever heard of Roy making was when the Cub Scout leader spent $80 of the Cubs' money on himself. Roy beat him up and got him sent to prison for that. Roy wore a pistol and drove a car equipped with a police radio, a siren, a spotlight, and other police gadgetry. There was not enough violence for Roy. He had to make his own.

On many holidays, and often for no special reason, one of the farmers would have a dance party in his seed barn, a steel structure where seeds harvested from the farms would be processed and bagged. Most of the people in the valley, of all ages, would attend, other than the Southern Baptists who thought dancing was sinful. There was lots of food and booze. Invariably, near the end of the evening, Roy would get drunk and start a fistfight, always with a newcomer to the valley or a visitor. Roy rarely bothered to declare war. He usually would commence the fight with a surprise uppercut to the jaw. That often ended the fight as soon as it started.

Roy also owned a seed barn, and he hosted a party one night. Orville Rider, Joe's brother, had moved away from the area but returned for a visit. Around midnight, we heard loud voices just outside the barn and everyone gathered around. Roy was yelling at Orville, "Why don't you be a man? Are you yellow? Take off your hat and fight!"

Orville protested that he didn't want to fight. Roy insisted. Finally, Orville took off his hat and handed it to a bystander. Just then, Roy let fly his standard haymaker, hitting Orville on the side of the head. A vicious fight ensued. At one point, Orville threw Roy against the steel wall of the barn and dented a large section of the wall. Eventually, Orville subdued Roy, sat on him, and made him "give up." The barn with its dent is still there. Appomattox has its Courthouse; Roll has Roy's dent.

Those of us who went to high school had to ride a bus to Yuma, a l00-mile round trip, over a two-lane road that wound through the treacherous Telegraph Mountain range. We passed the time with

"horseplay" that annoyed Elmer, the bus driver who would yell at us to stop and occasionally even eject one of us from the bus. A favorite incitement was to play catch with a ball, a book, or a girl's purse. Elmer would sometimes bribe us to be good by stopping at Ligurta, the one spot along the way where we could buy soda and snacks. Occasionally, he would delay the trip home on Friday nights so we could attend the school football game. Since I had no car, I could not attend other social functions in Yuma, such as school dances. But since I didn't know how to dance, it was not a great deprivation.

D. Racial Minorities in the Valley

We had several Mexicans in the valley. Some were citizens, some were lawful temporary workers, and some were illegal migrants. One of the farmers also hired American Indians for his farm workers. But there were no Blacks in the valley.

When I was in high school, a Black family moved to Wellton, a tiny town about 12 miles from Roll. They enrolled their children in the public school over the protests of parents and other residents, including even some residents of Roll, who had no legal standing in Wellton. Mexicans and Indians attended the public schools without apparent discrimination or controversy, but the predominantly white community insisted that no Blacks could go to school with their kids, even though that would mean that they could not go to school at all. I overheard much discussion of this issue but I never heard anyone give a *reason* for that stand. No one ever suggested what harm would come to anyone if the Black children were permitted to enroll in the school. To ask such a question, I surmised, would be the equivalent of doubting the existence of God. The principal announced that all school-age children residing in the community were legally entitled to attend public school and it was his legal obligation to admit them. He was fired – a decision my father strongly supported. This was my first experience of racism that I consciously recognized for what it was.

From my infancy, I observed racist remarks, jokes, and nursery rhymes, but those verbalisms had no identifiable targets. I instinctively knew that racist jokes were wrong, but I thought them relatively harmless since they were unconnected to action and had no reference to anyone I actually knew. Joe Louis, the heavyweight boxing champion, was an idol of mine, since I read about him in Life Magazine and listened raptly on the radio to his rematch with Billy

Conn. Curiously, Louis was known to everyone as the "Brown Bomber." No one referred to African Americans as "Black" until Malcolm X popularized that term in the l960s. "Colored" was a common description, usually employed without derogatory intention, as in the National Association for the Advancement of Colored People. ("Colored People" is now considered offensive.) "Negro" was the preferred term, as "Black" now is.

There was no television within range of Roll and we could pick up only two or three radio stations. It was not until I was in high school that I actually met a Black person and discovered, as expected, that Blacks were ordinary people with the same feelings, needs, and basic values as others. That anyone would deny access to education to children because of their skin color was as incomprehensible to me then as it is now. I do not understand how a woman as kind and good as my mother could stand silently by and allow such things to happen without a word of protest. But then her parents had come from Georgia and were born shortly after the Civil War. My father's parents had been raised in Mississippi and retained the Civil War attitudes as well. I don't know why I escaped my parents' racism but it was a generational experience. Many of my friends had racist parents yet rejected their prejudices as I did – or believed or hoped I did.

E. My Father

Daddy was a bigot, but he also had what psychologists call an "oppositional neurosis" that sometimes functioned as an antidote to his bigotry. Whatever opinion another person expressed, my father could be counted on to disagree. Thus, while he would make racist and anti-Semitic remarks and even had "no use" for Republicans, if someone else made derogatory remarks about any of those groups, he likely would come to their defense. His propensity to disagree trumped all his other prejudices. Although he never went to college, he was an avid reader and was well-informed about public affairs and many other subjects, such as geology and history. After he retired from farming, he wrote several books and bought a weekly newspaper that he edited.

I don't recall my father ever saying to me or my brothers that we had done a good job or congratulating us on any of our achievements. His only comments on our work were negative ones. He was not, however, oblivious to achievement. We sometimes overheard him bragging to others about the accomplishments of his

boys. (Stanley graduated from Harvard Business School.) And when he bought a newspaper in California, he frequently bored his readers by writing editorials about how special his nonresident sons were. If he had been asked why he never praised his sons, he probably would have said that praise destroys character.

His acts of kindness to friends and strangers were commonplace. For example, motorists often would run out of gas and ask him to sell them some gas. He would always refuse but would give them the gas they needed, *gratis*.

His kindnesses to me were uncommon but memorable. The earliest occurred when I was eight or nine and we had only recently arrived in Roll. When money was needed to buy athletic equipment for the softball team or to send the Boy Scouts to a jamboree, the community would sometimes hold a "box social." The girls and women would cook a dinner and put it in a shoe or hat box, put their name in the box, and wrap it prettily. The boxes would then be auctioned off. No one was supposed to know whose box belonged to whom. The highest bidder would then open the box, discover its preparer's name, and the two would sit down and share the meal. All the boys my age were sweet on a classmate, Virginia "Poochy" Seale. Bidding on Poochy's box was intense, and all of it by grown men, since the boys were too shy, and too poor, to bid. Although the usual winning bid was around a dollar, my father ended up buying Poochy's box for $5, which was about a day's wages for him (and about $80 today). I never found out how he discovered my secret crush or which box was Poochy's, but I was proud and fond of my father that night.

Another occurred when I was about to go to college. Daddy had discouraged me from going since he said I could do a fifth year of high school for free, but I was adamant about following my brother to college. Daddy, who had by then bought the farm where he had worked, set aside about ten acres of his farm for me. I would farm it and the profits would be mine. I did very little extra work on that plot and made a profit of more than $2,000 ($23,000 today) which gave me a good start in college.

F. 4-H Club, Farming & A Visit to the Supreme Court

I was very active as a youth in 4-H activities and, as a high school student, in the Future Farmers of America ("FFA"). I raised chickens, rabbits, sheep, and beef animals. I fattened up the sheep and

the steers, trained them as show animals, and showed them and sold them at the county fair in the spring.

I also milked one or two cows every morning and night. Although winter afternoons in the valley would usually warm up to seventy degrees or more, the nights were frigid, sometimes falling below ten degrees. On such days, when I went out in the morning to milk and feed the animals, their water tanks would be covered with an inch or more of ice, which I would have to crack with a hammer before the animals could drink. I couldn't wear gloves when milking as they interfered with my grip on the cow's teats, but the teats themselves provided sufficient warmth to keep my hands from freezing.

After the excitement of the war years ended, work on the farm was tedious. Most of the horses were replaced by tractors and threshing crews were made up of Mexicans imported legally for that purpose. The Mexicans reminded me of the Italians, since both groups seemed inordinately happy and often sang while working in the fields. They also told jokes, most of which I could not understand, but which they would translate if I asked them to. Working with the Mexican harvesting crews was interesting, but they were only here for a few weeks in the summer and again in the fall. Most of my time in the summer was spent pulling up weeds by hand from ditch banks. The summer heat was exacerbated in the ditch banks by their moisture, bringing the humidity levels very high and making the work almost unbearable. Worse yet, the weeds, called "pigweeds" for their odor, bled on my hands and clothing, creating a nauseating stink. For my first summer's work, in 1945, my father paid me $4. Stanley got $11. The difference was never explained.

The 4-H and FFA activities were fun and educational, not just in what they taught us about farming, but also in the opportunities they provided to engage in public speaking and leadership activities. In high school, I was in the same year president of the county 4-H clubs and president of the Yuma High FFA chapter. Both positions required me to chair meetings and act as master of ceremonies at banquets for parents and supporters, a prospect that I found frightening. These organizations also financed the only travel that ever took me out of state. In 1950, when I was sixteen, I won expense-paid trips to national 4-H meetings in Chicago and Washington, D.C. In Washington, the Arizona delegation met with the Senate Majority Leader, Ernest McFarland, who was from Arizona, and with President Truman. Among the structures we visited was the magnificent Supreme Court,

sometimes referred to as the "Marble Palace." It never occurred to me that I would one day work at the Court and later would argue cases there. To a farm boy from Roll, it was just a pretty building.

G. College and Law School

After high school, I attended Arizona State ("ASU") in Tempe, where Stanley was enrolled and which was tuition-free. I joined his fraternity and proceeded to party for four years (1952-1956). To afford the partying, I held a variety of part-time jobs, including grinding dirt samples in a chemistry lab, handling greyhounds at a racetrack, giving away L&M cigarette samples to fellow students, washing dishes in the fraternity house, being a railroad brakeman in the summer, driving a laundry truck, and, biggest job of all, delivering daily newspapers to the residents of Paradise Valley, north of Scottsdale. This seven-day-a-week job required me to get up at 2:30 every morning (or stay up until then) and drive ninety miles. I would roll up the newspapers as I was driving, put rubber bands on them, and then pitch a paper in the general direction of the customer's driveway as I sped down the empty roadway. I wore out two cars on this job and acquired an affection for sleep that has lasted a lifetime.

After an academically mediocre but socially spectacular undergraduate career, I enrolled in law school at the University of Arizona in the fall of 1956. I had not intended to become a lawyer until I encountered the law as an accused in my senior year at ASU. I stopped in Tempe to pick up something from a store and parked my Studebaker next to the store on the left side of the street. When I came out, a policeman was putting a ticket on my window. I asked what it was for, and he said, "reckless driving." He explained that by parking on the left side of the street I had created a hazard for oncoming traffic, even though there was virtually no traffic on that street. I went to see the magistrate about the ticket and told him what had happened. He commiserated and agreed that I was not guilty of reckless driving but at most parking on the wrong side of the street. I asked him about a "trial." Would there be a jury? How long would it take? Would I need a lawyer? He said that the trial would be before him, without a jury.

"Well then," I said, "Let's have the trial right now."

"Unfortunately," the magistrate responded, "If we have a trial, I will have to find you guilty because I have to back up the policeman. I would also have to revoke your driver's license."

"Wow," I said, "Without a driver's license I will lose my jobs. What can I do?"

He advised me that if I pled guilty, he would fine me only $25 (about $300 today) and would allow me to keep my license. Like millions of other Americans, before and since, I caved and entered a "voluntary" plea of guilty to reckless driving.

I concluded from this experience that I was not safe from the clutches of the law, that the legal system was corrupt, and that only one trained in law would have a chance in such a system. I began asking my law school-bound friends what was involved in going to law school.

In my senior year, I also fell in love and got married after graduation. We set up housekeeping in Tucson, where I could go to law school and my wife Janet could teach elementary school. Nine months later, the first of our four children, Glenn, was born.

For the first time in my life, I really enjoyed studying. I found the law fascinating as I realized that it was relevant to all the injustices I had experienced or observed and all the new ones I was discovering every day. Although working several part-time jobs – including assistant law librarian, tax return preparer, payroll clerk, business school teacher – I was first in my class all three years, editor-in-chief of the law review, and placed first on the bar examination.

In my job as assistant librarian at the law school, I would encounter a famous man who used the library in brief visits during the winter. He was Supreme Court Justice William O. Douglas, who had started annual visits to Tucson during the Court's winter recess after recuperating there following a near-fatal horse-riding accident in the fall of 1949. I never spoke to the Justice during these visits but was awed by the energy and strength he exuded. He would walk into the library, right past my desk, and head for the U. S. Reports. He would then begin pulling out volumes and looking up cases. He worked fast and noisily threw the books around. I never saw him speak to anyone or acknowledge anyone's presence. There was something awesome about him that I think I would have felt even if I had not known who he was.

In my final year in law school, I was appointed as Justice Douglas's law clerk, an honor that had been bestowed on an Arizona law graduate only once before. I got the job after being interviewed by one of Douglas's former clerks, Stanley Sparrow, who practiced law in Oakland, California. I would not actually meet Justice Douglas

until I had been on the job for two months. I decided to drive from Tucson to Washington, D.C., to begin my clerkship in the summer of 1959. My mother, who had never been east, went with me. We took the southern route. As we drove through Arkansas, we saw motels with signs in neon: "Colored" or "Whites Only." We passed a drive-in movie theater that had a "white entrance" and a "colored entrance." We stopped at a gasoline station that had three restrooms: "men," "women," and "colored." The door to the "colored" restroom was loose from its hinges and hung open; it was filthy. Neither of us had ever seen anything like that. I asked my mother, "How could anyone not know that this is evil?" She agreed. I think her racial attitudes were forever changed by that experience.

III. THE SUPREME COURT

Justice William O. Douglas was probably the most liberal Justice on the Supreme Court. Although working for him was thankless and stressful, it greatly expanded my skills and self-confidence as well as being educational in the ways of the Court and the interstices of federal law. Since I was almost as liberal as Justice Douglas, my only major dissatisfaction with him as a Justice was the sloppiness of some of his opinions. He was capable of great eloquence, but he had little interest in some of the Court's business and did not spend much effort on most of his assigned opinions.

I was his only law clerk. Other Justices had two and Chief Justice Warren had four, but Douglas said he didn't think there was enough work for two clerks. After all, I only worked about seventy hours per week.

A. Petitions for Certiorari

The Court received about 4000 petitions for review of lower court decisions per year of which it agreed to hear about 100. About half of the petitions ("for a writ of certiorari") were written (mostly by hand) by prisoners seeking review of their criminal convictions. Many petitioners were under death sentences. Part of my job was to write a one-page memo describing the proceedings below, the petitioner's claims, and the arguments of the opposition brief, if any. I also would evaluate the merits of the petitioners' claims and would make a recommendation to the Justice about how he should vote on the

petition, e.g., "grant," "deny," or "dismiss." I had no illusions that Justice Douglas had any interest in how I thought he should vote, but in making a recommendation I was distilling from what I knew about his and the Court's previous decisions, and his previous votes on petitions for review, what I thought he would want to do with each petition. My "recommendation" of a "grant" served merely to flag for him a petition that I thought he would want to give serious consideration.

Douglas was much more inclined than most of his brethren to vote to review a lower court decision. In fact, he protested in opinions he wrote, in speeches he gave, and in articles he published that the Court was not nearly as busy as some of his colleagues, like Justice Felix Frankfurter, claimed, and that the Court ought to be deciding at least twice as many cases as the hundred or so it reviewed every year.

A noteworthy case that the Supreme Court declined to review when I was there was the conviction and death sentence of Caryl Chessman, a bestselling author, sentenced to death for a sexual assault.[1] Although he was never even accused of killing anyone, Chessman was executed on May 2, 1960, while I was clerking for Justice Douglas, who had stayed Chessman's execution on previous occasions. As an opponent of the death penalty, I was sickened that day by Chessman's death. (In 1972, the Court declared the death penalty unconstitutional in three cases, establishing a moratorium on capital punishment for four years,[2] but this was more than a decade too late for Caryl Chessman).

B. Working on Opinions

Another part of my job was to proofread Douglas's draft opinions and suggest any corrections, stylistic changes, or additions. He would first write a draft – sometimes, he wrote the draft opinion as he sat on the bench during oral argument – and then send it downstairs to the printer. After a printed version came back, I would check the

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[1] Alan Bisbort, *The Curious Case of Caryl Chessman,* GADFLY ONLINE, http://www.gadflyonline.com/10-29-01/ftr-caryl-chessman.html). A federal judge granted a stay on the day of Chessman's execution but it was too late. *Id.* ("The judge told the warden to grant a stay of execution. The warden said, 'I'm sorry, it's too late. The pellets have just been dropped.'").

[2] Furman v. Georgia, 408 U.S. 238, 239-40 (1972). Subsequently, the Court upheld revised death penalty statutes in 1976. *See* Gregg v. Georgia, 428 U.S. 153, 186-87 (1976).

facts and the law against the draft. When I was ready with my suggestions, each of which I would type up on separate slips of paper, I would tell one of his secretaries, Nan Burgess or Fay Aull, to let him know I was ready to meet on the opinion. When he was ready, he would hit a button on his desk that would set off a buzzer, summoning me to his chambers. I would sit across the desk from him and hand him my first suggestion, telling him, "I think you should delete lines five through seven on page one and substitute this," and hand him the piece of paper on which was written the proposed change. If he agreed with my suggestion, he would draw lines through his draft and staple my suggestion to the draft. We then would move to the next suggestion. If he did not like that one, he would usually ask me why I made that suggestion. I would have a few seconds to justify it. He would then either staple it on the draft or pitch it into his outbox, usually without a word.

Early in the term, Douglas was assigned the Court's opinion in a case where the police had stopped a suspicious car and searched it, finding stolen property. The Court held that the search was unreasonable and the property was inadmissible as evidence. One of my scraps of paper in that case read, "If the search is to be justified as an incident to a warrantless arrest, the arrest itself must be based on probable cause." Douglas said to me, "That's hornbook law," meaning undisputed and too well known to warrant mentioning. I replied that I could not find it in any case or any treatise. He stapled it on the opinion. That opinion then became the landmark decision establishing that the Fourth Amendment requires probable cause for an arrest.[3] The opinion was reproduced in many casebooks used in law school classes. It *became* hornbook law.

There were only two situations in which I would have an opportunity to write more than a few sentences of an opinion. One was when a criminal defendant would petition Justice Douglas to allow him to be released from jail on bail, after lower courts had refused. As "Circuit Justice" for the United States Court of Appeals for the Ninth Circuit (the federal court of appeals for the western States), Douglas had authority to order a release on bail if he thought the lower courts had been wrong in refusing it or in setting release terms that were too

[3] Henry v. United States, 361 U.S. 98, 104 (1959). Justice Douglas's opinion for the Court states: "And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause." *Id.* at 102.

demanding. When he decided to grant bail, he would let me draft the opinion explaining his order. It would usually be only two or three paragraphs, but it was an opportunity to try to mimic the boss. I would write essentially what I thought he would say if he were writing the opinion. I got pretty good at it.

The other occasion when I had an opportunity to write was when Douglas "lost his Court" and asked me to convert what he had written as a majority opinion into a dissenting opinion. At the weekly conference following oral argument, the Justices vote on whether they will reverse or affirm the cases argued that week. These votes are preliminary and can be changed any time before the Court actually announces its decision. One of the Justices who votes with the majority at the conference will be assigned by the Chief Justice to write the majority opinion. (If the Chief Justice is voting with the minority, the most senior justice who votes with the majority will assign the opinion.) A Justice "loses his Court" when he has been assigned to write the opinion of the Court and circulates his draft to the rest of the Court but cannot get four other Justices to sign on to it. Some of his original majority may join a concurring opinion or even a dissenting opinion that has been circulated after the draft "majority" opinion. (Any justice is free to write a concurring or dissenting opinion in any case.) If a different opinion collects a majority, it will become the opinion of the Court. The Justice who had been assigned the opinion for the Court may convert his draft to a concurrence or may just withdraw it and join the now-majority opinion. If a majority of the Justices end up agreeing with a draft that has been circulated as a dissenting opinion, the author of what had been a dissenting opinion will change it to an opinion "of the Court" and the original majority draft will be converted to a dissent. This happened to one of Douglas's majority draft opinions and, as a result, he asked me to convert his draft majority into a dissent, doubtless assuming that I would alter only a few sentences here and there. Instead, I went to the library and did original research on the issue and wrote an entirely new dissenting opinion, using none of Douglas's draft. When I showed it to him, he said, "It's a little discursive but I guess it will do." (That was the closest thing to a compliment that I received from him all year.) He made a few changes, sent it to the printer and circulated it. In my proudest moment, the Justice got his Court back! His response: "Turn

this back into a majority opinion." Which I did.[4] Neither of us ever mentioned that case again.

I also spent about a third of my time with Justice Douglas working on books, articles, or speeches that he was writing. I would often research specific assignments. Otherwise, my contributions were similar to my contributions to his opinions. Occasionally, I would write two or three pages that he would adopt with few changes.

C. Justice Douglas's Prodigious Writings

Justice Douglas did not use a typewriter. He wrote everything in longhand at shorthand speed. His output was such that he needed two secretaries to type it up.

In addition to his opinions, speeches, and articles, he wrote many book reviews. I once observed him receive two books in the mail, which he took home that evening. The next morning, he returned with two reviews he had written of the books.

He also wrote and published more than twenty books. They included accounts of his world travels during the summer, his hikes in the wilderness and the need to preserve it, defenses of civil liberties, and several autobiographies, including one on his Court years. Many were bestsellers.

Several books by others have been devoted to Douglas's work on the Court.[5] His opinions were not favorites of scholars. Many were sloppy. Even the famous ones were often cryptic, leaving out steps in their reasoning or failing to mention competing concerns. One of the Court's most important decisions in criminal procedure, *Brady v. Maryland*,[6] is often criticized for its lack of detail or elaboration. No one questions, however, the basic holding of the case which fundamentally transformed criminal procedure. The truly significant fact is that no Justice in the history of the Court wrote more landmark, epochal decisions in criminal law and procedure than William O. Douglas.

Douglas somehow even found time and energy to engage in public protests. His most famous one was a highly publicized hike on

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[4] *See* FTC v. Henry Broch & Co., 363 U.S. 166 (1960).

[5] I recommend STEPHEN A. WASBY, HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS (1990).

[6] 373 U.S. 83, 90 (1963). *See also* Steven B. Duke, *Justice Douglas and the Criminal Law*, *in* WASBY, *supra* note 5, at 133-43.

the C&O Canal in 1954 to protest government plans to replace it with a highway. For several decades thereafter, Douglas and other environmentalists and friends (like me) would camp out and hike a section of the 185-mile canal every year. In 1971, the Canal became a public park.

Justice William O. Douglas and others hiking the C&O Canal in 1954. Photograph courtesy of the National Park Service.

Justice Douglas's published output was equal in quantity to that of half a dozen very talented, productive scholars and superior in quality to their output as well. He was a truly extraordinary intellect and public servant. It was my life's greatest privilege to have worked with him.

D. Justice Douglas in Chambers & Outside of Work

Douglas could be very warm and sociable when away from the Court. If he took his clerk on a hike or to lunch, he would be relaxed and talkative. But when you entered the Marble Palace, it was as if a curtain had come down and he was a different person.

When we were at work, Douglas treated me like a machine. He called me "Duke" and engaged in no small talk, not even good morning or hello. When he left for the evening, he would not even tell me he was leaving. Like my father before him, Douglas never complimented me for a job well done. Not only had I been prepared for this treatment by my father, I had been warned that I would be so treated.

On Saturdays, Douglas would often ask me to have lunch with him at the Methodist Club nearby. He would tell me stories about the Court in earlier times (he had been appointed in 1939). Sometimes, he would talk about FDR or current political, military, or environmental problems. If he ever asked me a personal question or my opinion on anything, I do not recall it.

While still in law school and informed that I had been hired as Douglas's law clerk, I met the only other University of Arizona graduate who had ever clerked at the Court, and who had clerked for Douglas, Charles "Chuck" Ares.[7] He forewarned me that I should expect to be "fired" early in the term. "Douglas always fires his clerk," Chuck said. "Just ignore it and come back to work the next day as if nothing happened." Presumably, the firing was Douglas's method of establishing a desired relationship with his clerk. It tended to discourage not only slacking off but disrespectful arguments and other forms of friction and time wasting. Early in the term, Douglas had asked me to research some issue of antitrust law and I revealed that I knew nothing about the subject. I had never taken a course in it. Dismissing me from his chambers with a wave of his hand, he said, "Duke, you better go back to school and learn some law." I was crushed and wondered if I was *really* about to be fired. By Christmas, when Justice Dougla gave me a bottle of scotch, I suspected that he must find something acceptable about my work. When, in January, he recommended me to become dean of a law school, I concluded that his remark about my going back to law school had been a relatively benign substitute for my ritual "firing."

Douglas would often invite me to accompany him to Redskins football games. I knew little about football and we rarely talked during the game, but I felt very privileged to be there. We also went on hikes on the C&O Canal and he invited me and my wife to a few dinner parties, where he and his wife Mercedes were charming hosts. He would also give me tickets to various Washington events to which he had been invited but chose not to go. One such event was President Dwight Eisenhower's January 7, 1960, State of the Union Address. Douglas gave me a ticket admitting me to the gallery where Mamie Eisenhower and other family members and dignitaries watched the proceedings. When I got there, I could not find a seat in the gallery, so I walked down to the front and sat on the stairs near the railing,

[7] For more on Charles Ares, see *Charles E. Ares*, LEGAL LEGACY, https://www.legallegacy.org/13-attorneys/28-charles-e-ares.

where I remained during the proceedings. A few minutes after I sat down, I glanced to my right and there, less than two feet from me, was the first lady. The Washington Post carried a picture of Mamie and me the next day.

Before joining Roosevelt's New Deal, Douglas had been a professor at Yale Law School. One of his good friends, Fred Rodell, was presently teaching at Yale, and I met Fred during my clerkship when he brought his students to observe the Court at work. I also met Charles Reich, a Douglas hiking buddy, and graduate of Yale Law, who practiced law in Washington and was on his way to New Haven to join the Yale Faculty. I decided that I would like to spend a year at Yale before heading west to practice law. I asked Douglas if he would recommend me. He said that I should go to Columbia instead and he asked Columbia to personally recruit me, which they did. Yale, he said, was too conservative, too "Harvardized." I had a very favorable impression of Yale Law School not only from Douglas's friends but from the other law clerks who had attended there, however, and I persisted in going to Yale. When I so informed Douglas, he reluctantly agreed to recommend me to Yale.

I later learned why Douglas no longer had any affection for Yale. First and foremost, Yale had refused to renew the contract of an assistant professor, Vern Countryman, because some alumnus of the law school had asserted that Countryman was a Communist. Countryman had been a law clerk to Justice Douglas and the assertions of his Communism were unfounded and false. The law faculty knew that Countryman was an outstanding scholar and teacher and voted him tenure but the law school and university administrations bowed to outside pressure and overruled the faculty.[8] Secondly, the Law School had recently hired two graduates of the Harvard Law School, Harry Wellington and Alexander Bickel, who had been Justice Frankfurter's clerks. Douglas and Frankfurter hated each other.

IV. DUKE AT YALE

In my graduate year at Yale Law School, I studied mostly tax

[8] Countryman later became dean of New Mexico Law School and then a full professor at Harvard Law School. *See* Nick Ravo, *Vern Countryman, 81, Professor and Commercial Law Expert*, N.Y TIMES (May 17, 1999), https://www.nytimes.com/1999/05/17/us/vern-countryman-81-professor-and-commercial-law-expert.html.

and international law. I encountered the best teacher I had ever experienced, and the worst. The best was Boris Bittker, who taught taxation and was also my advisor on a research project. Bittker taught tax in the auditorium to about l50 students. Within two weeks of the beginning of the term, he knew the names of many of the students and seemingly even knew what they were going to say before he called on them. He would shoot questions to various students like an orchestra conductor, eliciting one absurd response after another, leaving us with the sense that there could simply be no correct answer and that every case we were reading was ludicrous and indefensible, and he would move on.

The worst teacher was a famous political scientist, Harold Lasswell (coiner of the concept "Garrison State"[9]) who co-taught with Myres McDougal a course called, "Law, Science and Policy." Lasswell made no sense whatever and said, "thee uh" after every word or two. He and McDougal, a wonderful man and advisor to graduate students, wrote reams of material that we were required to read that was loaded with incomprehensible jargon. I spent most of my graduate year trying to understand the meaning of what they were saying.

Another experience proved to be sufficient justification alone for spending a year at Yale. I was a teaching assistant to Fred Rodell, who taught a small group in Constitutional law. Fred was an iconoclast and a brilliant writer who had published a famous article entitled Goodbye to Law Reviews in which he said, "There are two things wrong with most writing in law reviews. One is its style. The other is its content."[10] Fred had also written a book called, Woe Unto You, Lawyers!, in which he had lambasted the legal profession as worse than worthless, and another, Nine Men, in which he argued that the Justices decide cases based on their personal values and not on abstract principles.[11] Fred was a "character" even then, when Yale Law School put a premium on faculty and students who were out of the mainstream. For a while, he wore a beret inside of which was a coiled snake. It was more than entertaining to work with Fred.

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[9] Harold Lasswell, *The Garrison State*, 46 AM. J. OF SOCIO. 455, 455 (1941). "The purpose of this article," Laswell wrote, "is to consider the possibility that we are moving toward a world of 'garrison states' – a world in which the specialists on violence are the most powerful group in society." *Id.*

[10] Fred Rodell, *Goodbye to Law Reviews,* 23 VA. L. REV. 38, 38 (1936).

[11] *See* FRED RODELL, WOE UNTO YOU, LAWYERS! (1939); NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790-1955 (1955).

The truly invaluable experience was to be one of Fred's students. He also taught a seminar called "Law and Public Opinion," which was about how to write legal articles or stories for nonlawyers. A dozen or so students would write short papers every week and read them aloud after which the other students and Fred would critique the style of the paper. Our first assignment was to rewrite for a hypothetical audience of sixteen-year-old high school students something we had written about law. I had drafted an article for Justice Douglas about discovery in civil cases and I rewrote it for teenagers. When my turn came, I read a page or two and stopped. Fred asked the class for comments. Silence. He asked again. More silence. He said, "All right, Steve, I guess I will have to do it. It was lousy! It was loaded with clichés and jargon and . . . ." I was so shocked I didn't hear the rest of his critique. I had been Editor-In-Chief of the Arizona Law Review and had written things for Douglas that he found quite acceptable, including that discovery piece. How could I write something that was "lousy?" Within a few weeks, however, it became clear to me that Fred had been kind and that while I could write clearly, I had no sense of style. Douglas had been pleased with my writing because I had learned to mimic his style rather than developing a style of my own. That class was the most valuable experience I ever had as a student.

My other son, Warren (named after Chief Justice Earl Warren) was born during my graduate year at Yale. I was planning to return to Phoenix to practice law. But most of my fellow graduate students were law teachers looking for a better teaching job. Professor Quintin Johnstone, an adviser to the graduate students, encouraged me to apply for teaching jobs and to attend, with my fellow students, a law teacher's convention where interviews would be taking place. Why not? I thought. One interview stands out. I went to a hotel room to be interviewed by Kansas Law School. A few minutes into the interview, they offered me the job, paying $7,000 per year. I said that I would consider it but had several interviews yet to complete. They told me that if I left the room without saying yes, the offer would be withdrawn. I wondered if they also sold used cars in their spare time. I declined.

Back at Yale, after receiving several other offers, I was interviewed by the Yale faculty, at the suggestion of Charles Reich and perhaps Boris Bittker, for whom I had written a paper. The Law School Dean, Eugene Rostow, whose course in antitrust I was taking,

wrote to Douglas and asked him, among other things, if "Duke has fire in his belly." Despite his misgivings about Yale, Douglas wrote a very flattering response.[12] Yale too offered me a faculty position which I felt I must take, if only for a few years. It was 1961, I was only 26, and I had a lifetime in which to practice law.

During my first years at Yale, I taught courses in a number of subjects, including tax, and wrote articles on tax law.[13] I also taught a "small group" of first-term students in Civil Procedure. There were about seventeen students in the group. The purpose of the small group is to help integrate the students socially, to teach legal research and writing, and to encourage free thinking and free discussion without being graded. That was a wonderful experience because I got to know many students rather well and interacted with them on many levels. My group even started a small group football league where each small group (there were a dozen or so) would be invited to play touch football with "The Dukes." Everyone was encouraged to play: men, women, and teachers as well.

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[12] *See* MELVIN I. UROFSKY, THE DOUGLAS LETTERS 51 (1987) (quoting Justice Douglas's letter of recommendation for Duke, saying that "[h]is fires burn brightly" and that "[h]e has a real dedication to the law as an instrument of justice, as an expression of the democratic idea, as a reflection of the dignity and worth of the individual").

[13] *See* Steven Duke, *Foreign Authors, Inventors, and the Income Tax*, 72 Yale L.J. 1093 (1963); *see also* Steven Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 Yale L.J. 1 (1966).

Photograph of Professor Steven B. Duke courtesy of the 1963 Yale Law School yearbook.

V. BERKELEY BECKONS

After spending four years at Yale Law School, I still regarded myself as a Westerner. In 1965, I decided to spend a year as a visiting professor at the University of California at Berkeley, with an eye to possibly remaining there. Berkeley was transformational for me. I had been raised to believe that only "winos" – drunks – drank wine. I discovered that almost every adult in California did and I enthusiastically became one of them. Folk singers were everywhere. Berkeley smelled of Eucalyptus and the campus was gorgeous. Strangers were friendly. People were challenging almost every tenet and practice they could identify. Many women apparently decided that

it was liberating to go braless, topless, or even naked in public. Thousands of youngsters were experimenting with drugs. Students and others protested almost daily against the Vietnam War and virtually everything else the government was doing or sponsoring. President Lyndon Johnson's "War on Poverty" and his "Great Society" reflected a burgeoning egalitarian consensus in America like none the nation had experienced. Almost every week, it seemed, Chief Justice Warren's Supreme Court would announce a decision expanding the rights of Blacks, the poor, or criminal defendants. There was a growing consensus that injustice was pervasive but that it soon would be remedied.

I became almost ashamed to be teaching and writing about taxation. It had been fun and ego-nourishing to show students how the tax consequences of a corporate transaction could be drastically altered merely by attaching different labels to it: was it a "sale or exchange," a "merger," a "stock for stock exchange," or a "contribution to capital?" Knowing how to manipulate these terms could greatly enhance the market value of the lawyers who possessed the knowledge, and their clients could avoid costly taxes if correctly advised, but appreciating the social value of such knowledge was becoming more and more elusive to me. I couldn't generate any passion about corporate income tax because economists could not agree on who actually bears the tax on corporations: the corporations themselves, their shareholders, or their customers. For all anyone knew, a tax on a corporation might even hurt the poor.

All around me, every day, I saw people who needed help, racial discrimination, poverty, and injustice to be attacked. I shared the view, more common then than now, that much criminal behavior is environmentally caused: by poverty, broken families, violence, drugs and alcohol, poor education, and racial discrimination. Criminals were almost as victimized by society as were their victims. I decided that I would sharply change direction and focus on criminal law rather than taxation. But where?

There was a reactionary movement in California, led by a movie actor, Ronald Reagan. He was running for Governor against the visionary Pat Brown and promising to end the radical tumult on California's campuses and elsewhere. I feared that he would be elected and would keep his promises. (Reagan was elected Governor but became a moderate and left the campuses alone.) I decided to return to Yale, where I knew my change of direction would be tolerated.

VI. PUBLIC DEFENDER

To facilitate my transformation from tax lawyer to criminal lawyer – I had never even taken a course in criminal procedure – I arranged to spend the summer of 1966 as a deputy public defender in Phoenix, a position I arranged through a fraternity brother who had remained in Arizona and had "connections."

The summer was an invaluable experience. I learned more about the legal process that summer than I had learned clerking for Justice Douglas. I had never tried a case nor even seen a trial. But the workload of the office was heavy and they needed me to carry my weight. I handled about forty preliminary hearings that summer. In preliminary hearings, the State brings the recently arrested defendant into Justice of Peace court (The Justices of the Peace, or "JPs," were rarely lawyers but they presided over all preliminary hearings) and puts on a few witnesses to establish "probable cause" that the defendant is guilty. He is then "bound over" for trial by the JP or, in rare cases, released because probable cause is not established. Defense counsel views the preliminary hearing as essentially a "discovery" opportunity – a chance to get the prosecution witnesses committed to a story before they have been "prepped" by the prosecutors. In those forty or so preliminary hearings, I learned about how to ask witnesses a question, how to object, how to argue an evidentiary or other legal issue, and other basic trial procedures. This more or less prepared me for the four jury trials I was privileged to conduct that summer. Here are some of the highlights of that experience.

A. The Dictionary Saves a Life

In my very first case, I was assigned a preliminary hearing for an elderly man accused of child molestation. At the hearing, a cherubic looking fourteen-year-old girl testified about playing catch over the fence with the accused, her next-door neighbor. They stood close to the wire fence and tossed a rubber ball over the fence. In the course of the game, the defendant reached through the fence and touched the girl's breast in a manner that did not seem to her to be accidental. She quietly ended the game and went inside. Although her mother was in the kitchen as the girl entered, she said nothing about the matter to her mother for more than an hour.

The charge carried a mandatory life sentence. The offense was

"touching the private parts" of a child under the age of sixteen. I argued to the JP that a breast is not a "private part those parts are located much lower on the body." (An alternative argument was that "touching" involves skin on skin.) The JP was unimpressed and bound the accused over for trial. I went to the library and found a dictionary, which agreed with me about "private parts." I took an appeal the next day, citing the dictionary, and the court agreed. The charge was dismissed. Lawyering is a breeze. I am Perry Mason for a day.

B. Three Lookalikes

In my first jury trial, three related Black women – they were sisters or cousins – went into a variety store in Chandler, Arizona, and aroused the suspicions of the white clerk. She called the police. When the Latino cop arrived, he asked them for identification and they refused, saying it was none of his business. He said that if they won't show their identification, he will have to arrest them. He reached for one of them. The other two then attacked him, throwing everything in the store at him that was within reach (lamps, hula hoops, toys, games). They knocked him down and clubbed him with a brass lamp base. One even tried to get his gun out of his holster but did not succeed. Help was summoned and the girls were arrested.

I learned that Nada Fay, the girl he had reached for, was seven months pregnant. The other two girls claimed they were coming to her defense because of her pregnancy and their fear that she would have a miscarriage if she went to jail. The girls remained in jail because they could not make $1,000 bail. The day before their trial, I told them to make sure that their mother brought them dresses for court and they assured me that it was all arranged. The next day, however, to my dismay, they were brought to court in their jail uniforms.

As a result of the facts that they were (1) related, (2) African American, and (3) all dressed identically, none of the eyewitnesses could point out which two of the girls were hitting the cop and which (the pregnant one) was just standing there when the cop reached for her. I got the judge to instruct the jury that there is no duty to answer a policeman's questions, even about one's identity,[14] and that they were entitled to resist an unlawful arrest. The State was left with the

[14] In 2004, a bare majority of the Supreme Court repudiated earlier dicta and held that a person can be required to identify himself to a policeman. Hiibel v. Sixth Jud. Dist. Ct., 542 U.S. 177 (2004).

claim that whichever girl used excessive force was guilty of a crime. But one of the girls had done nothing and witnesses could not identify which of them had assaulted the cop. The girls were acquitted.

C. The Missing One-Armed Man

Eddy Halley[15] was a tall black man, about forty, with a beautiful smile and a warm glow about him. I liked him instantly. I was at the jail to interview him about his arrest for armed robbery of a small grocery store in East Phoenix, owned by a Chinese American family. Eddy had been identified by Albert, a teenage boy who was working in the store when the robbery occurred.

Eddy insisted he had nothing to do with the robbery. "In fact," he told me, "I was in Somerton, 200 miles away," when the robbery supposedly occurred. Eddy told me that he had been doing farm work in Somerton and hanging out with a one-armed man named "Louie," also a farm worker. He showed me a document bearing what could have been the same date – it's unclear on the paper – and said it was a receipt for clothing that he pawned at a dry goods store in Somerton that day. He told me the name of the store and said people there will remember him.

I set out for Somerton, to find Louie, the one-armed man, and to check out the dry goods store for other alibi witnesses. I couldn't find anyone in Somerton who had ever heard of or saw a one-armed man, other than the one the "Fugitive" was looking for on the popular television program, and no one had seen him either.

The owner of the dry goods store remembered Eddy. "He used to come in here a lot and steal things," she said. No, she can't recall him pawning any clothing, and she doesn't recognize the "receipt" as anything she might have given anybody.

When I returned to Phoenix, my colleagues say that the prosecutors had heard about my trip to look for the one-armed man and got a good laugh out of it. They hadn't the slightest doubt about Eddy's guilt.

I went to interview the Chinese owner of the robbed grocery story and was prepared to show him some photographs. He refused to look at them, saying, "I don't see anybody. No. I can't see good. No use looking at pictures. Didn't see anybody." He covered his eyes during

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[15] Eddy Halley is a pseudonym. His real name has not been used to protect the attorney-client privilege.

most of this protest. Obviously, he was not going to be a problem for the defense.

I went to see Albert, who lived in the neighborhood. I hoped that he would be uncertain of his identification or, at the very least, would not have had an adequate opportunity to observe what occurred and can be impeached. I began to ask him some questions about the robber: How big was he? How old? What race?

Albert said, "It was Eddy."

"What do you mean?" I ask.

"Eddy lives next door,: Albert replied, "He used to come in the store almost every day before he robbed us."

"Are you absolutely certain it was Eddy?" I asked.

"Absolutely," Albert answered. "But can I ask you a question? I don't want to testify. Do I have to?" I wanted to say no. I wanted to tell him he can refuse and get away with it if he takes the Fifth Amendment. But I said what I am obliged to say, "Yes, you do. You will be subpoenaed and your duty will be to tell what you know and to testify truthfully." I then left, discouraged by the results of my investigation and perplexed about how I can defend the case.

Three days later, the trial started. Mr. Song, the owner, was called to the stand and testified that he had been robbed at gunpoint. He then said he didn't see the robber, repeating what he told me.

Albert then took the stand and described the robbery. He was asked if he saw the robber in the courtroom. "No," he responded, "I don't see him." The prosecutor pointed to Eddy and said, "Didn't you point this man out to me just a few minutes ago?" Albert answered, "I don't recall." The prosecutor tried several more times to get Albert to identify Eddy, then gave up.

Afraid that the prosecutor's references to Albert's earlier identifications of the defendant might be enough to take the case to the jury, I boldly asked Eddy to stand up and loudly said to Albert, "Take a good look at this man. Was he or was he not the robber?" Albert replied, "I don't think so." Obviously, both Albert and Mr. Song had a less benign view of Eddy than I did.

The judge reluctantly directed a verdict of not guilty. Eddy was ecstatic and more than impressed. "Man, you're good" he said to me. "F. Lee Bailey got nothing on you, man. When I get in trouble again, I'll call you."

D. The Wrong Charge Frees the Guilty

Edward Tellez was stopped by the Phoenix police as the car he was driving weaved dangerously from one lane to the other. Tellez was on drugs. The policeman took him and his car into custody. A routine search of the car revealed some expensive medical equipment in the trunk. A medical supply company had reported it stolen the same day.

Tellez was charged in a two-count complaint with (1) receiving stolen property and (2) stealing the property. After hearing the basic facts from the arresting officer and the owner of the equipment, the JP determined that because there was no evidence that Tellez actually stole the equipment – someone else could have stolen it and Tellez could have bought it from the thief – the only charge on which there was probable cause was receiving stolen property. The JP dismissed the theft charge.

A few months later, I tried the case to the jury. The same proof was offered. Tellez wanted to get on the stand and testify that he lent his car to a stranger a few hours before his arrest and had no idea how the stolen equipment got in his car. He had told me that story in interviews and I had concluded he was lying. I refused to put him on the stand, not only because he was an obvious liar, but also because he had a prior record of armed robbery that would become known to the jury if – and only if – he testified. We put on no evidence.

I argued to the jury that because there was not a sprig of evidence that anyone *other* than Tellez stole the goods, they had to acquit him. An essential element of receiving stolen property is that someone *other than the defendant* steals the property and then delivers it to the defendant who knows it was stolen. The prosecution had the burden of proving *every* element beyond a reasonable doubt, I argued. The judge instructed the jury accordingly.

The jury wasn't impressed and found the defendant guilty after twenty minutes of deliberation. Tellez was sentenced to fifteen years in prison.

He then immediately filed a petition for a writ of habeas corpus, complaining that I had rendered ineffective assistance of counsel in not permitting him to testify in his own defense, a privilege he claimed that I had no right to deprive him of. He cited some case law that, to my surprise, supported his claim that the defendant, not his lawyer, has the right to decide if he will testify.

While Tellez' troublesome habeas corpus petition was pending, I appealed his conviction to the appellate court, making the same claim to the court that I made to the jury: he may have been a thief, but he wasn't charged with stealing, only with "receiving." The appellate court agreed, reversed the conviction, and entered a judgment of acquittal. Tellez was released. The habeas petition he filed was mooted by these developments. My thank you note for the successful appeal apparently was lost in the mail.

E. Serendipity in a Murder Case

The capstone of my summer as a public defender was to try a first-degree murder case. My client, *Nano Fernandez*, age seventeen, was accused of the deliberate, premeditated murder of another boy, *Jose Contreras*.[16] The killing occurred in very unwelcome circumstances for a defense lawyer: it was witnessed by two dozen teenagers and a policeman, who drove up as Nano was stabbing Jose. Nano confessed to the police that he stabbed Jose because he was "mad at him" for telling everybody in the neighborhood that Nano was "chicken," and that Jose was going to "get him." Fortunately, the Supreme Court decided only a few days before the killing, in *Miranda v. Arizona*,[17] that warnings of the right to remain silent, etc., must be given by the police before a lawful interrogation can take place. Even more fortunately, this ruling had not yet percolated down to the Phoenix police. Nano's confession was inadmissible.

In the course of trial preparation, I learned a lot about the "victim" and about my client. Nano even changed from a skinny, pimply "greaser" to a husky, pale, wholesome looking young man. His hairdo, resembling an Afro when he was arrested, was now a crew cut. Apart from the change in his coiffure, which I had ordered, none of the rest was planned. It was a serendipitous consequence of his being in jail. Because I educated him on law and other matters, Nano also changed from an apparent fearless killer to a fearful self-defender cornered by a glue sniffing maniac.

I put on several witnesses to establish that Jose was violent and had threatened to kill Nano. I was also able to adduce evidence that Jose had threatened other children, had shot out streetlights, and

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[16] The names in italics in this paragraph are pseudonyms. The real names of the individuals have not been used to protect the attorney-client privilege.

[17] 384 U.S. 436 (1966).

generally behaved outrageously. I was also able to persuade Nano that the fact that he was mad at Jose was not the reason he had stabbed him; the main reason was his fear that Jose would carry out his threats. Nano would not be less than a man if he admitted that. He so testified and was acquitted.

VII. REFLECTIONS OF A NOVICE DEFENSE LAWWYER

As I wound up my summer as a public defender, I reflected on a few surprises the experience had produced.

First, I had not expected to like my clients, yet for the most part I did. (There were exceptions, including a man who raped his two-year-old stepdaughter and another man who got several old people to name him a beneficiary of their life insurance and then murdered them.) Even though I was prepared to blame my clients' behavior on their parents and society, I expected them to be angry, evil psychopaths. Most of them, however, seemed quite normal, ordinary people. I came to suspect that the main difference between them and me was native intelligence or something close to that, perhaps maturity. They committed their crimes because they didn't appreciate the consequences or, if they did, they lacked the ability to control their impulses. In short, emotionally, they were still children. In any event, they were not anything like I had expected them to be and there, but for the grace of good luck and good genes, would have been I.

I also concluded that whether my clients were convicted or acquitted of the crimes they were charged with ultimately would make little difference in the lives of most of them. For them to change direction, to learn to control their impulses and to succeed as legitimate, law-abiding citizens would require massive interventions from organizations with the expertise and resources to help them adapt. Such organizations did not exist. It would take a lot more than the aspirations of the "Great Society" to put such programs in place.

I was not guilt-ridden over the fact that I was often representing the guilty who would likely commit other crimes against innocent victims. My job was no more to protect society against criminals than it is the job of a physician called upon to treat a criminal for a disease. My role in the system was to protect my client *from* the system, from his "legal disease," if you will. Doing that was challenging because I often empathized with their victims and was essentially a shy person. I did not have the dramatic personality useful in presentations to judges

and juries. It should have been difficult for me to conceal my sympathy for the victims. However, I found it possible to replace my usual feelings with much stronger passions about some injustice in the particular case I was defending. There was almost always some illegality or impropriety in the investigation or prosecution of the case that I could focus on to help me justify what I was doing and to nourish and sustain my passion. That passion was usually palpable to the jury and could be interpreted by them as a belief in my client's innocence or at least to his entitlement to an acquittal.

I was fortified in my role as a defender by the fact that for every crime that is prosecuted, a hundred are not, and those few that are prosecuted are usually plea-bargained down to a far less serious offense than the facts and the law specify. If society does not want to spend the resources to solve and to prosecute more than a fraction of its crimes, its occasional failure to convict a few who are prosecuted cannot be very criminogenic.

I also concluded that decisions by defense counsel will often be the difference between conviction and acquittal. The result in most criminal cases depends less on guilt or innocence than on the skill and temperament of defense counsel. The fate of a defendant in court was therefore arbitrary. In all four cases where I represented defendants before juries, I made several decisions that another lawyer could have made differently and those different decisions could have resulted in convictions. Perhaps the nation's best criminal defense lawyer of the twentieth century, Edward Bennett Williams, is said to have said somewhere that differences in the quality of defense counsel rarely make a difference in the outcome of a criminal case. Perhaps he had in mind only differences among elite defense lawyers. Otherwise, I am unable to agree with such a broad statement. During my summer, I encountered many prosecutors and defense attorneys who were arguably incompetent and none who could be counted on to conduct a trial free of serious error. I was incompetent at the beginning of the summer and far from error-free at the end.

What I retained after that summer was a passion for a system of criminal justice free of corruption and faithful to its own rules. I have never doubted that a system that respects its own rules is superior to a hypocritical criminal justice system like the one I encountered in Tempe magistrates court and that can still be accurately described the same way today.

VIII. CONCLUSION

As a shy young boy, I was troubled by injustice of many kinds that I observed in my tiny farming community: injustice to our soldiers denied access to an essential of life—water, by their general; to mistreatment of our German prisoners of war; and to Black children denied education that was provided free to all others. I also witnessed lawless law enforcement. It did not occur to me then that I could do anything about it.

In college, I experienced injustice as a victim and went to law school to protect myself and my family from more of it.

I learned in law school and clerking for Justice Douglas that the injustice concentrated in criminal law is not immutable but is subject to correction at all levels of its promulgation and administration. Even a shy, nonpolitical person who is trained in criminal litigation can effect great change.[18] I also confirmed what I suspected from my college days, that a competent, committed criminal defense lawyer is a savior of freedom.

I devoted six decades to learning more about criminal procedure, teaching the subject to law students, writing about it, and to litigating issues of criminal justice in the courts. I regret not being more effective but have no regrets about the commitment.

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[18] For example, I wrote the brief for the state in *Malloy v. Hogan,* 378 U.S. 1 (1964) in which we argued, and the Court held, that the Fifth Amendment privilege against self-incrimination applied to the states through the Fourteenth Amendment. That decision became the foundation of the Court's world-famous decision in *Miranda v. Arizo*na, 384 U.S. 436 (1966). I also successfully argued against the constitutionality of the federal kidnapping statute in a decision that invalidated several states' death penalty statutes, *United States v. Jackso*n, 390 U.S. 570 (1968).