Journal of Criminal Law and Criminology

Volume 65 | Issue 3 Article 1

1975

Implementing the Obligation of Advocacy in Review of Criminal Convictions

Larry I. Palmer

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 65, No. 3

Printed in U.S.A.

CRIMINAL LAW

IMPLEMENTING THE OBLIGATION OF ADVOCACY IN REVIEW OF CRIMINAL CONVICTIONS

LARRY I. PALMER*

It is generally assumed that there is some relationship between the United States Supreme Court's "right to counsel" cases and the expanded role of appellate courts in criminal law decision-making.[1] For instance, the Court's decision requiring appointed counsel on appeal to file a brief before he seeks withdrawal on the grounds that the appeal is "without merit", *Anders v. California*;[2] has led to two kinds of inquiry because of this assumption. Does *Anders* define, albeit inadequately, court-appointed appellate counsel's obligation to his indigent client?[3] Or is *Anders* an expression of the Court's previous decisions requiring appointed counsel at trial[4] and on the first appeal as of right?[5] As to an emerging issue such as when an individual is entitled to appointed counsel on a discretionary appeal,[6] the lines of inquiry generated by the assumption lead to more difficult questions about the functional relationship of appellate courts and the wide-spread presence of counsel in the criminal process.[7]

Despite this widely held assumption, few academic resources have been expended on systematic analyses of the constitutional doctrines dealing with counsel and the role of review[8] in the criminal process. When did the Court begin exploring the possible roles that appointed counsel might play in the appeals process? *Anders* is, as will be demonstrated, one such instance where the Justices were struggling explicitly with the implementations of its growing body of constitutional doctrines of counsel and review. There have been few discussions of whether in fact, from the viewpoints of various Justices, the problem of the right to appointed counsel on a discretionary appeal, ought to be viewed as an extension of the doctrines dealing with access to review, the doctrines of counsel at trial, or a combination of the doctrines. The lack of such systematic analyses of these cases with a variety of doctrinal bases is unfortunate at a time of general debate over judicial administration. Such debate has led to judicial criticism of the performance of counsel in the criminal process and suggestions for reform.[9]

The impetus for the systematic analysis presented in this article is the recurrence of constitutional issues surrounding counsel in the criminal process[10] and the current widespread debate over judical administration. Part I proposes an integrated theory of the constitutional decisions dealing with the right to counsel and the review of criminal convictions. Such an integration assumes that various decision-makers in criminal law perform different functions. The corollary of this assumption is that the difference in function should lead to different constitutional analyses by appellate courts. To develop an integrated theory, it will be argued that those cases dealing directly with the function of counsel and appellate courts in criminal law must be analyzed in terms of constitutional principles. The purpose of such an integrated theory is to

* Associate Professor of Law, Rutgers-Camden, A.B. Harvard, 1966; LL.B. Yale, 1969.

I would like to express my appreciation to Mary Sibley, a third year student at the Rutgers-Camden Law School, for her research assistance in the preparation of this article.

I would also like to acknowledge the aid of my colleague Professor Tom J. Farer, who was kind enough to read a draft of this paper.

[1] H. PACKER, LIMITS OF THE CRIMINAL SANCTION 237 (1968) [hereinafter cited as PACKER, LIMITS].

[2] 386 U.S. 738 (1967).

[3] Herman, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1973).

[4] Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] Douglas v. California, 372 U.S. 353 (1963).

[6] Ross v. Moffitt, 483 F. 2d 650 (4th Cir. 1973), *cert. granted*, 415 U.S. 909, (1974).

[7] *See* Ross v. Moffitt, 42 U.S.L.W. 3605 (U.S. April 30, 1974) (oral argument).

[8] For a pre-*Gideon* analysis of the counsel problem see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on the Most Pervasive Right of the Accused*, 30 U. CHI. L. REV. 1 (1962).

[9] *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227 (1973) [hereinafter cited as Burger, *Special Skills*]; Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

[10] *See, e g.*, Fuller v. Oregon, 96 Ore. 457, 504 P.2d 1393, *cert. granted*, 414 U.S. 1111, aff'd, ___ U.S. ___, 94 S. Ct. 2116 (1974).

delineate some of those unique features of modern criminal adjudication that are viewed as "fundamental". Such a demarcation will make more visible the part criminal adjudication plays in the "crisis of the courts".

Part II uses the integrated constitutional theory as a tool for evaluating or assessing the many proposals for reforming courts. To illustrate the utility of the analysis, two current problems will be discussed in terms of the integrated analysis developed in Part I. First, proposals to limit the availability of one kind of review of a criminal conviction—federal habeas corpus—will be discussed. In most discussions these proposals have been viewed as the problem of determining when criminal litigation has become final. Second, a variety of proposals to expedite appellate criminal appeals will be discussed. These proposals have been viewed as addressing the problem of "speedy disposition" of criminal appeals. With an integrated constitutional theory, however, both problems can be analyzed and resolved in terms of allocating the resources of appellate courts and counsel in criminal law decision-making.

Whether the proposed integrated constitutional theory or some other is adopted, several new perspectives are generated by an integrated approach. While some avenues of reform are foreclosed because of the constitutional nature of the principle jeopardized by reform, many other avenues are still open. Despite the constitutional overlay on criminal law decision-making in recent years, state bodies have more latitude to modify the administration of their criminal law than has been generally assumed. Finally, legal scholars must start to examine a new legal institution created by constitutional adjudication—counsel for the accused and the convicted in the criminal process. Under an integrated approach, the cases dealing with counsel and review in criminal law should no longer be seen solely as constitutional opportunities to protect the "indigent".

I. The Varieties of Right to Counsel and Access to Review

The proposed integrated theory proceeds from the premise that judges, even in their constitutional decision-making, decide cases in terms of certain principles and rules.[11] The proposition is congruent with the recent analysis suggesting that there are similarities between judicial reasoning in common law and constitutional cases.[12] For instance, judges do not generally develop basic "policies" of law in deciding common law and constitutional disputes.[13] On the other hand, when the rule of law employed to decide a common law or constitutional case is justified by a "principle" of law, the scope of review is more searching than when the rule is justified by a policy of law.[14] While drawing the distinction between "principles," "rules," and "policies" is considerably more difficult in constitutional law than in common law doctrines,[15] the method of analysis based on this distinction helps to illuminate the function of review in the criminal process.

Since judges often differ when any "fundamental" issue of law is decided, it is hardly surprising that the Justices have had many differences in recent constitutional cases dealing with the state criminal process. Under the proposed theory it is possible to characterize the nature of these differences in terms of divergent views as to what principles or rules should govern the case before the Court. Given the rapidity of the constitutionalization of the criminal process, Justices often agree with the result or the new rule developed in the case but feel compelled to write concurring opinions.[16] Once the differences among the Justices have been identified, the proposed theory provides a method of resolving these conflicts of principles and rules, at least in the area of the right to counsel and review of criminal convictions. Essentially the method of analysis requires that cases that are identified as containing clear conflicts of principles should be analyzed as attempts to create new principles. If the major import of the case is to illuminate a conflict of principles among the Justices, these decisions should not be analyzed as containing particular constitutional rules that must be followed in solving the problems of judicial administration. Rather these decisions are more usefully viewed as stating constitutional policies of fair adjudication that are developed by a particular kind of appellate court, the Supreme Court of the United States. The cases dealing with review of

[11] *See generally* Dworkin, *A Model of Rules*, 35 U. Chi. L. Rev. 14 (1967).

[12] *See generally* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973).

[13] *Id.* at 267.

[14] *Id.* at 269.

[15] *Id.*

[16] *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972).

criminal convictions[17] and the role of appointed counsel on appeal[18] are examples of basic policy decisions by the Court without a clear articulation of of underlying constitutional principle.

The theory will help to explain why the overall impact of the cases dealing with the right to counsel and review of criminal convictions is an expanded role for appellate courts in criminal law decision-making. With such an explanation it becomes apparent that criminal law decision-making may be an exception to the general rule that appellate courts do not develop basic legal policies.[19] By creating more issues for judicial resolution, the Supreme Court has not usurped the legislative role, rather the Court's decisions have realigned the institutional competences of the courts, the legislature, and other decision-makers. As an explanation or rationalization of the new role for appellate courts, the integrated theory becomes useful to those resolving the problems of judicial administration.

The integrated approach differs significantly from recent discussions of the right to counsel in the criminal process.[20] There has been a tendency to treat the right to counsel cases as one legal doctrine to be expanded or constricted in subsequent decisions. A given decision on the right to counsel is thus viewed as indicative of a broad trend in constitutional decision-making. Following this line of analysis, one expects a decision holding that an individual is entitled to counsel at a deferred sentencing proceeding[21] to signal the the development of a constitutional theory of the correctional process by the Court.[22]

A second type of commentary on right to counsel cases assumes that the instrumental view of law is the standard of evaluating the Court's decisions.[23] The important point of analysis in this type of commentary is to determine how individuals will respond to a particular decision to grant or withhold counsel. Thus, in discussing whether counsel is required at parole revocation hearings, one commentator suggests that the courts' subsequent refusal to hold that a parolee is *per se* entitled to counsel at a revocation hearing signals the end of due process.[24]

The integrated theory proposes a method of criticism that follows a different line of inquiry. As to either decision involving the right to counsel, the integrated analysis seeks first to ascertain if there is a particular principle dealing with counsel in the decisions. After determining what the principle is, the next line of inquiry is whether the articulated principle is consistent with the principle previously articulated in the case law. At a third level of inquiry, one might ask if the particular rule established in the case is in conflict with any principle articulated in the cases. For example, both the decision requiring counsel in all deferred probation revocation proceedings and the decision requiring counsel to be provided in probation proceedings on a case by case analysis are consistent with the previously articulated principles requiring counsel in the criminal process.

While the integrated theory is a legal theory of due process in criminal law decision-making, the theory should not be confused with Professor Packer's Due Process Model.[25] In explaining the impact of *Gideon v. Wainwright*,[26] which requires the states to provide counsel for those accused of a felony, Packer asserts that the opinion "will remain for a long time the watershed decision in the evolution of the criminal process."[27] Such a statement creates the impression that *Gideon* remains the analytical starting point for discussions of lawyers in the criminal process. The proposed theory accepts Professor Packer's notions that the widespread presence of lawyers has significantly modified the criminal process. However, the proposed analysis will start with the principle of constitutional law involved in the *Gideon* decision. Along

[17] Draper v. Washington, 372 U.S. 487 (1963); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

[18] Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967); Douglas v. California, 372 U.S. 353 (1963).

[19] *Cf.* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 267 (1973).

[20] *See, e.g.*, Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968); Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215 (1971).

[21] Mempa v. Rhay, 389 U. S. 128 (1967).

[22] *See* Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1, 10 n.44 (1968).

[23] Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215 (1971). *But see* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

[24] Van Dyke, *supra* at 1217. This same commentator suggested that Eldridge Cleaver was forced to remain in "exile" by the failure of the Court to require procedural safeguards, including the right to counsel, at parole revocation hearings.

[25] PACKER, LIMITS.

[26] 372 U.S. 335 (1963).

[27] PACKER, LIMITS at 237.

with Professor Packer's analysis, the integrated theory recognizes that a constitutional requirement of counsel in state criminal processes creates a host of new legal issues.[28] The integrated legal theory is in direct conflict with the notion that to use either Due Process or Crime Control Models is the method of resolving these new issues.

Reduced to its essentials, the integrated theory of counsel and review cases focuses on three principles. The Court has explicitly recognized that an individual accused of a crime is required to have a lawyer at trial in order to increase the accused's opportunity to defend against a criminal charge. This first principle will be referred to as the principle of an opportunity to defend against the deprivation of liberty. Second, the Court has implicitly developed a principle that requires that convicted persons have an opportunity to have another body determine if the status of "convicted person" is legitimate. This principle, referred to as the opportunity to litigate the legitimacy of state control, is implicit only because the issue of whether review of a criminal conviction is required has not been raised in recent times.[29] To relate the first two principles in an integrated approach, a third principle should be recognized. That principle is the obligation of appellate counsel to use the review procedures available to argue that the conviction is illegal. This principle will be called the obligation of advocacy. In furtherance of the principle, the theory of illegality argued to the appellate court should be based on the theory of defense employed by counsel to defend the accused at trial. None of these three principles necessarily explains all of the cases on review and counsel since many of these cases contain rules rather than principles. Rather, these principles will be used to demonstrate that these cases can be understood as part of an integrated modern theory of criminal law decision-making. Finally, it is not contended that particular Justices have used this particular integrated theory in their decisions. It is only contended that they could in future decisions or that others—state appellate courts, court administrators, and the providers of counsel—could use the analysis to resolve certain problems of judicial administration.

A. *The Opportunity to Defend Against the Deprivation of Liberty*

A decade after *Gideon*, it is still important to emphasize that its doctrinal foundation is found in a variety of theories of due process. The primary issue resolved in *Gideon* is whether the state is obligated to provide trial counsel for an individual accused of a "serious crime". Or put another way, the question is whether some fundamental notion of "fairness" requires that those accused of a crime be assisted by counsel. While a unanimous Court answered the question by placing the obligation of providing counsel on the states, the variety of theories of due process available to arrive at the result is amply demonstrated by the three concurring opinions.[30] All of the divergent methods of reasoning to the same result are functions of the particular Justice's theory of due process. Thus, each opinion contains an explicit theory of the Supreme Court's review function in criminal law.

A tendency of some courts and commentators to merge discussions of *Gideon* with cases dealing explicitly with equal protection notions[31] shifts the

[28] Packer raises questions about *Gideon*, some of which have been subsequently answered by the Court:

> In what kinds of criminal prosecutions does the right to assigned counsel apply—in "serious" offenses only? If so, what are the criteria of "seriousness"? When does the right to counsel begin and end? Are the limits the same for assigned counsel as for privately retained counsel? Looming up behind these questions are even more portentous ones. Does the effective assistance of counsel require that the state must provide financial compensation for the lawyers who serve? Must provision be made for other expenses of an effective defense? *Id.*

[29] Despite the relatively recent introduction of appellate review in the United States, a modern constitutional theory without a concept of review of a criminal conviction is now unthinkable on several counts. Pragmatically speaking, the Court's own opinions have created more appellate issues for the lawyers now constitutionally required to be in the criminal process. Were there no state criminal appeals, there would be greater incentives for these lawyers to cast all appellate issues in terms of constitutional law in order to gain federal review. Out of self-interest or a concern for minimizing federal interference with the state criminal processes, the Court is unlikely to allow states the option of eliminating all state review of criminal convictions. *See generally* L. ORFIELD, CRIMINAL APPEALS (1939); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972). While it appears unlikely at present that any state legislature would seriously contemplate a policy of no criminal appeals, it is a theoretical possibility under conventional analyses in the states' attempt to "ration justice". *Cf.* Hazard, *Rationing Justice*, 8 J. LAW & ECONOMICS (1965).

[30] 372 U.S. at 345 (Douglas, J., concurring); *id.* at 347 (Clark, J., concurring); *id.* at 349 (Harlan, J., concurring).

[31] Justice Clark does this explicitly in *Anders* when he cites *Gideon* as one of the principles to which he adheres. 386 U.S. 738, 742 (1967). Apparently the more accepted "equal protection" analysis used in *Anders*' companion, Entsminger v. Iowa, 386 U.S. 748 (1967), allows the dissenters in *Anders* to concur in *Entsminger*.

goal of *Gideon* to equalizing the plights of the "indigent" and "non-indigent" defendant. But such interpretations ignore the scrupulous avoidance of any mention of equal protection in the Court's opinion.[32] In addition, such discussions have confused the due process issue in *Gideon* with a related secondary issue involving counsel. Admittedly, when the authoritative state decision-making body has decided that retained counsel is allowed, the state may be required to furnish counsel to the "indigent". And such a question does raise an issue of "equal protection" under some analyses.[33] Some commentators suggest that for "pragmatic reasons" the due process and equal protection grounds of decisions may become unimportant in constitutional decision-making.[34] However, in determining which matters are fundamental principles of modern criminal law decision-making, the due process-equal protection dichotomy is important to understanding the divergence and convergence of the variety of theories utilized in deciding cases.

The recent extension of *Gideon* to less serious crimes in *Argersinger v. Hamlin*[35] is illustrative of both the convergence as to result but divergence as to the underlying theory of due process. Once again a unanimous Court, but with three concurring opinions, held that a state must provide counsel whenever its processes of adjudication result in an actual deprivation of liberty.[36] The "rule" of *Argersinger* is workable from a reviewing court's perspective since an allegation of lack of counsel at trial requires few judicial resources for its resolution. However, from a trial court's perspective, the actual rule articulated will lead to several obvious problems in administration since it requires a trial judge to make a prospective judgment as to what the sentence will be in a relatively minor crime.[37] But focusing on the problems of implementing the *Argersinger* rule ignores its more significant impact on unresolved problems of constitutionally requiring appointed lawyers as part of criminal law decision-making. Besides reaffirming the principle of *Gideon* as the opportunity to defend against a criminal charge, each opinion addresses the problem of effectuating the new counsel rules. The tentative guidelines for resolving the problems appear dependent upon the particular legal theory employed by each Justice.

All the opinions discuss the variety of ways in which the legal services required by the Court's expansion of *Gideon* can be met. Justice Douglas, in the lead opinion, suggests that legislative reform may meet the new demand for lawyers. His suggestion is that "decriminalizing" some petty offenses would decrease the need for lawyers.[38] To suggest that "decriminalizing" public drunkenness or narcotic addiction will decrease the need for lawyers is somewhat curious. If by decriminalization Justice Douglas means that another form of state process such as an administrative agency should be used, the need for lawyers has not necessarily been diminished. As a matter of constitutional due process principles, the "civil" processes of state control that involve the deprivation of liberty require lawyers in the adjudicative part of the decision-making.[39] Most legislative schemes involving "civil" commitment already require that counsel be appointed.[40] It is unlikely that the Court will allow legislatures to take away counsel or ban counsel unless the principle of counsel's necessity when the state deprives the individual of liberty is to be reexamined. Under existing constitutional analyses, "decriminalization" should lead to transfer of perhaps non-existing lawyers from the minor criminal courts to the civil commitment adjudication. Perhaps Justice Douglas thinks that this civil adjudication will require less time than minor

386 U.S. at 752 (Stewart, Black, and Harlan, concurring). *See* discussion in text pp. 25–27. *See also* Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971), *aff'd on other grounds*, 407 U.S. 128 (1972). *Cf.* Birzon, Kasanof, Forma, *The Right to Counsel and Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 BUFFALO L. REV. 428, 432 (1965); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* in CRIMINAL JUSTICE IN OUR TIME 1, 64–81 (1965).

[32] Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 245–48.

[33] *Cf.* Wainwright v. Cottle, 477 F. 2d 269 (5th Cir.), *judgment vacated*, 414 U.S. 895 (1973) (Douglas, J., dissenting).

[34] *See, e.g.*, Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 41–43 (1972).

[35] 407 U.S. 25 (1972).

[36] One justification for the Court's peculiar rule is that it defines the limits of the sixth amendment's requirement of counsel in "criminal prosecutions". Such a definitional approach explains, for instance, why the sixth amendment-fourteenth amendment jury trial requirement is made operative by the possibility of six months incarceration, Baldwin v. New York, 399 U.S. 66 (1970), but the counsel requirement depends on the actual result of trial and sentence.

[37] 407 U.S. at 42 (Burger, C.J., concurring).

[38] *Id.* at 38–39 n.9.

[39] *Cf. In re* Gault 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967).

[40] *See, e.g.*, 42 U.S.C. § 3413 (Narcotics Addict Rehabilitation Act); CAL. WELFARE AND INSTITUTIONS CODE § 5252.1 (West 1954) (alcoholism and mental illness); FLA. STAT. ANN. § 394.46 (mental illness) §§ 392.25, 392.26, 392.32 (tuberculosis), § 396.102(a) (alcoholism); and N.J. STAT. ANN. §30:9-12.21 (1964) (alcoholism).

criminal offenses. If so, then some more lawyers are available.

Another possible legal reform of a judicial nature to meet the demand for lawyers is to enlarge the pool of available persons by modification of the constitutional definition of counsel. In *Argersinger* at least three Justices indicated their willingness to experiment with a constitutional definition of counsel broader than one restricted to members of the organized bar.[41] If law students under adequate faculty and professional supervision can meet the constitutional standard for counsel in lower courts, the number of "lawyers" available has been increased.

Rather than expand or experiment with various constitutional notions of counsel, Chief Justice Burger expressed faith in the ability of the traditionally organized bar to meet the needs.[42] Without further guidance from the Court, the Chief Justice expressed faith that the organized bar could and would meet the needs generated by an evolving constitutional standard of counsel.[43]

Justice Powell's approach looks directly at changing the Court's own constitutional analysis as a possible solution. He attempts to formulate a rule under an explicitly flexible theory of due process.[44] Such an analysis allows him to express doubts, in view of the differing ability of the states to furnish counsel, about the wisdom of new prophylactic constitutional rules requiring counsel. For instance, a less rigid analysis might allow the requirement of counsel for the accused to depend upon whether the state uses counsel in the particular proceeding.[45] Since the efficacy of any new constitutional rule in terms of maintaining the purpose of the principle is in doubt, Powell's analysis requires the scrutinizing of each factual situation to determine if counsel's presence furthers or hinders the opportunity of individuals to defend against a deprivation of liberty.[46] But since the state court had tried to formulate the more rigid constitutional rule that counsel is required if there was a possibility of six months imprisonment, he voted to reverse and remand.

Once it is clear that the obligation to provide counsel is derived from a variety of theories of due process, the use of different types of analysis for requiring or withholding counsel at certain nontrial stages is explicable.

The incompatible positions of some of the Justices in cases holding that counsel is required at "a critical stage" of the pre-trial process are examples of a conflict over what is the appropriate constitutional rule for counsel as opposed to the appropriate constitutional principle. For example, a recent case held that counsel was not required at a photo identification before trial. The majority's analysis started with the assumption that counsel is required for the accused at certain pretrial stages in order to increase his opportunity to defend against the charge.[47] The concurring and dissenting opinions should be read as different views as to whether a certain constitutional rule requiring counsel at a pre-trial stage is necessary to implement the basic principle of an opportunity to defend.[48] Not surprisingly, a given Justice may find himself writing for the majority and sometimes dissenting when the Court is deciding whether the stage of the investigative process is a "critical stage" for the purposes of requiring counsel. A Justice may go so far as to suggest that his analysis of when counsel is or is not required keeps a semblance of principled constitutional adjudication.[49]

A more generalized view of some of the right to counsel cases as constitutional rules rather than principles has several important consequences for

[41] 407 U.S. at 40 (Brennan, J., concurring, joined by Stewart and Douglas, J. J.).

[42] *Id.* at 43–44 (Burger, C. J., concurring).

[43] *Id.* at 44. *See also,* Burger, *Special Skills.*

[44] *Id.* at 44 (Powell, J., concurring).

[45] *Cf.* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell,* 24 STAN. L. REV. 1001, 1028 (1972).

A flexible due process analysis of whether counsel is required in summary court martial proceedings was used by the Ninth Circuit recently. Daigle v. Warner, 490 F.2d 358 (9th Cir. 1974) *See also* Mills v. Municipal Ct, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973).

[46] I would adhere to the principle of due process that requires fundamental fairness in criminal trials, a principle which I believe encompasses the right to counsel in petty cases whenever the assistance of counsel is necessary to assure a fair trial. 407 U.S. 47.

. . . .

Therefore Justice Powell concludes,

I would hold that the right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case by case basis.

If the trial court should conclude that the assistance of counsel is not required in any case, it should state its reasons so that the issue could be preserved for review. *Id.* at 63.

[47] United States v. Ash, 413 U.S. 300 (1973).

[48] *Id.* at 321 (Justice Stewart concurring); *id.* at 326 (Brennan, J., dissenting). *Cf.* State v. Jones ___ La. ___, 284 So. 2d 570 (1973).

[49] Kirby v. Illinois, 406 U.S. 682, 688 (Stewart, J., writing for the plurality); *cf.* Wellington, *supra* note 12.

criminal law decision-making. In terms of theories of decision-making, many of the pre-trial counsel "rules" are joint legislative-judicial decisions to control investigative agents. That is, the Court has explicitly recognized that some of its counsel rules can be "overruled" or "replaced" by legislative rules which are as fully effective as the Court's constitutional rules.[50] For example, if a given state legislature were to provide regulations and the resources for video tapes of line-ups, then in that state lineups are not necessarily "critical."[51] Therefore, the line-up might proceed without counsel in that state.

Another way of demonstrating the consequences of analyzing the right to counsel cases in terms of whether they contain principles or rules is to reconcile the Court's treatment of these cases under its constitutional retroactivity doctrine.[52] The problem for an integrated theory of the counsel cases is: why are some counsel cases held retroactive and others not under the Court's analysis? If we view the primary constitutional principle of the counsel cases to be that of the opportunity to defend against the deprivation of liberty, it is easy to see that *Gideon* fits the purpose of protecting the integrity of the fact-finding process.[53] Similarly, the application of a right to counsel to juvenile adjudication will be viewed as "fundamental" so as to require retroactive application.[54] However, the rule requiring counsel at a pre-trial line up or a pre-trial police interrogation is not applied retroactively although both rules were in furtherance of the primary principle.[55] The explanation of this problem of law and time is that the constitutional rules are not so fundamental that other decision-makers cannot change the actual effect. In the Court's own language, the presence of counsel at trial is "essential to a fair trial."[56] As mentioned before, other decision-makers trying to meet the burdens of the Court's "critical stages" guideline might seek alternative legal remedies for providing counsel.

A further refinement of this analysis is possible because some of the pre-trial counsel cases are held retroactive.[57] All of these cases are "post-

[50] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[51] United States v. Wade, 388 U.S. 218, 239 (1967). *But see* the note of Mr. Justice Fortas, concurring in part, dissenting in part in *Wade. Id.* at 262 n.*.

[52] The discussion that follows is different from Professor Wellington's related analysis of the retroactivity problem of the fourth amendment's exclusionary rule. Professor Wellington analyzes the general problem of retroactivity in terms of "principles" and "policies" rather than in terms of principles and rules. Professor Wellington begins this portion of his discussion by stating:

> I should like to examine some of these cases, as if they were (to the extent that it is possible) common law decisions. *This enables me to put aside questions of federalism and habeas corpus* and to test the assertions of the last several pages concerning the legitimacy of prospective and retroactive overruling of prior decisions and the relationship thereto of principles and policies. *Id.* at 258 (emphasis added).

The divergence of Wellington's analysis from the one presented here, however, is more apparent than real. By his exclusion of habeas corpus and federalism, for purposes of analytical argument, Wellington has removed that which is most crucial to the constitutional theory of due process proposed in this article.

I suspect that once we feed back in the problems of federalism and habeas corpus, the individual Justice's theory of constitutional principles and rules will become operative as an explanation of their behavior on the retroactivity problem in the fourth amendment area. For instance, how an individual justice voted on the retroactivity of United States v. Katz, 389 U.S. 347 (1967), may be a function of whether the Justice thought that *Katz* set forth a new principle of fourth amendment analysis or was merely a new rule derived from previously accepted principles of the constitutional analysis of the fourth amendment. The acceptance of the principles might have to be tested on a Justice by Justice basis since the problem of the fourth amendment's exclusionary rule is a subject of the Justice's concept of the proper role of the Supreme Court in state criminal process—the problems of federalism and habeas corpus. I would venture that a careful analysis of the late Justice Harlan's approach to the fourth amendment over time might bare some relationship to his developing theory of due process. *Compare* Mapp v. Ohio, 367 U.S. 643, 680 (1961) (Harlan, J., dissenting) *with* United States v. Harris, 403 U.S. 573 586 Harlan, J., dissenting). Whether principles and rules rather than policies and principles actually explain the differences between the Justices in the fourth amedment area might be demonstrated by an analysis of the work of Justices Stewart and White. I will venture a hypothesis that the two Justices take two different principled approaches to the fourth amendment, even where they agree on the result. *Compare* Almeida-Sanchez v. United, States 413 U.S. 266 (1973) (Stewart, J., for the majority) and United States v. Edwards, — U.S. —, 42 U.S.L.W. 4463 (March 26, 1974) (White, J., for the Majority) *with* Almeida-Sanchez v. United States, 413 U.S. 266, 285 (White, J., dissenting) and United States v. Edwards, — U.S. —, 42 U.S.L.W. 4463, 4466 (March 26, 1974) (Stewart, J., dissenting). *Cf.* Cupp v. Murphy, 412 U.S. 291 (1973) (Stewart, J., for the majority) and 412 U.S. 291, 297 (White, J., concurring).

[53] *See, e.g.*, Desist v. United States, 394 U.S. 244, 249–50 and n.14–15 (1969).

[54] *Cf.* Ivan v. City of New York, 407 U.S. 203 (1972) (holding *In re* Winship, 397 U.S. 358 (1970) retroactive).

[55] *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966).

[56] *See* note 53 *supra.*

[57] McLeod v. Ohio, 381 U.S. 356 (1965) (holding Massiah v. United States, 377 U.S. 201 (1964) retroactive); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (holding White v. Maryland, 373 U.S. 59 (1963) retroactive).

indictment" as opposed to "pre-indictment." The explanation of this further rule of retroactivity is that once the indictment has come about, the Court thinks the principle of a fair adjudication must be protected. To the Court, the state process has shifted from investigation to adjudication. Thus, if one has pled guilty—the functional equivalent to an adjudication at trial—without the aid of counsel, the Court will require retroactive application of the new rule.[58] It is important to realize that the retroactivity thus turns on whether the post-indictment proceeding was enough like the **actual** adjudication of guilt rather than whether the **state** called the stage an "arraignment" or "preliminary hearing."

Essential in this analysis is a determination that the particular stage is enough like adjudication to be protected by those principles. The holding that the accused is to be offered counsel at a revocation hearing under a deferred sentencing scheme is applied retroactively.[59] In this manner the Court is defining when the "criminal prosecution"—the process aimed at depriving the individual of his liberty—has ended.[60] Thus, the Court is defining the end of the adjudicatory phase of the criminal process rather than starting the beginning of a new constitutional approach to sentencing. The decision on retroactivity now has the significance of allowing the Court to shift its analysis of the constitutional necessity of counsel.

Once the defendant has been adjudicated guilty and is under state control, the Court's analysis of the need for counsel shifts from the *per se* rules to an explicit case by case approach. In contrast to protecting the individual from a deprivation of liberty, the Court's most recent due process analysis of parole and probation recognizes that the interest to be protected is only that of "conditional liberty."[61] With only one dissent, the Court held that an individual is not *per se* entitled to counsel at a probation or parole revocation hearing.[62] Under such an analysis, the decision to have counsel at a parole or probation revocation hearing is to be decided on a case by case basis. A due process analysis is required because from the perspective of a person on parole or probation—at conditional liberty—some form of official decision-making takes place when parole or probation is revoked. Thus, the Court sees that counsel may sometimes be required to insure the integrity of that legal decision.[63] The Court explicitly did not consider the situation where an individual, claiming a lack of funds, was denied counsel when the state allowed everyone else with the available resources to have counsel.[64] The significance of this type of analysis is that the states actually have more latitude in structuring sentencing or dispositional decision-making processes than trial processes. It may be, for instance, constitutional to deny everyone, "rich" and "poor," counsel before the parole board when it revokes parole if the other resources of decision-making are deemed adequate. These other resources are essentially a parole board with an adequate number of members, an investigative staff, and a mechanism of reviewing the board's decisions.[65] It is also possible to conceive of a system of sentencing done by a panel of experts without lawyers as an initial matter, if a legislature thought it appropriate and devoted adequate resources to make the system reasonably functional to its purposes.

But from the Supreme Court's institutional position of protecting the essentials of the fair trial or fair adjudication, the presence or absence of a lawyer is not the definitive label in constitutional analysis. Having developed over the years an analysis using counsel as an operative principle, an integrated theory of due process allows the Court to see the limits of its own principles. A rule of evidence[66] or a rule on the order of presenting witnesses[67] may violate the policies of fair trial because the Court sees the particular state rules as interferring with the lawyer's ability to defend the accused. It is also possible that the Court's notions of fairness in terms of the adversary system's method of trial adjudication will lead to the result that a state's requirement that the

[58] *Id. But see* Coleman v. Alabama, 399 U.S. 1 (1970).
[59] McConnell v. Rhay, 393 U.S. 2 (1968) (holding Mempa v. Rhay, 389 U.S. 128 (1967) retroactive).
[60] *Cf.* Morrissey v. Brewer, 408 U.S. 471 (1972).
[61] Gagnon v. Scarpelli, 411 U.S. 778, (1973). Morrissey v. Brewer, 408 U.S. 471 (1972)
[62] Gagnon v. Scarpelli, 411 US. 778 (1973).
[63] *Id.*
[64] Gagnon v. Scarpelli, 411 U.S. at 783 n.6.
Such a separation of the two issues of due process and equal protection explains, for instance, Justice Brennan's concurrence in Morrissey v. Brewer, *supra*, and his joining of the majority in Gagnon v. Scarpelli, *supra*. In *Morrissey* he states the issue remains open as to whether counsel must be furnished to the indigent parolee if the non indigent parolee is allowed counsel. 408 U.S. at 491. *See* Dobbs v. Wallace, 201 S.E.2d 914 (W. Va. 1974) (failure to appoint counsel to represent indigent parolees held denial of equal protection where the state permits parolees to be represented by retained counsel).
[65] 408 U.S. at 484–90.
[66] Chambers v. Mississippi, 410 U.S. 284 (1973).
[67] Brooks v. Tennessee, 406 U.S. 605 (1972).

defendant give notice of alibi[68] will not violate due process unless the defendant's lawyer is precluded from a reciprocal right to discover prosecution evidence in order to defend.[69]

Viewing the Court's right to counsel cases primarily in terms of principles and rules that are related to other policies of fair adjudication may help to explain why more definitive statements on what is effective assistance of counsel have not developed. First, the Court appears committed to counsel as essential to the opportunity to defend.[70] Second, without a functional definition of counsel, there can be few, if any constitutional rules as to when counsel has failed to defend adequately.[71] The reason that ingenious counsel or sympathetic courts have been unable to develop the constitutional principles or rules of ineffective counsel may be because there is really little agreement as to how the constitutional function of counsel is to be defined. Or put in terms of decision-making, it is not clear what is the appropriate forum to even raise the issue[72] of ineffective assistance of counsel, not to mention develop the necessary constitutional doctrines. But more important is that the other constitutional doctrines developed to protect the notions of criminal law decision-making may achieve the same functional results as any proposed ineffective assistance of counsel doctrines. Yet in other decisions dealing with access to review of a conviction, there has been continuous disagreement of the doctrinal origins of the principles and rules of access of review of a criminal conviction. But once these cases are analyzed in terms of the function of review, the conflict can be resolved consistent with the theory of decision-making proposed.[73]

[68] Williams v. Florida, 399 U.S. 78 (1970).

[69] Wardius v. Oregon, 412 U.S. 470 (1973).

[70] That is, the Court is unwilling to consider Professor Hazard's suggestion of making the process fair by eliminating lawyers for the state. Hazard, *Rationing Justice*, 8 J. LAW AND ECONOMICS 1, 8 (1965) [hereinafter cited as Hazard, *Rationing Justice*].

[71] *See, e.g.*, United States v. De Coster, 487 F.2d 1197 (D.C. Cir. 1973); Beusley v. United States, 14 CRIM. L. REP. 2427 (6th Cir. January 21, 1974); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980–81 (7th Cir. 1948); Diggs v. Welsh, 148 F.2d 667 (1945); People v. Washington, 41 Ill. 2d 16, 241 N.E. 425 (1968). *See also* Johnson v. Vincent, 14 CRIM. L. REP. 2425 (S.D.N.Y. January 30, 1974) (ineffective assistance of appellate counsel).

[72] *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 55 (1970) (Harlan, J., concurring and dissenting).

[73] A liberty due process analysis of *Gideon's* sixth and fourteenth amendment requirements is essential to the resolution of the emerging issue of the right to proceed without counsel. *Compare* People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233, (1972) (holding that there is no constitutional right to defend pro se) *with* United States v. Dougherty, 473 F.2d 1113, 1138 (1972) (Bazelon, C. J., concurring) (holding there is). *See also* Faretta v. California, ___ U.S. ___, 94 S. Ct. 1559 (1974) (cert. granted).

B. *Access to Review of a Conviction—Litigating the Legitimacy of State Control*

The Court's own opinions dealing with criminal appeals suggest that at least one criminal appeal is constitutionally required. *Griffin v. Illinois*,[74] the origin of the modern theory of access to review, contains the analytical conflict that has prevented a clear recognition of the principle of an opportunity to litigate the legitimacy of state control. Justice Black's opinion insists upon equal access on the part of indigents to review of their convictions.[75] Subsequent cases involving the waiver of filing fees,[76] the screening of appeals,[77] and the appointment of appellate counsel[78] were also decided on the basis of equalizing the plight of the "rich" and the "poor" in the criminal process. All of these cases restate Justice Black's proposition that the states are not constitutionally required to provide appellate review of criminal convictions for anyone, rich or poor.[79] It does appear illogical to insist upon constitutional access for indigents to something—review of a conviction—that is not constitutionally required for the rich and the poor alike.

The manner in which the apparent inconsistency can be resolved is to recognize that there is a constitutional principle that requires that a convicted individual must have an opportunity to litigate the legitimacy of state control. The Court's failure to articulate this principle in the cases dealing with access may be due to the fact that the Justices have been unable, even recently, to agree on a doctrinal

[74] 351 U.S. 12 (1956).

[75] 351 U.S. at 16–20.

[76] Burns v. Ohio, 360 U.S. 252 (1959).

[77] Draper v. Washington, 372 U.S. 487 (1963).

[78] Douglas v. California, 372 U.S. 353 (1963).

[79] Griffin v. Illinois, 351 U.S. at 18; Draper v. Washington, 372 U.S. at 456–500; Douglas v. California, 372 U.S. at 355–58; Burns v. Ohio, 360 U.S. at 257–58. The approach is criticized by Justice Harlan who dissents in Griffin v. Illinois, 351 U.S. at 29 and Douglas v. California, 372 U.S. at 360. The proposition that there is no constitutional right of appeal is also recited in Lindsey v. Normet, 405 U.S. 56, 77 (1972); Monger v. Florida, 405 U.S. 958 (1972) *cert. denied*, (Douglas, J., dissenting); North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

An opportunity to re-examine the issue of a right of appeal may be forthcoming. *See* Ross v. Moffitt, 483 F.2d 650 (4th Cir. 1973), *cert. granted*, 415 U.S. 909 (1974).

basis for deciding any given access case.[80] A variety of due process and equal protection arguments have been advanced to explain the result of any given case.[81] The failure to clearly establish the principle on some fourteenth amendment ground has been of no practical importance to the Court. But the failure to make the analytical distinctions required by a recognition of the principle could have important practical consequences to others trying to meet the Court's many constitutional requirements. By analogy, the failure to start with the principle that every convicted individual is entitled to review is like confusing the question of whether everyone is entitled to a lawyer with the issue of whether the state must provide lawyers for those without resources to pay for a laywer within the criminal process.[82] Analyzed in terms of principles, implicit in the access cases is the rule that a state prosecution must include at least one opportunity for review of the conviction.

An integral and explicit part of the principle of litigating the legitimacy of state control is the requirement of a lawyer's assistance in a criminal appeal. In *Douglas v. California*,[83] decided the same day as *Gideon*, the Court required the states to provide the convicted person with a lawyer on his first appeal-as-of-right. Justice Douglas, for the majority, reasoned that the "poor" convicted person must have as "meaningful" an appeal as the rich convicted person who could afford and utilize the services of a lawyer. He reached the result without any specification as to whether notions of due process, equal protection, or some combination of the two required the result.[84] Once again, it should be apparent that the poor must be placed on an equal footing to those with more resources only because the rich have something that is fundamental—review with the assistance of a lawyer. Making *Douglas* consistent with *Griffin v. Illinois*,[85] the "leading case," under the integrated analysis requires only a traditional type of reconciliation of the two cases. In *Griffin*, Justice Black suggested that the equalizing notion means the state courts have to furnish a transcript unless "other means of affording adequate appellate review to indigents" are found.[86] After *Douglas*, it is apparent that those alternative means do not mean review absent the participation of a lawyer in the appellate process. Without reading *Griffin* and *Douglas* together to delineate the underlying principle, the Court's analysis would appear to allow the states the option of eliminating lawyers in criminal appeals for everyone.[87] Under the integrated analysis, the option does not exist. Rather the integrated analysis' explicit articulation of the principle makes it easier to distinguish the problems of access in criminal law from the problems of access in other types of legal processes.[88]

More recent attempts to apply the *Griffin* rationale are not inconsistent with the above argument that a criminal prosecution requires some minimal means of review. In *Mayer v. Chicago*[89] the unanimous Court held that an individual convicted and fined under a city ordinance was entitled to a record sufficient for access to review.[90]

[80] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring); *id.* at 12 (Black, J., writing for the plurality).

[81] Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 7–14 (1963).

See Mitchell v. Johnson, 488 F.2d 349 (6th Cir. 1973); Ross v. Moffitt, 483 F.2d 650 (4th Cir. 1973), *cert. granted.*, 415 U.S. 909 (1974).

[82] *See* text *supra* at 269.

[83] 372 U.S. 353 (1963).

[84] *Id.*

[85] 351 U.S. 12 (1956).

[86] 351 U.S. at 20.

[87] If the issue were ever raised, review of a criminal conviction would be held to be a "fundamental" aspect of the criminal process. Note, *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 108 (1963). *Cf.* Texas v. Pruett, 470 F.2d 1182 (5th Cir. 1972), *aff'd*, 414, U.S. 802 (1973). To arrive at such a result, the Court would need two related theories. One important theoretical consideration would be the functions appellate courts should perform in the criminal process. *Cf.* L. ORFIELD, CRIMINAL APPROACH (1939). The other consideration would be a legal theory of access to review of a criminal conviction. Either something like the Brennan or Harlan rationale could be used as a starting point for such a theory. The Harlan rationale, however, should be preferred because his theory of due process takes account of the allocation of judicial and other resources. Furthermore, when faced with the question of whether due process requires some system of review, Harlan was the only Justice to articulate a connection between requiring counsel and review of the initial determination. *In re* Gault, 387 U.S. 1, 72 (1967) (Harlan, J., concurring and dissenting).

See also Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1028–29, 1028 n.148 (1973).

[88] Counsel for the petitioners in Boddie v. Connecticut, 401 U.S. 371 (1971), were surprised that the Court decided in their favor on an explicit due process ground. LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L. J 487. *See also id.* at 520–21 n.153. *See* note 80 *infra*.

[89] 404 U.S. 189 (1971).

[90] A leading commentator has suggested that the more recent *Argersinger* incarceration-in-fact rule means the Court might now view *Mayer* differently. L. HALL, Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE, 27 (Supp. Jan. 1973). But such analysis fails to distinguish the issues of an opportunity to defend from access to review.

However, in *Britt v. North Carolina*,[91] which did not involve access to review of a criminal conviction, the Court held that the denial of a transcript of the defendant's first trial that ended in a mistrial was justified under the "narrow circumstances." While those circumstances were not sufficiently different from cases where the Court had required a transcript of a preliminary hearing,[92] for the two dissenters, *Britt* demonstrates the inherent difficulties of applying *Griffin* without a clear articulation of its basic principles.[93]

Facing the issue in terms of access to review of criminal convictions allows for a discussion of this issue in terms of its limits—the problem of finality of criminal convictions. Given a process that requires lawyers in the trial and appellate process, the notion of "challenge" and litigation pervades the system.[94] Yet every legal process must determine when the litigation has ended. For instance, deciding when federal habeas corpus relief is available can be seen in terms of allocating the time of counsel, the opportunity to defend, and the opportunity to review the guilt determination in the state proceedings.[95] Despite the uncomfortableness of the suggestion, we must now recognize Professor Hazard's suggestion that courts, legislatures, and now court administrators, are "rationing justice" [96] in terms of particular views of the competence of counsel at trial or pre-trial stages, and the ability of an appellate court to review guilt determination with or without counsel's active participation.[97]

C. *The Principle of Advocacy in Review of Criminal Convictions*

Until *Anders v. California*[98] the Court had managed to avoid explicit discussion of the principle originating in *Gideon* in a case purporting to deal solely with the *Griffin* lines of cases. As noted previously, the rule requiring appointed counsel on appeals, although decided on the same day as *Gideon*, relied solely upon *Griffin*.[99] Justice Clark combined the two lines of cases in *Anders* in deciding that appointed appellate counsel could not file a "no merit" letter rather than a brief on the merits without explicit exposition.[100] Acting on the assumption that the convicted person had a lawyer to defend him because of the principle of *Gideon*, the Court had implicitly assumed that there might be an arguable issue for appellate review. This assumption is reinforced by the Court's requirement of appointment of appellate counsel under the principle of *Griffin*. But to put these implicit assumptions into an integrated theory, *Anders* should be recognized as establishing a third principle of criminal law decision-making. That principle is that counsel in a criminal appeal has the obligation of advocacy. As a new principle, *Anders* is the starting point for integrating the functions of appellate courts and counsel in criminal law. While the opinion in *Anders* is replete with refer-

[91] 404 U.S. 226 (1972).

[92] Roberts v. LaVallee, 389 U.S. 40 (1967).

[93] As the equality notion of *Griffin* is expanded from review stages, broadly defined, the equal protection—due process dichotomy reappears. When the issue is whether "indigents" can be jailed for failure to pay fines, a unanimous court cannot agree on a rationale. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 40 (1970). The conflict is even more dramatic when the issue is the applicability or inapplicability of *Griffin* to the issue of filing fees to divorce cases. Justice Harlan, for the majority, in Boddie v. Connecticut, 401 U.S. 371 (1971), cites and uses *Griffin* as a case dealing solely with access to courts and the allocation of judicial resources. *Id.* at 382. Justice Black, the sole dissenter and author of *Griffin*, thought its rationale wholly inapplicable to "civil" cases. *Id.* at 385–86. Concurring, Justice Douglas reads *Griffin* as an equal protection case dealing with a principle of invidious discrimination based on poverty. *Id.* at 388. The other concurring justice, Brennan, prefers a joint due process and equal protection rationale of *Griffin*. He holds that a fee requirement for the indigent in a divorce case is a denial of equal access to the courts. *Id.* at 390. *Cf.* Brickman, *Of Arterial Passageways through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595 (1973); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Right's—Part I*, 1973 DUKE L. J. 1153 (1973).

[94] PACKER, LIMITS at 204–38.

[95] Schneckloth v. Bustamonte, 412 U.S. 218, 250, (1973) (Powell, J., concurring); *cf.* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[96] Hazard, *Rationing Justice*, *supra* note 70.

[97] Limiting access to federal review of the voluntariness of guilty pleas is apparently dependent on the assumption that counsel performs his obligation to defend. *See* McMann v. Richardson, 397 U.S. 759 (1970). The obligation to defend includes, in at least Justice White's view, the obligation to litigate the voluntariness of a confession along the available avenues. At the time of the plea in question, Jackson v. Denno, 378 U.S. 368 (1964), was not the law. Underlying Justice White's analysis is a further assumption that defense lawyers will not allow individuals with conceivable legal defenses (i.e. suppression of a confession that leads to lack of evidence for the jury to convict) to plead guilty. If subsequent analysis or research proves White's assumptions erroneous, the present acceptance of guilty pleas and the bargain model of criminal law. *See, e.g.*, Santobello v. New York, 404 U.S. 495 (1971), will be brought into question. *See also* discussion in text *infra* p. 281.

[98] 386 U.S. 738 (1967).

[99] Douglas v. California, 372 U.S. 353 (1963).

[100] 386 U.S. at 742–45.

ences to notions of advocacy for the indigent,[101] neither the opinion nor subsequent discussions clearly articulate that the Court has established a new principle.

Most discussions of *Anders* have improperly assumed that the major issue left open for resolution after *Anders* is the definition of a "frivolous appeal." [102] Such discussions are misguided since the Court's statement that counsel can request withdrawal if the claim is "wholly frivolous," [103] is only one rule to implement the more general principle of advocacy.[104]

A critical examination of *Anders*' companion case, *Entsminger v. Iowa*,[105] will demonstrate that establishing the principle of advocacy is *Anders*' major innovation. Despite a court order to file a full record, briefs, and be prepared for oral argument, counsel simply filed a "clerk's transcript." [106] The state court's short per curiam affirmance of the conviction was inadequate primarily because appellate counsel failed to take advantage of the appellate procedures available.[107] After *Entsminger* there is no rule that says "clerk's transcript" or that "no merit letters" are per se unconstitutional. Rather the constitution prohibits the use of either procedure in such a way as to inhibit or encourage appellate counsel to abandon his obligation of advocacy.[108]

Clarifying the underlying principle of *Anders* is only the beginning of the appellate courts' job. But given such clarification, courts should be aware of the wide range of combinations of rules that might effectuate the principle. Careful examination of any proposed rule will reveal wide ramifications for the appellate courts' relationship to other institutions. For instance, in formulating a rule to implement *Anders*, a court must make judgments about the general quality of counsel in its jurisdiction. In some specific situations courts might need to consider in addition the effect of a statewide system as compared with other arrangements for providing legal services to the indigent.[109]

Overall, however, the failure of most courts to see and address issues like those outlined above has led to some misuses of the *Anders* principle. Without critical examination of the appellate courts, counsel, and the rules of appellate procedure in a given jurisdiction, there may be a tendency of courts and commentators to see contradictions in the law where in fact none exists. Also, a court may improperly assume that the major issue left open for resolution after *Anders* is under what circumstances can appellate counsel withdraw.[110] Armed with an inadequate analysis of *Anders*, courts may go beyond constitutional principles in attempts to deal with the problems of advocacy.[111]

For example, the California courts at one time went beyond the requirements of advocacy. In *In re Ketchel*[112] the court required that the defendant receive a psychiatric examination on the theory that appellate counsel might use the expert information to develop a theory of ineffective assistance of counsel at trial.[113] While the court thought the spirit of *Anders* required such a result,[114] it failed to consider whether its notion of the obligation of advocacy went beyond any theory of defense offered at trial.[115] *Anders* requires that appellate counsel, as an advocate, argue every issue that might be in the record. But the court is incorrect in assuming that *Anders* provides guidance for what are the proper rules of appellate procedure. Given the operation of the California appel-

[101] 386 U.S. at 741–42.

[102] Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1973) [hereinafter cited as Hermann, *Frivolous Appeals*]; Note, *Screening of Criminal Cases in the Federal Courts of Appeal: Practice and Proposals*, 73 COLUM. L. REV. 77 (1973).

[103] 386 U.S. at 744.

[104] *Id.*

[105] 386 U.S. 748 (1967).

[106] 386 U.S. at 750.

[107] 386 U.S. at 752.

[108] *See, e.g.*, MISSOURI STAT. ANN., Rules of Criminal Procedure § 29.01(c) (1969). After Douglas v. California, 372 U.S. 353 (1963) was decided, the Missouri supreme court amended its rules to require appointment of counsel for indigents who wish to appeal. Gerard, *The Right to Counsel in Missouri: A Limited Inquiry, into the Factual and Theoretical Underpinnings of Douglas v. California*, 1965 WASH. U.L.Q. 463, 464 and n.4 (1965). Under the present rules appointed appellate counsel is required to submit a brief which modifies one appellate route available in Missouri before *Douglas* and *Anders*, that of appeal by means of a motion for a new trial for which no brief is required. *Id.* at 465. It is Gerard's thesis generally that the motion for a new trial procedure did not adequately provide the indigent appellant with the resources of counsel.

[109] *See e.g.*, N.J. STAT. ANN. § 2A:158A (1971); Trebach, *A Modern Defender System for New Jersey*, 12 RUTGERS L. REV. 289 (1957).

[110] *See, e.g.*, Barber v. State, 471 S.W.2d 814 (Tex. Crim. App. 1971).

[111] Throughout all of these proposed solutions is the uneasy feeling that appellate counsel cannot withdraw. *Cf.* Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals*, 59 J. CRIM. L.C. & P.S. 1 (1968).

[112] 68 Cal. 2d 397, 438 P.2d 625, 66 Cal. Rptr. 881 (1968).

[113] *Id.* at 401, 438 P.2d at 628, 66 Cal. Rptr. at 884.

[114] *Id.* at 402, 438 P.2d at 629, 66 Cal. Rptr. at 885.

[115] *Id.* at 403–06, 438 P.2d 629–31, 66 Cal. Rptr. at 885–87, (dissenting opinion).

late courts, the court might legitimately want to have higher standards than *Anders*, but those standards should be stated as such.[116]

More recent discussions interpreting *Anders* in California have focused on the issue of protecting effective appeal. In *In Re Banks*,[117] a state habeas corpus proceeding, the appellate court held that the petitioner had been denied his right of "effective advocacy by appellate counsel." [118] The case is a curious one since the petitioner's involvement in the various state and federal review mechanisms spanned nearly a ten year period.[119] The attempt to obtain the effective advocacy eventually required by the court involved three trips to the United States Supreme Court and numerous requests for appointment of different appellate counsel.[120] The Court went on to hold that the petitioner's constitutional rights had been violated in his 1962 trial by the prosecution's comments upon his refusal to take the stand. In deciding to consider the merits in this collateral proceeding, the court had to decide why its usual remedy of reinstating the appeal did not apply to the case. Two factors moved the court to decide the case on the merits. One factor was "conservation of scarce judicial resources." The other was the able advocacy of the newly appointed counsel.[121] The court failed, however, to discuss whether its disposition of the case would have prevented the numerous appeals cases at hand or in future cases.

The long range resolutions of the problem of numerous appeals lies in the California courts' effective use of the "Anders Brief." It is a brief required by the Court in *Anders*, consisting of any arguable points with citations to the record and relevant cases that must be filed before counsel can withdraw.[122] The California rule of allowing withdrawal of counsel after a full discussion of all the issues in the record and deciding to dismiss an appeal as "frivolous" is the rule used by most states.

Another solution to numerous appeals is to use the apparently contradictory rule of not allowing appointed counsel to withdraw.[123] Those states forcing counsel to file appellate briefs rather than "Anders Briefs" may have different views as to the best allocation of the resources of counsel, time spent on direct appeal review, and time spent on collateral review of conviction. Both rules permit appellate courts to perform their function of reviewing a conviction with the aid of counsel.[124]

What then appears to be a conflict between courts allowing the *Anders* briefs and those requiring appellate briefs is only two different rules to enforce the obligation of advocacy. The real conflict in the case law has developed as a result of the failure of some courts to see that the appellate courts, rather than lawyers, must administer any rules. In an attempt to prevent the "Brief Against the Client," [125] one court has tried to admonish appointed counsel to imagine that he were being paid in deciding whether to withdraw.[126] However,

[116] *See, e.g., In re* Smith, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970) (the kind of arguments an active appellate advocate could and should make are outlined in the opinion).

[117] 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971).

[118] *Id.* at 340, 482 P.2d at 217, 93 Cal. Rptr. at 593.

[119] History of the appeals of *In re* Banks: 1. August 9, 1962 judgment was entered on two counts of robbery and one count of attempted robbery. Petitioner had conducted his own defense. 2. Petitioner filed a timely appeal. The Court of Appeals affirmed. Court-appointed appellate counsel received several continuances and two requests from the clerk of the court to file a brief. Finally, over a year later, a twenty three page brief was filed. The brief cited only two cases. In 1964 the strongest appellate argument was denial of counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963), and yet the case was not cited. Counsel then dropped the case and wrote to petitioner, but did not send the court a no-merit letter as required. See *In re* Nash, 61 Cal. 2d 491, 393 P.2d 405, 39 Cal. Rptr. 205 (1964). 3. Petitioner sought relief *in propria persona*. The United States Supreme Court vacated and remanded for consideration in light of Griffin v. California, 380 U.S. 609 (1965). Banks v. California, 382 U.S. 420 (1966). 4. Petitioner requested appointment of different counsel, but the court of appeals denied his request. It informed counsel he might brief and present oral argument. However, Counsel did not submit a brief, or motion, and did not appear to argue the case. Court of appeals affirmed. 5. Petitioner sought relief again *in propria persona*. The United States Supreme Court vacated and remanded for reconsideration in light of Chapman v. California, 386 U.S. 18 (1967). Banks v. California, 387 U.S. 92 (1967). 6. Court of Appeals again affirmed. 7. Banks petitioned the United States Supreme Court a third time. Certiorari was dismissed for petitioner's failure to petition the California supreme court for a hearing. Banks v. California, 395 U.S. 708 (1969). 4 Cal. 3d at 340–42, 341 n.1, 593 n.1, 482 P.2d at 217–18, 217 n.1, 93 Cal. Rptr. at 593–94.

[120] *Id.*

[121] *Id.* at 343, 482 P.2d at 219–20, 93 Cal. Rptr. at 595–96.

[122] *See, e.g.*, People v. Feggans, 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967).

[123] Dixon v. State, 284 N.E.2d 102 (Ind. Ct. App. 1972); McClendon v. People, 481 P.2d 715 (Colo. 1971); State v. Gates, 466 S.W.2d 681 (Mo. 1971); State v. Cheelester, 26 Utah 2d 300, 488 P.2d 1045 (1971).

[124] *See* notes 108, 109 and 117 *supra*.

[125] Suggs v. United States, 391 F.2d 971 (D.C. Cir. 1968).

[126] *Id.* at 977–78 (appendix).

such a rule encourages counsel to consider for himself if the appeal is likely to succeed. Furthermore, the standard ignores the possibility that at a certain point of lack of probability of success, a paying client will decline to pursue an appeal. Even prior to *Anders* the federal statutory scheme for indigent appeals had been interpreted as preventing lawyers from deciding who gains access to review.[127] Once a judicial officer has issued a certificate of probable cause,[128] the question of whether to pursue the appeal has ended. The case ought to be argued in the appellate court on the basis of any conceivable point in the record.

Lawyers seem peculiarly aware of the fact that appeals to the indigent are costless and thus from the indigent's point of view every appeal ought to be pursued.[129] Yet, lawyers like to "win" appeals and may "resent" the suggestion that they are bound only to make the appellate arguments that support the defense presented below. Such a requirement on appellate counsel puts in proper perspective two problems generated by *Anders*.

The first of these problems is appellate counsel's obligation when the client pled guilty but has appealed. Under the proposed analysis, the answer is a choice between two options dependent upon the goals of the particular appellate courts. Either the plea was involuntary in the sense that present constitutional standards or the state's own standards were not observed in receiving the plea;[130] or counsel can simply inform the court that there is no appellate argument to be made because there was no defense made out below.[131] The appellate court must determine which option it prefers. The first option would be important to an appellate court seriously interested in scrutinizing plea bargaining with an eye towards some reform.[132] The second option may be adopted by a court willing to await federal constitutional developments by, in effect, forcing the defendant to pursue collateral attack in both state and federal courts.[133]

The other major problem to be noted, especially in those jurisidictions that disallow the "Anders Brief," is what appellate counsel should do with the trial record without any "good" arguments.[134] The manner in which appellate courts should construe this issue is whether counsel below made out a defense at all. Courts should distinguish two kinds of cases. One is where appellate counsel dislikes the arguments or defense strategy presented at trial or considers them lacking in merit. The others are situations where apparently no defense was presented.[135] In the first kinds of cases appellate courts should force appellate counsel to be advocates. In the latter cases, appellate counsel should present a claim of ineffective assistance of trial counsel.

Such a claim by appellate counsel should not be viewed as an occasion for disciplinary action against trial counsel.[136] Rather, raising the issue gives the appellate court an opportunity to scrutinize the actual quality of trial counsel. Such scrutiny by appellate courts is the starting point of the development of a doctrine of effective assistance of trial counsel based on the obligation to defend. Until an appellate court has started to assess the quality of counsel in criminal cases generally, however, there should be no haste to develop a new ill-defined constitutional doctrine of effective assistance.[137] Also an appellate court may be achieving functionally what is meant by "effective assistance" of counsel by enforcing both

[127] Ellis v. United States, 356 U.S. 674 (1958).

[128] 28 U.S.C.A. Federal Rules of Appellate Procedure, R.24; Third Cir. R.7B.

[129] Hermann, *Frivolous Appeals*, at 701; A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATED TO CRIMINAL APPEALS 63-64 (Approved Draft 1970).

[130] *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969); *cf.* Commonwealth v. Hughes, 434 Pa. 423, 253 A.2d 258 (1969) (holding that a psychiatric examination is not required before plea of guilty is accepted).

[131] *See, e.g.*, People v. Barrios, 1 Ill. App. 3d 1029, 274 N.E.2d 662 (1971); People v. Grant, 1 Ill. App. 3d 658, 274 N.E.2d 603 (1971); People v. Bell, 130 Ill. App. 2d 791, 267 N.E.2d 367 (1971); People v. Carter, 92 Ill. App. 2d 120, 235 N.E.2d 382 (1968); Commonwealth v. Sparks, 438 Pa. 77, 263 A.2d 414 (1970).

[132] National Commission on Goals & Policies of Criminal Law chaired by Gov. Peterson recommended eliminating plea bargaining in the next 10 years. The California supreme court may be indicating a willingness to scrutinize the plea bargaining process. People v. Martin, 9 Cal. 3d. 687, 511 P.2d 1161, 108 Cal. Rptr. 809 (1973).

[133] State v. Borough, 279 Minn. 199 n.2, 156 N.W. 2d 757, 759 n.2 (1968).

[134] Hermann, *Frivolous Appeals* at 703.

[135] United States v. Camodeo, 367 F.2d 146 (2d Cir. 1966), *vacated and remanded*, 387 U.S. 575, *aff'd*, 383 F.2d 770 (2d Cir. 1967) (although arguably the government's failure to produce a witness was an error but the error was not preserved by defense counsel).

[136] Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U.L. REV. 653, 671 (1971) [hereinafter cited as Bazelon, *Efficient Courts*].

[137] Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Bines, *Remedying Ineffective Representation in Criminal Cases: Departure from Habeas Corpus*, 59 VA. L. REV. 927 (1973) [hereinafter cited as Bines, *Ineffective Representation*].

See also United States v. De Costa, 487 F.2d 1197 (D.C. Cir. 1973).

an obligation to defend at trial and an obligation of advocacy on appeal.

Some of the recommendations of the organized bar are really contrary to the underlying principles of *Anders*. The suggestion that counsel can waive oral argument if the appeal is not meritorious[138] will encourage lawyers to effectuate that which a unanimous court condemned in *Entsminger*—an inadequate appeal. If oral argument is not necessary, court rules can accommodate this problem by placing the case on a summary calendar.[139] In this manner the court makes the basic decision of access to appellate review and the quality of that review.

II. Terminating Review and "Speedy Dispositions" of Criminal Appeals

While the principle of advocacy applies equally to federal and state cases, its application in federal cases raises three significant issues not clearly discernible in an examination of state court response to *Anders*. The review function of federal courts in criminal law differs significantly from that function in state courts. When the federal court, as a habeas corpus court, reviews a state conviction, the court may need to consider the previous opportunities for review.[140] Second, since the origins of the doctrines of right to counsel and access to review are in the federal constitution, innovations in the area are likely to be matters of federal law. A disastrous effect of the failure to analyze *Anaers* for federal courts may be an attempt to debate and decide issues which will prove non-productive. Third, federal courts are already equipped with the resources, in terms of personnel and functional definitions, that make them particularly appropriate for a study of the functions of appellate courts. Because of recent legislation authorizing a research function as part of the federal appellate courts,[141] these courts are uniquely situated to ask and answer questions about the relationship of counsel and the review function in criminal law.

A. *Advocacy in Federal Courts*

The difference in review function of federal and state courts in criminal law cannot be described merely in terms of relative breadth. Federal courts review not only federal criminal convictions but also state criminal convictions after state appellate review has determined that conviction and confinement of the individual is prima facie legitimate. As to the latter function of reviewing state convictions, the convicted individual can invoke federal judicial process of review without a lawyer.[142] Also, federal courts have increased access to review through liberalized pleading for state prisoners[143] and liberal construction of the federal habeus corpus statute.[144] At the same time the courts have developed "screening devices" to limit access to review.[145] An often suggested solution to unlimited access is to appoint a lawyer for the pro se litigant in federal court.[146] However well-meaning the suggestion, if adopted, lawyers will become the screeners or the deniers of access to review.

---

[138] Waiver of oral argument and submission of a brief was proposed by the ABA Advisory Committee on Sentencing and Review. The Full House of Delegates rejected the Advisory Committee's draft on this point. Hermann, *Frivolous Appeals* at 703 n.12. However, such a route is suggested for appeals without issues of substance as distinguished from frivolous appeals. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Criminal Appeals 5 (Approved draft 1970) § 3.2 b(ii) provides:

> If the client wishes to proceed it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading the court. After preparing and filing a brief on behalf of the client, counsel may appropriately suggest that the case be submitted on briefs *or request permission to withdraw*, (underlining added to tentative draft). *See also* commentary, *Id.* at 6.

[139] Fifth Cir. Rule 18; Third Cir. Rule 12(e). *See also* NLRB v. Local No. 42, Int'l Ass'n of Heat & Frost Insulators & Asbestos Wkrs., 476 F.2d 275 (3d Cir. 1973); Isbell Enterprises, Inc. v. Citizens Cas. Co. of N.Y., 431 F.2d 409 (5th Cir. 1970); Murphy v. Houma Well Serv., 409 F.2d 804 (5th Cir. 1969); Huth v. S. Pac. Co., 417 F.2d 526 (5th Cir. 1969) (summary disposition without oral argument). The Supreme Court has denied certiorari to review the fifth and fourth circuit screening procedures. United States v. Ambers, 416 F.2d 942 (5th Cir. 1969), *cert. denied*, 396 U.S. 1039 (1970); *In re* Louisiana Loan & Thrift Corp., 416 F.2d 898 (5th Cir. 1969), *cert. denied sub nom.* Holohan v. Reynolds, 397 U.S. 912 (1970); Pluchino v. United States, 410 U.S. 958 (1973) (cert. denied).

[140] Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). [hereinafter cited as Friendly, *Collateral Attack*].

[141] 28 U.S.C. §§ 620–29 (1970) (Federal Judicial Center).

[142] *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969).

[143] *Cf.* Haines v. Kerner, 404 U.S. 519, 520–21 (1972).

[144] Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963).

[145] Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 Colum. L. Rev. 77 (1973). *See also* 28 U.S.C. § 636(b) (3) (1970) which authorized district courts to use United States magistrates to screen post-conviction applications. "The additional duties authorized by rule may include, but are not restricted to . . . (3) preliminary review of applications for post trial relief made by individuals convicted of criminal offenses. . . ."

[146] *But see* Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Litigation in the Federal Courts*, 47 N.Y.U.L. Rev. 157, 250 (1972).

The federal courts must recognize that it is better for state prisoners to have access to federal review of a conviction without lawyers. In the first place if the convicted person has proceeded at trial and at least one appeal with a lawyer, he is hoping to obtain relief where the combined efforts of two lawyers have failed.[147] Second, if the petition lacks merit, it is the federal court's responsibility to say so and make the difficult determination of when a given piece of criminal litigation is final. The federal courts must develop legal doctrines that limit access in order to prevent lawyers from making the determination of when criminal litigation is final.[148] Finally, the federal court's ability to make the determination of finality will be a function of its ability to enforce the obligation of advocacy in the state courts.[149]

In one sense the federal courts, in their review of criminal convictions, have created the "law explosion" or the emphasis on "legality" [150] in criminal law. And as the source of any further doctrinal developments on access to review or counsel in the criminal law, the federal courts are in the position to clarify the emerging issues of delivery of legal services in the criminal process. Foremost in this clarification should be an insistence that the provision of counsel in the criminal process is a "juridical right" as opposed to a "social welfare right." [151] Cast as a juridical right, counsel is required whenever the state seeks to impose its criminal label through prosecution. After the prosecution the individual is entitled to at least one review with a lawyer to insure the legitimacy of state control. Such a delineation is distinct from the position of some commentators and judges who see the right to counsel and access cases as part of a social welfare movement.[152]

Once the constitutional doctrines of counsel and access are seen as juridical rights or matters of judicial principles and rules, federal courts are in the position to eradicate the differential standards between retained and appointed counsel.[153] If there is one constitutional standard of performance of counsel, judicial decisions will be dealing directly with the troublesome questions of who gets what kind of legal services in the criminal process. The line of "indigency" is not a static economic level that a rule establishes. For instance, depending upon one's use of resources for trial counsel, one may be indigent for purposes of appeal. Courts should not shrink from these troublesome issues of the marginal defendants, i.e. those who do not meet standards of indigency but cannot afford full access to review.[154]

Addressing the problems does not mean the courts would resolve every issue in terms of whether or not the decision favors the indigent. Instead the courts should be aware of the allocative effect of any of its decisions. For example, the unresolved issue of whether it is permissible to require some form of repayment from those who have had counsel appointed in criminal cases is a much broader issue than indigency.[155] Appointing counsel with little inquiry into true ability to pay may make counsel more readily available to all those charged with crimes. Bearing in mind that this service, at apparent zero cost to the defendant, is a cost that must be born by someone, a court might determine that a system of recoupment of some of the funds is permissible. The degree to

[147] *Cf.* United States v. O'Clair, 451 F.2d 485, 486 (1st Cir. 1971) (holding that appellant is not entitled to appointment of different counsel who presumably would be willing to serve as mouthpiece for petitioners own arguments).

[148] Schneckloth v. Bustamonte, 412 U.S. 218, 250, (1973) (Powell, J., concurring); *See also* Friendly, *Collateral Attack.*

[149] *Cf.* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[150] PACKER, LIMITS at 232–36.

[151] Cappelletti & Gordley, *Legal Aid: Modern Themes and Variations*, 24 STAN. L. REV. 347 (1972). The authors suggest that in the nineteenth century legal aid was a combination of juridical right and charity. *Id.* at 387. Legal aid as a juridical right is also present in 20th century schemes. One feature of legal aid as a juridical right is its emphasis on individual rights and responsiblities. As contrasted with the social welfare approach, a program of aid as a juridical right "only coincidentally attacks problems that transcend individual interests or capacities." *Id.* at 393. *Cf.* E. FRIESEN, E. GALLAS & N. GALLAS, MANAGING THE COURTS 49 (N.Y. 1971); Burger, *Counsel for the Prosecution and Defense—Their Roles under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 3 (1969).

[152] *E.g.*, Douglas v. California, 372 U.S. 814 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *See also* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 301–03 (1966).

[153] *Compare* West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973) (holding the standard of effectiveness of retained counsel is the same standard as that for appointed counsel) *with* United States *ex rel.* O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970) (holding there is a different standard for retained counsel). *See generally* Bines, *Ineffective Representation* at 982.

[154] D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 150–51 (1968).

[155] James v. Strange, 407 U.S. 128 (1972). As this article was about to go to print, the Court upheld a state statute requiring the convicted indigent defendant to repay the cost of counsel when he became financially able. Fuller v. Oregon, ___ U.S. ___, 94 S.Ct. 2116 (1974).

which some persons might forego counsel because of possible recoupment might be balanced by others using the appointed system when their "indigency" is in doubt. The foregoing of counsel by some and the appointing of counsel where indigency is uncertain would be desirable if the court thought the lawyers operating under its appointive system were better than the average private attorney engaged in criminal practice.

The presence of lawyers throughout the criminal process has begun to generate new kinds of public policy issues.[156] What kinds of controls will most likely make the decision-making of lawyers conform to the constitutional purposes for requiring their presence? Where the appellate court is attempting to control a large public defender organization, the court would be trying to control a bureaucracy, not a disparate group of individual lawyers. Mixed systems of appointed private lawyers and public defenders are simply variations on this theme.[157] Providing funds for counsel and the organization of the public defender is a legislative response to the judicial creation of the requirement of counsel in the criminal process.[158]

The federal appellate court is in a unique position to recognize the existence of the new institution of counsel. As an appellate court it performs the function of asking questions of itself and other agencies about the criminal law.[159] Congress has strengthened this role by allowing for the appointment of a court executive,[160] one of whose functions is to engage in research.[161] Viewing the federal court's review function in its broadest sense creates a new task for the court executive. He must first distinguish the unique features of criminal litigation in federal courts before he develops overall court management policies.[162] Professor Packer's thesis about the connection of counsel and review should be the starting point of his research endeavors. As the official researcher, the executive must translate Packer's thesis into testable hypotheses that relate his management recommendations to the goal of enforcing the obligation of advocacy. Any given federal circuit, as well as the circuits together,[163] provide the laboratory for testing the probable impact of some legal innovations.

The series of questions that a court executive might ask could begin with a question of court management that leads to larger issues of delivery of legal services. As to simple methods of docketing cases, the executive might ask if the cases are categorized in such a way that the various review functions of federal courts can be studied separately and integrally.[164] As to the usual function of direct review of criminal convictions, the executive might ask if various federal districts within the circuit have different systems of providing counsel.[165] If so, a basis of comparison exists for testing by some criteria the best way of supplying counsel at trial and on direct appeal. If, for instance, over a large number of cases it were found that appeals from one federal district took longer, or resulted in more reversals than appeals from another district, a host of other questions are now ready to be addressed. Was the system of appointing counsel on appeal the same for cases in both districts? Or does the make-up and complexion of

[156] John v Hurt, 489 F.2d 786 (7th Cir. 1973) (per curiam) (holding that there is a qualified judicial immunity for the public defender); Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973), *cert denied*,—U.S.—, 94 S. Ct. 879 (1974) (holding that the public defender as an association does not act under color of state law for the purposes of an injunction under 42 U.S.C. § 1983 (1970)). The second circuit case may involve a more complex issue since the district court judge had ordered a certain case load for the legal aid attorneys in New York City; Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

[157] 18 U.S.C. § 3006A(a) (1970). *Cf.* D. OAKS & W. LEHMAN, CRIMINAL JUSTICE SYSTEM AND THE INDIGENT at 165.

[158] *See*, United States v. Thompson, 361 F. Supp. 879 (D.D.C. 1973). *Cf. In re* Defender Association, 13 CRIM. L. REP. 2405 (Pa. Sup. Ct. 7/2/73) (upholding city of Philadelphia appointments to board of Defender Association which is in part run with city funds).

[159] Bazelon, *Efficient Courts* at 655.

[160] 28 U.S.C. § 332(e) (1970).

[161] 28 U.S.C. § 332(e) (6) & (7) provides that the court executives' duties may include: "Conducting studies relating to the business and administration of the courts within the circuit...." and "Collecting, compiling, and analyzing statistical data...."

[162] For a characterization of the court executive as manager and a description of managerial duties see Statement of Ernest Frieson, Jr., *Hearings on a Bill to Provide for the Appointment of an Administrator of the Courts for Each Judicial Circuit before the Senate Subcomm. on Improvements in Judicial Machinery of the Committee on the Judiciary*, 90th Cong., 2d Sess., July 25, 1968, p. 290. *See also* Statement of Edward C. Gallas, *Id.* at 303 (research projects of the administrator).

[163] 28 U.S.C. § 331 (1970) (section on Judicial Conference of the United States includes provision for making comprehensive survey of U.S. courts).

[164] *Cf.* Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 277–79 (1973) (identifying habeas corpus actions and distinguishing them from other civil actions).

[165] 18 U.S.C. § 3006A(a) (1970).

the bar in each district explain the difference? What other research would be appropriate in the district courts to clarify the problem? And finally, what kinds of recommendations, e.g., changes in rules of appellate procedure versus the standards for effective assistance of counsel are appropriate given the kind of research being undertaken?[166]

Through a set of similar questions the court executive should compare the expenditure of appellate resources on direct federal criminal appeals to the expenditure of resources in collateral review of state convictions.[167] Once again the problem might start with a simple directive to change the docketing of cases so that the state of origin of a case on collateral attack is readily identifiable. More pertinent questions might go to the nature of direct review of criminal cases and collateral review in the states in the circuit. For instance, are there significant differences in the quantity and quality of federal review required in states with elaborate post-conviction statutes[168] as compared with those without such provisions? One might assume that the state without an elaborate collateral review mechanism generates more work for federal courts. But if the state with a minimum level of collateral review has an effective system of appeals and an effective public defender system, the absence of presence of elaborate state collateral attack procedures may not be significant.[169] Such a result would support the overall thesis of this article that the time spent on review of criminal convictions in federal courts is a function of counsel at the original trial, effectiveness of counsel on appeal, and thus the effectiveness of appellate courts.

A more sophisticated study might include a study of the work of another arm of some federal appeals court, the pro se clerk. The executive might examine what happens to those cases that are screened out by the pro se clerk. As the official researcher, the executive must present his proposed research to the judicial council for pre-research review. His ability to design his research in terms of legal doctrines will increase his impact. Furthermore, preview of research by the court before it is undertaken will help to determine the scope of the executive's recommendations. For reasons peculiar to the judges, the court might determine that modification of rules might be an appropriate goal of research but that legal doctrines as to effective assistance of counsel are not.[170] Realistically, as an arm of the court, the executive can only be as innovative as the particular federal circuit court of appeals that he serves. But his overall performance as court manager will be improved if he recognizes the unique features of criminal law in his policy formulations.

B. *"Speedy Dispositions" of Criminal Appeals*

Research, including the process of posing and resolving questions, takes time during a period when expediting or speeding up the work of appellate courts is assumed to be the most important common goal. One answer to this objection is to simply postulate that time is a commodity input of the appellate courts' efficient output in criminal law. Deciding how long criminal appeals take will ultimately require allocative decisions by appellate courts, but a complete answer must go further.

First, the courts must realize that lawyers and judges are more likely to define the issue of "time" as the issue of "delay." Given the status of the absence of delay in trial as the fundamental right to a speedy trial,[171] lawyers have every incentive to argue that delay on appeal is some type of "fundamental individual interest," a violation of which would entitle defendants to certain remedies from the appellate courts. This tendency will be reinforced by the Supreme Court's most recent pronouncement that the only remedy available for denial of a speedy trial is dismissal of the indictment.[172] If this reasoning by analogy[173] approach

[166] Statistics will affect the constitutional outcome of cases. *Cf.* Furman v. Georgia, 408 U.S. 238 (1972).

[167] Actions taken under 28 U.S.C. § 2255 (1970) are not discussed in the article but the analysis would be generally applicable.

[168] It might be useful to compare the outcome of federal cases originating in a state like New Jersey which has only one appeal as a matter of right, see N.J. Rules Governing Criminal Practice, Rule 3:22–3, with the outcome of cases originating in Pennsylvania which provides counselled collateral attacks on the criminal judgment. *See* Commonwealth v. Hoffman, 426 Pa. 226, 232 A.2d 629 (1967).

[169] New Jersey appellate courts may have more means of insuring vigorous appeals through its inherent rule-making power. E. FRIESEN, E. GALLAS, & N. GALLAS, MANAGING THE COURTS at 31–35.

[170] For reasons peculiar to the judges, they may not want to authorize research aimed at modifications of difficult constitutional issues involving complex value judgments. *See, e.g.*, Burchard, *Lawyers, Political Scientists, Sociologists—and Concealed Microphones*, 23 AM. SOCIOLOGICAL REV. 686, 687 in J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS 103 (N.Y. 1972).

[171] Barker v. Wingo, 407 U.S. 514 (1972); Dickey v. Florida, 397 U.S. 30 (1970).

[172] Strunk v. United States, 412 U.S. 434 (1973).

[173] *E.g.*, Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 575–76 (1969) [hereinafter cited as Carrington, *Crowded Dockets*].

to the appellate process is adopted, the problem for research will be defined as one of "delay." [174] The solutions proposed will all be similarly aimed at eliminating the problem of "delay" or "undue delay" that is harmful to some assumed proper functioning of appellate courts.[175]

However, viewing the issue broadly in terms of the different functions of trial and appeals in criminal law, time performs different functions in the two aspects of criminal adjudication. At least one member of the Supreme Court has indicated that the constitutional delay analysis in criminal trials is not applicable to the appellate process.[176] This distinction is of constitutional significance because delay at trial interferes with the overall presumption of innocence,[177] which is part of the due process analysis of a fair trial. As such, given a particular theory of due process of law, a concept of delay of trial might be integrated into the notion of a right to defend.[178]

Time can be defined in terms of appellate functions in criminal law. Such a definition requires that the legal presumption for an appellate court analysis of the effect of time is the reverse of that of the trial court in criminal law. Rather than assume that a person is innocent, the appellate court is entitled to assume he is guilty. Therefore, the primary question for appellate courts is whether the convicted appellant has been rightfully convicted and is legitimately under the control of government officials. Such an articulation of the issue clarifies the meaning of legality of guilt determination in the new emphasis on review of criminal convictions. Furthermore, such an emphasis on legality in review determinations means that appellate courts sometimes pursue goals of the criminal law that have nothing to do with the individual litigant before it.

The alleged relationship between "delay" in criminal appeal dispositions and the interference with other goals of criminal law is minimized by determining that the legality of the guilt determination is to be viewed as the major function of criminal appeals. For instance, it is often asserted that delay in appellate disposition "dilutes deterrence or interferes with whatever rehabilitative treatment that may be available." [179] The assertion is based on two unspoken assumptions about how the multiple goals of the criminal law are pursued. First, the statement assumes implicitly that review of a criminal conviction does not further some important goals of criminal law. In this regard the assertion ignores the fact that criminal adjudication, including appellate review, is the manner in which the values of the criminal law are articulated.[180] Second, the statement assumes that whatever penal policy is compromised by criminal adjudication is worth more to the appellate courts than the time required for review.

The latter assumption seems particularly unwarranted since the lack of appellate review of sentencing, and thus of penal policy, is what presently distinguishes sentencing from most other criminal law decisions, particularly the determination of guilt. The effect of time spent on criminal appeals on penal policy under present analysis is unknown. If appellate courts were to institute review of sentencing, the supposed trade-off of penal policy and the review of conviction could take place in the appellate courts. If the trade-off became possible, courts would be producing a new product for the criminal process. Whatever time the performance of this role required of the appellate court would be in production of a different output. The older product or output of the appellate court had required the reviewing of the guilt determination and the work of investigative agents. But it is impossible to predict that the total time spent on criminal appeals will increase or decrease because of the institution of review of sentence.[181]

Time expended by an appellate court on criminal appeals of all kinds is time taken from other matters. But distinguishing criminal appeals is

[174] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 3 (1970); Christian, *Delay in Criminal Appeals, A Functional Analysis of One Court's Work*, 23 STAN. L. REV. 676 (1971); Fleming, *The Law's Delay: The Dragon Slain Friday Breathes Fire Again Monday*, 32 PUBLIC INTEREST 13 (1973); Scwab & Geddes, *Expediting Disposition of Criminal Appeals in Oregon*, 51 ORE. L. REV. 650 (1972). Comment, *Appellate Delay in Criminal Cases*, 2 AM. CRIM. L.Q. 150 (1964); Note, *Screening of Criminal Cases in the Federal Courts of Appeals*, 73 COLUM. L. REV. 77 (1973).

[175] *Id.*

[176] Dickey v. Florida, 398 U.S. 30, 43 n.4 (1970) (Brennan, J., concurring).

[177] *See* Dickey v. Florida, 398 U.S. at 41 (Brennan, J., concurring): "The evils at which the clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process." *Cf.* Barker v. Wingo, 407 U.S. at 527 and n.27; *In re* Winship, 397 U.S. 358 (1970).

[178] *See* Barker v. Wingo, 407 U.S. 514, 522–30 (1972).

[179] Carrington, *Crowded Dockets* at 576.

[180] Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion at Sentencing*, 62 GEO. L.J. 1 (1973).

[181] *But see* Hermann, *Frivolous Appeals* at 720–21.

useful because it allows for identification of the options not available for reforming the courts to make them produce more. Without complete theoretical justification, the fundamental value judgment has been made that our criminal process needs lawyers and review of guilt determinations.[182] Put another way, lawyers at trial and at least one review of a guilt determination with lawyers are necessary inputs.

In judging the time element involved in these decisions of fixed inputs, "indigent appeals" are not the problem. While "indigents" surely have every incentive to appeal since appeal comes at zero cost to them, all defendants have more incentives to appeal when the system operates basically on a trial plus at least one review. Of course some clients will be deterred by lack of resources from pursuing some appeals, but in hiring a lawyer's services for a criminal case clients increasingly purchase a trial plus review and the opportunity for a re-trial.[183] The ability to purchase the services of an attorney may be an important variable in assessing the time spent on review. If a lawyer is paid for his services he may have an incentive to deliver more than the minimum of a trial and one appeal. The paid lawyer may seek more appeals in order to make the paying client see himself as better off than the non-paying or indigent defendant. Or the paid lawyer may have an incentive to make maximum use of the appellate process dependent upon his client's resources. Such incentives may translate into more time spent upon appeals by paying clients. However, the costs of invoking the process of review may not be an important variable in assessing the time spent on review. The hypothesis might be tested by comparing those states which place a near zero monetary cost on invoking the process of review by providing every convicted person with a transcript and charge no fees to those states that impose direct costs in order to invoke the appellate process.[184]

Similarly, the option of increasing sentences for "frivolous appeals" [185] is probably not available. Such a method of internalizing some of the costs of appeal to the convicted will lead to the due process objection that a sentence has been increased solely because of appeal.[186] While a successful appellant litigant could not be punished, the unsuccessful litigant would. Thus some potentially successful litigants would be deterred from appealing by such a system. A second objection would be that punishment would be inflicted by appellate courts without a legal determination of the "crime." In this connection, it is significant that appellate courts have not used their rule authority to add "damages" to a litigant who pursues a frivolous appeal in criminal cases.[187] By their language, the rules might be thought to apply to only civil litigation. Courts would find, were they to consider the applicability of these rules to "criminal" cases, that the punishment of even a fine would have been inflicted without a legal determination of guilt.

The time expended in review of criminal convictions becomes a function of defining the product of the appellate courts, choosing between the available options of inputs, and then measuring the output. The most frequent measure of success of criminal appeals, reversal rates,[188] seems to ignore the primary function of appellate courts. The convicted litigant or his lawyer will measure the output in this manner. The fact of reversal is irrelevant to an appellate court, as a lawmaker in many aspects of criminal law. Surely to the judges who voted for affirmance, the appeal ended successfully. Furthermore, a case that clarifies the legal issues in a problem area of the law is a success for the court.[189] A self-evaluating appellate

[182] Hazard, *Rationing Justice*. It is fixed unless the Supreme Court will reexamine *Gideon*.

[183] The defendant is at least trying to gain the bargaining position of a retrial if not outright acquittal.

[184] In California, Massachusetts, and Ohio free transcripts are available to all criminal defendants. CAL. GOV'T CODE ANN. § 69952 (West, Supp. 1973); MASS. ANN. LAWS ch. 278 § 33A (1972) (felonies); OHIO REV. CODE Tit. 23, §§ 2301.23, 2301.24, 2301.25 (1955).

[185] Hazard, *After the Trial Court—The Realities of Appellate Review* in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 60, 84 (1965).

[186] Michigan v. Payne, 412 U.S. 47 (1973); Stynchecombe v. Chaffin, 412 U.S. 17 (1973); Colten v. Kentucky, 407 U.S. 104 (1972); North Carolina v. Pearce, 395 U.S. 711 (1969).

[187] *See, e.g.*, Federal Rules of Appellate Procedure, R.38. *Cf.* United States *ex rel.* Boyd v. Rundle, 437 F.2d 405, 406 (3d Cir. 1970).

[188] Carrington, *Crowded Dockets* at 578; Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 309–19 (1973); Hermann, *Frivolous Appeals* at 706.

[189] United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972) (en banc). A 7-2 majority's overruling of its prior panel decision in United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), is hardly an example of an appellate failure because there was no reversal. Of some importance in judging appellate success may be the fact that two judges in the 3-2-3 majority switched from their own previous position in *Zeiler* (Judges Van Dusen and Adams), 461 F.2d at 740, 746. But an equally erroneous criterion would be

court must develop measurements related to its institutional function.

The institutional role for federal courts demonstrates that research aimed at exploring limitations on collateral review is certainly appropriate. The option of limiting access to this form of review is thus available.[190] But any innovation in limiting federal review by collateral attack must await some careful analysis. The appellate courts should also exercise restraint in relying more upon the necessary inputs—the lawyers at trial and on appeals—to raise issues for appellate decision-making. An example of this need for judicial restraint is the still debated issue of the insanity defense. Do lawyers fail to raise the issue as often as some appellate judges might like because their clients do not perceive the benefit of such defenses[191] or because they ignore an important issue of law? The issue of insanity may be symbolically extremely important to appellate courts and legal scholars because it deals with moral issues in the criminal law. But the fact that few lawyer-litigants choose to defend on the basis of insanity and few appellate advocates raise the issue presents an important question for the appellate court: is this an issue of law that remains unresolved because of legislative unwillingness or inability to answer the question of why there is an insanity defense? [192] If the answer is in the affirmative, the appellate court is starting to articulate its responsibility for the "justice" output by leaving such an issue for legislative action or inaction. But the courts might have an input into the legislative decision to act or not to act by raising questions about the administration of the legislative determination that a "mad and bad" syndrome can exist within the law.[193]

The issue of "delay" of appellate dispositions in criminal appeals will be raised in this period of demands for an efficient judiciary. The appellate courts must see that all such alleged issues are really functions of larger and more important issues. The question of whether "delay" in appellate dispositions of a criminal appeal is a reason for granting bail[194] raises the question of the purposes of bail in general. Should the same criteria be used for bail prior to trial versus bail after trial pending appeal? A great degree of confidence in the effectiveness or "fairness" of criminal trials might lead one to argue that no one should be entitled to bail pending appeal. After all, a system of money bail starts to raise the issue of "indigency"[195] and those out on bail have no incentive to stop appealing. If lawyers are to be disciplined for "delay" in criminal appeals,[196] is that because the lawyers have violated the standard of advocacy in the jurisdiction in failing to pursue the appeal expeditiously? If there is delay in state collateral attack,[197] is federal habeas corpus appropriate because state opportunities to litigate are inadequate? If the legislature declares that a certain appellate decision must be done within a specified time,[198] is an appellate court free to affirm or reverse automatically if the time period is violated? If the government is allowed to appeal certain decisions, what criteria will be used to determine that the appeal is for "delay" and what sanctions follow such a determination? [199]

Time is one of the commodities of input into the appellate court's output in criminal law of determining whether the individual is rightfully convicted. The appellate courts must insist that the fixed input of counsel at trial spend its time defending against the charge and that other fixed input of counsel on appeal spend its time seeking at least one review based on the defense made out at trial. Such an approach starts to reward those appellate lawyers who successfully follow the de-

that the Supreme Court ultimately upheld the majority on the point. *See* Ash v. United States, 413 U.S. 300 (1973).

[190] Friendly, *Collateral Review*.

[191] Bazelon, *Efficient Courts* at 672–73.

[192] *Cf.* Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963); Goldstein, *The Brawner Rule—Why? or no More Nonsense on Nonsense in the Criminal Law, Please!*, 1973 WASH. U.L.Q. 126 (1973).

[193] *Cf.* Jackson v. Indiana, 406 U.S. 715, 740 (1972).

[194] *See, e.g.*, Rivera v. Concepcion, 469 F.2d 17 (1st Cir. 1972). *Contra*, State *ex rel.* Mastriani v. Tahash, 277 Minn. 309, 152 N.W.2d 786 (1967) (three year delay on habeas corpus petition—petitioner serving life sentence for first degree murder).

[195] PACKER, LIMITS at 216–217.

[196] United States v. Smith, 436 F.2d 1130 (9th Cir. 1970).

[197] Duke v. State, __ Ind. __, 298 N.E.2d 453 (1973) (held that 2½ year delay deprived the defendant of a prompt appeal); Fariss v. Tipps, 463 S.W.2d 176 (Tex. 1971) (held that petitioner is entitled to a speedy probation revocation hearing). *But see* Mastriani v. Tahash, 277 Minn. 309, 152 N.W.2d 786 (1967).

[198] *See, e.g.*, 28 U.S.C. § 1826(a) & (b) (1970) (federal recalcitrant witness statute provides that an appeal from an order of confinement must be disposed of within thirty days).

[199] 18 U.S.C. § 3731 (amended 1971) provides in part: "An appeal by the United States shall lie . . . from a decision or order . . . suppressing . . . evidence . . . if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay. . . ."

fense strategy as opposed to those who raise issues not used in defense of the criminal charge. Awarding this type of appellate strategy is necessary to prevent the institutional defense services from rationing justice. Without such appellate court control there exists the possibility that the defender organizations are trading invisibly time spent on individual appeals for time on "significant" or "winning issues." But more important is the need to examine the impact of the institutional defense counsel in the criminal process to determine whether criminal appeals are part of the invisible form of the "bargain model" of the criminal process.[200]

[200] It may well be that the specialization in the various stages of a criminal proceeding which is made possible by the vast volume of cases which comes to the Voluntary Defender's office promotes efficiency and provides expert service.... These twin qualities of the divisions of labor and specialization are the pillars of the large modern private law firm. On the other hand, in such an institutionalized system there are inherent the risks of a loss of the close confidential relationship between litigant and counsel and the subordination of an individual client's interest to the larger interest of the organization. These risks of course are greater in the case of indigents for whose clientele there is no compensating pressure of competition. United States v. Moore, 432 F.2d 730, 736 (1970).

See also United States *ex rel.* McCoy v. Rundle, 419 F.2d 118, 119–20 (1969) (Freeman, J., concurring). *Cf.* Comment, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 468–69 (1969).

Conclusion

Legal scholars cannot ignore the demand for more efficient courts by claiming that law or justice is not rationed. They must join the debate on judicial administration by explaining the policies of the law that create the apparent conflict with the goal of more efficient courts. This examination of the implications of the right of counsel and access to review cases is a portion of the overall debate. A second obligation of legal scholarship is to develop through legal analysis testable hypotheses that researchers in other disciplines can use in their decisions about courts and related institutions. In this regard, it should be noted that certain kinds of data about the operation of courts will be gathered because of the legislatively defined research functions of federal court executives. Thus, the second goal of this article has been to offer some suggestions for research that should enable courts, court administrators, evaluators of courts, and the providers of counsel in criminal law to allocate the resources that society is devoting to criminal law administration. And finally this article has demonstrated that the alleged problem of "delay" in at least criminal appeals is a matter of determining what are the fixed and variable inputs of the appellate courts' product or function in criminal law. "Delay" in criminal appeals is a matter of identifying the variable input of time in criminal law litigation.