



1969

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## Recommended Citation

Walter W. Steele Jr., *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw L.J. 488 (1969)

<https://scholar.smu.edu/smulr/vol23/iss3/4>

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# THE DOCTRINE OF RIGHT TO COUNSEL: ITS IMPACT ON THE ADMINISTRATION OF CRIMINAL JUSTICE AND THE LEGAL PROFESSION

by

Walter W. Steele, Jr.\*

THE SYSTEM for the administration of criminal justice is in the form of a continuum, with various stages ranging from the initial arrest to parole.<sup>1</sup> Each stage of the continuum serves two functions: first, to screen out some of the population of the continuum (the accused or the convicted, as the case may be) and second, to impose some process which makes the remaining population ready for the next stage. For example, at the grand jury stage a person is either no-billed (and thus screened out of the continuum), or he is indicted, which prepares him for the next stage (pretrial) along the continuum.

Two distinct branches are involved in the process of decision-making in the continuum; *i.e.*, the courts and judges from the stages of arrest through appeal, and the boards and administrators from the stages of conviction to final discharge. This bifurcation results in a hiatus in communication and cooperation between functionaries in the continuum. For example, prison officials supposedly possess expertise in the subject of rehabilitation, but because they belong to an administrative stage, they take no part in sentencing decisions, which are assigned to a judicial stage.

In the few years since the 1963 decision in *Gideon v. Wainwright*,<sup>2</sup> the doctrine of right to counsel has been expanded to include many of the pre-trial as well as some of the post-trial stages of the criminal continuum. This Article will attempt to show that the expansion of the doctrine of right to counsel from the trial stage to pre- and post-trial stages of the continuum will have a more pervasive impact than simply providing increased legal service to persons charged with an offense. Notably, some of the basic characteristics of the criminal justice continuum in the pre- and post-trial stages will be changed as a result of this expansion. For example, the infusion of lawyers into the post-conviction stages of imprisonment and parole will mean that for the *first time* these stages will have an element (the presence of the lawyer) in common with earlier stages, such as trial and sentencing. Once the presence of the lawyer is routinely accepted at all of these stages, it may serve to curtail the lack of coordination between the judicial and administrative decision making processes.

As will be demonstrated, the expansion of the doctrine of right to counsel will impose new burdens on the legal profession. Not only will the profession be forced to supply competent and affordable manpower, it will be

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<sup>1</sup> Cf. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND AD. OF JUSTICE, TASK FORCE REPORT: THE COURTS 84 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS].

<sup>2</sup> 372 U.S. 335 (1963).

called upon to provide new models and new norms for the delivery of legal service to the accused. It will be demonstrated herein that many of the characteristic and traditional forms of lawyering are inapposite to the type of legal service called for at some of the pre- and post-adjudication stages of the criminal continuum.

In order to develop the theme of the pervasive impact of the doctrine of right to counsel, this Article will first examine the constitutional justification of the doctrine. This will be accomplished through a discussion of the rhetoric of the courts together with a survey of those stages in the continuum where the doctrine has been applied to date. Following this discussion of the substantive aspects of the doctrine, is set out a description of the roles of the lawyer in the administration of criminal justice. The various lawyer roles are examined from the points of view of the client as one recipient, and of the criminal justice continuum as another. By dichotomizing lawyer roles into client relationships verses continuum relationships, the unique quality of the lawyer roles is revealed. It will be demonstrated that the nature of the lawyer roles is such that they provide indispensable services to the client and to the continuum simultaneously, and without any inherent conflict of interest. Finally, this Article will explore the potential impact of the doctrine of right to counsel on the criminal justice process. It will be argued that the unique capacity of the lawyer to serve both the client and the continuum simultaneously is the harbinger of some unanticipated consequences of the doctrine of right to counsel. The doctrine's impact, beyond the simple provision of more lawyers for more people, will be developed through a discussion of the effect of the doctrine upon both the legal profession and legal education.

#### I. THE CONSTITUTIONAL HISTORY OF THE DOCTRINE OF RIGHT TO COUNSEL

The sixth amendment of the United States Constitution declares: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."<sup>3</sup> The development of a judicial interpretation of the word, "right," as employed in this phrase, is essentially the history of the doctrine of right to counsel. "Right to have assistance of counsel" could reasonably be interpreted in any one of three ways:

- (1) The accused has a constitutionally guaranteed option to employ counsel.
- (2) The accused has a constitutionally guaranteed option to have counsel assigned if he cannot afford to employ one.
- (3) The Constitution requires that counsel be employed or assigned whether or not desired by the accused.

The history of the sixth amendment is of little assistance in deciding which of these three meanings was intended. Most of the original colonies had laws dealing with right to counsel, and the drafters of the amendment

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<sup>3</sup> U.S. CONST. amend. VI.

were obviously familiar with them. However, the scope of the right varied between colonies, and there is no way of knowing which interpretation the drafters intended to adopt.<sup>4</sup> Probably the most realistic interpretation of the available history is that the constitutional draftsmen gave the matter no careful thought. Beaney, the most thorough chronicler of the subject, states:

The provision in the Sixth Amendment to the Constitution emerged in an atmosphere of silence concerning the intentions which produced it. Since there was a general understanding that the federal courts would have jurisdiction of an insignificant number of criminal proceedings, the logical assumption is that no great thought was given to the precise nature of the federal right to counsel.<sup>5</sup>

Peculiarly, the Supreme Court did not settle upon one of the three possible meanings of the phrase until one hundred and forty-six years after it was placed in the sixth amendment. In the case of *Johnson v. Zerbst*,<sup>6</sup> decided in 1937, the Court opted for the second possible interpretation; that "right" meant a constitutionally guaranteed option of the accused to have counsel, assigned or employed. The Court said:

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence.<sup>7</sup>

*Johnson v. Zerbst* was restricted by its language to the federal system; it was another twenty-six years before the Court, in *Gideon v. Wainwright*,<sup>8</sup> imposed the same requirement upon the states. Although *Gideon* settled the question of the application of the sixth amendment right to counsel to the states, the extent of the right at each stage of the criminal process remains unsettled.

## II. THE CONSTITUTIONAL APPROACHES TO THE DOCTRINE OF RIGHT TO COUNSEL

The sixth amendment is the sole source of constitutional language that expressly refers to a right to counsel. However, the Supreme Court has not limited itself to the sixth amendment to expand the doctrine of right to counsel. In some cases the Court has held that the due process and equal protection clauses of the fourteenth amendment require that counsel be assigned to the indigent defendant. The rhetoric of the Supreme Court right to counsel cases will be discussed at this point with a view of locating some unifying principle between the sixth amendment right to counsel

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<sup>4</sup> See W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955); Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE L.J.* 1000 (1964).

<sup>5</sup> W. BEANEY, *supra* note 4, at 25.

<sup>6</sup> 304 U.S. 458 (1938).

<sup>7</sup> *Id.* at 467-68.

<sup>8</sup> 372 U.S. 335 (1963).

cases and those cases relying upon the due process and equal protection clauses of the fourteenth amendment.

A. *The Sixth Amendment as a  
Vehicle for Right to Counsel*

When the sixth amendment was written the processes of applying criminal sanctions, as well as the role of a lawyer within those processes, was relatively primitive. Hence, the amendment speaks in terms of a "criminal prosecution" giving the right of counsel to an "accused" for his "defence." As a vehicle for expanding the doctrine of right to counsel, this language of the sixth amendment is both too narrow and too broad. The words "criminal prosecution" and "defence" are too narrow because it strains their plain meaning to extend their import to some of the modern stages of the criminal continuum; stages which did not exist when the sixth amendment was written.<sup>9</sup> For instance, it has been held that the sixth amendment will not serve to extend the doctrine of right to counsel to inmates seeking post-conviction relief, because there is no "criminal prosecution" or "defence" involved at this stage.<sup>10</sup> It may reasonably be argued that it was the recognition of just such limitations which caused the Supreme Court to use the *fifth* amendment as the rationale for *Miranda v. Arizona*<sup>11</sup> instead of the sixth amendment which had been applied in the earlier case of *Escobedo v. Illinois*.<sup>12</sup>

The words "criminal prosecution," "accused," and "defence" as used in the sixth amendment set definite longitudinal limits on the right to counsel, but they do not set any vertical limits, *i.e.*, to any particular *level* of criminal prosecutions. In this respect the language of the sixth amendment is overly broad. Certainly, a requirement of assigned counsel in *every* criminal prosecution, no matter how minor or how trivial the possible sanction, would place a severe and constant strain on any judicial system. The Court seemed to have this fact in mind when it decided *Betts v. Brady*<sup>13</sup> in 1942, holding that the states were under no sixth amendment obligation to provide counsel in all criminal cases. Even now, five years after *Betts* has been overruled by *Gideon*, the matter of whether counsel must be provided in *all* criminal prosecutions is far from settled.

On its face, therefore, the sixth amendment is sufficiently broad to appear to require assigned counsel at *any* criminal prosecution; and yet the sixth amendment is apparently so narrow that it does not require counsel at significant non-judicial stages. In order to escape this enigma, the Supreme Court has sometimes used the fourteenth amendment to extend the doctrine of right to counsel.

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<sup>9</sup> *E.g.*, "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself." *United States v. Wade*, 388 U.S. 218, 224 (1967).

<sup>10</sup> *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965); *Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962).

<sup>11</sup> 384 U.S. 436 (1966).

<sup>12</sup> 378 U.S. 478 (1964).

<sup>13</sup> 316 U.S. 455 (1942). The majority opinion contains a survey of the law of each state which established that no state provided assigned counsel in all criminal cases.

B. *Fourteenth Amendment (Due Process Clause) as a Vehicle for Right to Counsel*

Normally, the Supreme Court attempts to maintain a balance between what it foresees as constitutionally desirable, and what it senses to be presently practical.<sup>14</sup> For this purpose, the due process clause of the fourteenth amendment provides a convenient tool. The due process clause allows the Court to posit a principle which is realistic for the time, and yet remains sufficiently flexible to accommodate some future extension of the principle, such as the right to counsel. The language of the touchstone case of *Powell v. Alabama*<sup>15</sup> demonstrates the point: "All that is necessary now to decide, as we do so decide, is that in a capital case . . . it is the duty of the court . . . to assign counsel . . . as a necessary requisite of due process of law . . ."<sup>16</sup> Thus the Court settled the question of the day, while leaving the door open for future changes.

Since *Powell*, cases which have dealt with right to counsel as a part of due process may be divided into two categories: those which employ the "special circumstances" test, and those which employ the "critical stage" test. Prior to *Gideon* the Court consistently employed the "special circumstances" test in which the right to counsel was held to apply because the Court found a lack of fairness in the facts of the specific case. *Townsend v. Burke*<sup>17</sup> and *Moore v. Michigan*<sup>18</sup> stand as examples of cases which applied the "special circumstances" test. In both of these cases it was held that, *under the particular circumstances*, due process required that the right to counsel be extended to the accused. In both cases some untoward event had occurred in the course of the proceedings; in *Townsend* the judge obviously misinterpreted the presentence report, and in *Moore* an uneducated Negro received a maximum sentence without the benefit of cross-examination or mitigating testimony. The Court in both cases appeared to limit its holding to the facts before it. There was no necessary implication from either of these cases that due process required that the right to counsel should be uniformly extended in the future to cases involving similar circumstances.

After *Gideon* (which applied the sixth amendment right to counsel to the states as a part of due process) the Court began to employ the "critical stage" test to extend the right to counsel. Under the "critical stage" test, right to counsel is not necessarily limited to the case before the Court; the right is extended to all future cases where the particular critical stage may arise. Thus, under this test the assignment of counsel apparently becomes an invariable procedural step for future cases, regardless of circumstances. For example, in *United States v. Wade*<sup>19</sup> the Court held that conducting a line-up was a critical stage, requiring the assignment of counsel at line-

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<sup>14</sup> Compare *Robinson v. California*, 370 U.S. 660 (1962), with *Powell v. Texas*, 392 U.S. 514 (1968).

<sup>15</sup> 287 U.S. 45 (1932).

<sup>16</sup> *Id.* at 71.

<sup>17</sup> 334 U.S. 736 (1948).

<sup>18</sup> 355 U.S. 155 (1957).

<sup>19</sup> 388 U.S. 218 (1967).

ups held in the future. Similarly, in *Mempa v. Rbaj*<sup>20</sup> the Court held that probation revocation was a critical stage, with the result that the presence of counsel is necessary in future instances where probation is to be revoked. Apparently the Court does not intend to completely abandon the "special circumstances" test in favor of the "critical stage" test. A juxtaposition of the opinions in *Hamilton v. Alabama*<sup>21</sup> and *White v. Maryland*<sup>22</sup> demonstrates this point.

*Hamilton* was decided before *Gideon*, so the "special circumstances" test was applicable. In *Hamilton* an unrepresented indigent pleaded not guilty at his arraignment. The Supreme Court held that a lawyer was constitutionally required at this arraignment, because in Alabama certain defenses are considered abandoned if not raised at arraignment. Since the "special circumstance" in this case was the peculiar nature of the Alabama statute, there was no particular reason to believe that the *Hamilton* decision extended the right to counsel at arraignment beyond the Alabama jurisdiction.

*White v. Maryland* involved the right to counsel at a preliminary hearing. Under the applicable Maryland statute no rights are lost at a preliminary hearing as they are under the Alabama statute in *Hamilton*. In *White* an unrepresented indigent entered a guilty plea at his preliminary hearing, and this fact was made known to the jury at a subsequent trial on the merits (where the defendant plead *not* guilty). Since *White* was decided after the *Gideon* case, the "critical stage" rule was applicable and in reversing the conviction the Court reasoned:

Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in *this case* as critical a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel . . . We therefore hold that *Hamilton v. Alabama* governs and that the judgment below must be and is reversed.<sup>23</sup>

Why did the Court state that *Hamilton v. Alabama* governs the issue? Should not *Gideon v. Wainwright* have governed the issue (that is if the "critical stage" test has replaced the "special circumstances" test)? Why did the Court emphasize that the Maryland preliminary hearing was a "critical stage in *this case*"? The quoted language seems to imply that the preliminary hearing would not have been "critical" had it not been for the "special circumstance" that the guilty plea was introduced into evidence at the main trial. The answer to the question of whether or not the Court intends to completely abandon the "special circumstances" test in favor of the "critical stage" test is found in the case of *Pointer v. Texas*<sup>24</sup> which was decided after *Hamilton v. Alabama* and *White v. Maryland*. In *Pointer* the defendant contended that the failure to appoint counsel to represent him at the preliminary hearing was a violation of his constitu-

<sup>20</sup> 389 U.S. 128 (1967).

<sup>21</sup> 368 U.S. 52 (1961).

<sup>22</sup> 373 U.S. 59 (1963).

<sup>23</sup> *Id.* at 60 (emphasis added).

<sup>24</sup> 380 U.S. 400 (1965).

tional right to counsel as established by the *Hamilton* and *White* decisions. The Court disposed of the defendant's contention with this statement:

[T]he State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling as to the right to counsel.<sup>25</sup>

The *Pointer* case demonstrates the importance of the fourteenth amendment due process clause as a vehicle for the expansion of the right to counsel doctrine. The critical nature of any given stage in the criminal justice continuum may vary significantly between states (as in the case of the preliminary hearing-arraignment stage). In these cases the Court apparently intends to continue to rely on the pre-*Gideon* "special circumstances" test as a part of fourteenth amendment due process. On the other hand, in those instances where the critical nature of any given stage is fairly uniform between the states (as in the case of line-up or probation revocation) the Court apparently intends to rely on the post-*Gideon* "critical stage" test as a part of fourteenth amendment due process. Thus, the fourteenth amendment serves a sort of double duty in the expansion of the right to counsel doctrine.

### C. Fourteenth Amendment (Equal Protection Clause) as a Vehicle for Right to Counsel

The notion of equal protection of the laws has been used by the Court on occasion to extend the doctrine of right to counsel. The equal protection clause states: "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>26</sup> On its face, this language is subject to but one construction, *i.e.*, a state may not apply its laws in a discriminatory fashion. Consistent with this construction the Court held in *Griffin v. Illinois*<sup>27</sup> that the state must furnish an indigent with a transcript for his first appeal, because such transcript was *sine qua non* to appeal under Illinois statutes. In another case the Court ruled that if a state statute provides that transcripts are to be made at hearings for post-conviction relief, those transcripts must be supplied free to a penurious inmate.<sup>28</sup> Another court has held that if a state statute expressly allows representation by counsel at revocation proceedings, then equal protection demands the assignment of counsel for indigents at such proceedings.<sup>29</sup>

In *Douglas v. California*<sup>30</sup> the Court held that counsel must be furnished to indigent appellants, although no California statute expressly mentioned the appearance of counsel on appeal. The Court said: "[T]hat equality [is] demanded by the Fourteenth Amendment where the rich man, who

<sup>25</sup> *Id.* at 402-03.

<sup>26</sup> U.S. CONST. amend. XIV, § 1.

<sup>27</sup> 351 U.S. 12 (1956).

<sup>28</sup> *Long v. District Ct. of Iowa*, 385 U.S. 192 (1966); *Lane v. Brown*, 372 U.S. 477 (1963).

<sup>29</sup> *Hoffman v. State*, 404 P.2d 644 (Alaska 1965). *But see* *Brown v. United States*, 351 F.2d 564 (7th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966).

<sup>30</sup> 372 U.S. 353 (1963).



appeals as of right, enjoys the benefit of counsel's examination into the record . . . while the indigent . . . is forced to shift for himself."<sup>31</sup> Thus, in *Douglas* the Court apparently abandoned the necessity for positive state action in order to invoke the equal protection clause, and adopted a substitute principle of economic balancing.

Is there a beginning and ending to the notion that equal protection of law requires a coextension of rich man-poor man opportunity to enjoy the services of a lawyer? A rich man is always enjoying the benefit of something, while the indigent is forced to shift for himself. A rich man can retain a lawyer immediately upon his arrest, and keep the lawyer searching for relief all the way to the last day of the sentence. Does equal protection of law require that an indigent be extended the same opportunity to utilize counsel? The operative answer, at least for now, is "no." The Court seems to appreciate the unlimited consequences which its economic balancing doctrine might entail. Consequently, the Court has equivocated its *Douglas* opinion by stating that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them."<sup>32</sup> As the Court has said, lines can be drawn; but the problem is, how does one *draw* them? On at least two occasions since *Douglas* the Supreme Court has declined the opportunity to "draw the line" on the question of whether or not economic balancing requires assigned counsel in post-conviction relief cases.<sup>33</sup>

#### D. *Integration of the Sixth and Fourteenth Amendment Approaches to Right to Counsel*

The basis for the right to counsel doctrine could have been limited to the sixth amendment since only that amendment speaks to the doctrine in express terms. Therefore, why should the fourteenth amendment even be considered as an independent vehicle for right to counsel? The answer seems to lie in the primary concern of the Court for fairness to the accused at all stages of the criminal continuum. In the language of the Court: "[T]he accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out where counsel's absence might derogate from the accused's right to a fair trial."<sup>34</sup>

The Court is willing to engage in as much "amendment jumping" as necessary to expand the doctrine of right to counsel, because the Court considers counsel to be the paladin of fairness to the accused.<sup>35</sup> If the Court is faced with a clear case of a critical stage in a criminal prosecution (*i.e.*, line-up in *Wade*) it will employ the sixth amendment as the rationale for

<sup>31</sup> *Id.* at 358.

<sup>32</sup> *Id.* at 357.

<sup>33</sup> *Johnson v. Avery*, 37 U.S.L.W. 4128 (U.S. Feb. 24, 1969); *Long v. District Ct. of Iowa*, 385 U.S. 192 (1966).

<sup>34</sup> *United States v. Wade*, 388 U.S. 218, 226 (1967).

<sup>35</sup> The Court has made numerous references equating counsel with fairness, *e.g.*, "In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . ." *United States v. Wade*, 388 U.S. 218, 227 (1967).

right to counsel. On the other hand, where the facts present a stage which is unique to one particular state (*i.e.*, the arraignment-preliminary hearing in *Hamilton and White*) the Court may rely upon fourteenth amendment due process as the rationale for right to counsel. In other cases (*e.g.*, *Douglas v. California*) the Court has chosen fourteenth amendment equal protection as the rationale for right to counsel.

It is clear that the Court does not intend to be hemmed-in by the restrictive language of the sixth amendment (*i.e.*, "criminal prosecution," "accused," "defence").

Accordingly, there seems to be no constitutional limitation on the scope of the right to counsel doctrine. Using fairness to the accused as the standard, the Court is free to expand or contract the doctrine by the selective integration of the sixth and fourteenth amendment approaches. One of the federal circuit courts has expressed the point succinctly: "[T]he appointment of counsel may sometimes be mandatory even in those areas in which the Sixth Amendment does not apply. This is true when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing cannot be had without aid of counsel."<sup>36</sup>

### III. A FUNCTIONAL APPROACH TO THE DOCTRINE OF RIGHT TO COUNSEL

As indicated in the preceding section, the pattern of the extension of the doctrine of right to counsel can best be explained substantively by using the abstraction: fairness to the accused. But what might be the result if the cases are approached from a functional viewpoint, *i.e.*, from the standpoint of the particular stages in the continuum where right to counsel has already been extended? Is there something inherent in these particular stages which results in right to counsel being extended to them, and not extended to other stages? How does the Court select the particular stages where fairness to the accused dictates that the right to counsel must be extended?

The stages of the criminal justice continuum are usually interdependent. For example, if a grand jury returns an indictment in inappropriate language the subsequent trial is of no consequence, even though the trial itself may have conformed to all of the legal requirements. Given this interdependence, the difficulty of determining what motivates the Court to select any particular stage for the extension of right to counsel is apparent. The stages to be discussed are arranged in the sequence in which they normally occur. The first stage is the arrest stage, followed by the grand jury stage, and the preliminary hearing-arraignment stage. These are the stages most common to the initiation of a criminal prosecution. The intervening stages are the plea bargaining stage, the trial stage, the sentencing stage, and the appeal stage. Finally, the corrections stage will be examined.

<sup>36</sup> *Dillon v. United States*, 307 F.2d 445, 446-47 (9th Cir. 1962); *accord, e.g.*, *La Clair v. United States*, 374 F.2d 486 (7th Cir. 1967).

*The Arrest Stage.* The onus of being placed under arrest is enough to justify consideration of extending the doctrine of right to counsel to that stage. Of those arrested many are discharged before they reach the trial stage of the continuum.<sup>37</sup> Is the right to counsel advisable in order to enhance the accuracy (fairness) of the arrest decision, or might this be a waste of scarce legal talent since the suspect has a good chance of being released anyway? Originally, counsel was not a constitutional necessity at any time during arrest, because arrest was held to be investigative, rather than accusatorial.<sup>38</sup> *Escobedo v. United States*,<sup>39</sup> *Miranda v. Arizona*,<sup>40</sup> and *United States v. Wade*<sup>41</sup> changed that. Paradoxically, all three of these cases are limited to some specific activity incidental to the arrest, *i.e.*, interrogation or line-up. None of these cases considered the social handicaps brought on by the arrest itself. The coerciveness of interrogation or line-up can be minuscule compared to the consequences of the loss of liberty or the loss of access to friends and relatives that results from being placed in custody. Nevertheless, under the present state of the law, the right to counsel during custody, absent some special circumstances, does not exist.

*The Grand Jury Stage.* After arrest, in most jurisdictions, serious cases are forwarded to a grand jury. It is difficult to imagine a stage where a lawyer could be more useful to insure fairness to the accused. The weight and sufficiency of the evidence against the accused is examined by the grand jury in an informal atmosphere and the decision to indict is in the form of an edict, instead of an articulated judgment. Furthermore, the grand jury hearing provides the individual with an opportunity to become one of the drop-outs in the criminal process.

In the case of *In re Groban*<sup>42</sup> the Supreme Court held that an individual called to testify before a grand jury has no right to counsel. This holding appears to overlook the seemingly critical nature of the grand jury hearing, and its obvious potential for mistake, prejudice, and arbitrariness. The Court reasoned in *Groban* that sufficient protection is provided grand jury witnesses by the fifth amendment privilege against self-incrimination. In light of *Miranda* and *Wade*, the Court might overrule *Groban* when presented with an opportunity.<sup>43</sup> It does seem incongruous to proclaim the necessity for a lawyer to protect the rights of an individual when he is subjected to interrogation or line-up by the police, while denying the same individual a right to counsel when he is subjected to the similar tactics of a grand jury.

*The Preliminary Hearing—Arraignment Stage.* The functions and tim-

<sup>37</sup> See L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES 9 (1965); P. TAPPAN, CRIME, JUSTICE AND CORRECTION 360-66 (1960).

<sup>38</sup> See *Gilmore v. United States*, 129 F.2d 199 (10th Cir.), *cert. denied*, 317 U.S. 631 (1942).

<sup>39</sup> 378 U.S. 478 (1964).

<sup>40</sup> 384 U.S. 436 (1966).

<sup>41</sup> 388 U.S. 218 (1967).

<sup>42</sup> *In re Groban*, 352 U.S. 330 (1957) (this case involved a fire inquest, but the court compared the proceeding to a grand jury hearing).

<sup>43</sup> The dissenting opinion of Justice Black in *Groban* was referred to with favor in *United States v. Wade*, 388 U.S. 218, 231 n.15 (1967).

ing of the preliminary hearing-arraignment stage vary between states. Generally, the preliminary hearing or arraignment serves to identify the defendant, establish probable cause, accept pleas, and fix bail. The nuances of the doctrine of right to counsel at this stage have already been discussed.<sup>44</sup> Suffice it to say that it is often impossible to know whether counsel is constitutionally required at this stage in the continuum. One court has made the point in this language: "From *Hamilton v. Alabama* and *White v. Maryland*, it is plain that there is no arbitrary point in time at which the right to counsel attaches in pre-trial proceedings. . . . Rather, the 'critical' point is to be determined both from the nature of the proceedings and from that which actually occurs in each case."<sup>45</sup>

*The Plea Bargaining Stage.* Plea bargaining is obviously a significant stage for any defendant who wants to "make a deal." In *Doughty v. Sacks*<sup>46</sup> the Ohio supreme court held that the right to counsel is waived when a guilty plea is entered unless the defendant positively indicates his desire that counsel be appointed. The United States Supreme Court remanded with instructions that the case be further considered in light of *Gideon*.<sup>47</sup> Upon remand, the Ohio court reaffirmed the conviction, and again emphasized that the onus was on the defendant to request counsel at the time of his plea.<sup>48</sup> Thereafter, in a per curiam opinion, the Supreme Court reversed the conviction.<sup>49</sup> The Supreme Court's reference to *Gideon* appears to have extended the doctrine of right to counsel to the plea stage. It remains unclear, however, whether the defendant has the same right to counsel while the plea is being negotiated with the prosecutor.<sup>50</sup> Logically, at least, that point at which the plea is actually bargained for is as significant as that point at which the plea is formally entered and received.

*The Trial Stage.* Elasticity remains in the definition of the sort of offense to which the right to counsel must be extended. While factors of cost and manpower dictate that some limitation be placed upon the obligations of the government to furnish assigned counsel in criminal cases, such limitations should not be based merely upon doctrinaire labels. As stated by Mr. Justice Stewart in *Winters v. Beck*:

In *Gideon v. Wainwright*, we said that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth' . . . . No State should be permitted to repudiate those words by arbitrarily attaching the label 'misdemeanor' to a criminal offense.<sup>51</sup>

<sup>44</sup> See text accompanying notes 21-25 *supra*.

<sup>45</sup> *United States v. Reincke*, 333 F.2d 608, 611 (2d Cir.), cert. denied, 379 U.S. 909 (1964).

<sup>46</sup> 173 Ohio St. 407, 183 N.E.2d 368 (1962).

<sup>47</sup> *Doughty v. Maxwell*, 372 U.S. 781 (1962).

<sup>48</sup> *Doughty v. Sacks*, 175 Ohio St. 46, 191 N.E.2d 727 (1963).

<sup>49</sup> *Doughty v. Maxwell*, 376 U.S. 202 (1964).

<sup>50</sup> Compare *Anderson v. North Carolina*, 221 F. Supp. 930 (W.D.N.C. 1963), with *People v. Bowman*, 40 Ill. App. 2d 116, 239 N.E.2d 433 (1968).

<sup>51</sup> *Winters v. Beck*, 385 U.S. 907, 908 (1966) (dissent from denial of certiorari).

In the absence of a definitive ruling by the Supreme Court, a number of theories have been used to delineate the scope of right to counsel at the trial stage.<sup>52</sup> Generally, the decision turns upon the "seriousness" of the offense,<sup>53</sup> or just the fact that liberty may be lost.<sup>54</sup> The case of *Duncan v. Louisiana*,<sup>55</sup> decided by the Supreme Court in 1968, is indicative of the Court's attitude on the seriousness of the offense which will justify the extension of right to counsel. In *Duncan* the Court recognized that there is a limitation to the type of offenses which are deserving of a jury trial (another sixth amendment right).<sup>56</sup> Furthermore, the Court showed a preference for a potential six months' imprisonment as the dividing line between petty and serious offenses.<sup>57</sup>

*The Sentencing Stage.* Whether or not sentencing is a critical stage depends upon the import of the equivocal language of *Mempha v. Rbay*.<sup>58</sup> *Mempha* extended the right to counsel to hearings for revocation of probation where the sentence was to be set for the first time. However, *Mempha* did not even mention the case of *Specht v. Patterson*,<sup>59</sup> decided seven months earlier, where the Court had said: "We held in *Williams v. New York* that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed."<sup>60</sup> *Mempha's* failure to discuss *Specht* and *Williams*<sup>61</sup> leaves some doubt about the Court's intentions as to the critical nature of sentencing hearings.<sup>62</sup> Nevertheless, despite the evasiveness, a conservative interpretation of *Mempha* is that sentencing is a critical stage, requiring the assignment of counsel for indigents.

*The Appeal Stage.* In *Douglas v. California*,<sup>63</sup> the Court extended the doctrine of right to counsel to the point of first appeal. In the later case of *Anders v. California*<sup>64</sup> the Court went so far as to require that assigned

<sup>52</sup> Comment, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases*, 19 Sw. L.J. 593 (1965). In a majority of jurisdictions assigned counsel are not regularly provided in cases of "misdemeanor" or "petty offenses." E.g., *Satterwhite v. State*, 423 S.W.2d 592 (Tex. Crim. App. 1968); Criminal Justice Act, 18 U.S.C. § 3006A(a) (1964).

<sup>53</sup> See *State v. Madison*, 240 Md. 2d 265, 213 A.2d 880 (1965).

<sup>54</sup> See generally Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 398 (1966). See *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942); *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967).

<sup>55</sup> 391 U.S. 145 (1968); see Note, *The Right to Trial by Jury in State Court Prosecutions*, 22 Sw. L.J. 875 (1968).

<sup>56</sup> "It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States." 391 U.S. 145, 159 (1968).

<sup>57</sup> *Id.* at 159-61. But see *DeJoseph v. Connecticut*, 222 A.2d 752 (Conn.), cert. denied, 385 U.S. 982 (1966).

<sup>58</sup> 389 U.S. 128 (1967). For a complete discussion of *Mempha*, see Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempha v. Rbay*, 47 TEXAS L. REV. 1 (1968).

<sup>59</sup> 386 U.S. 605 (1967).

<sup>60</sup> *Id.* at 606.

<sup>61</sup> *Williams v. New York*, 337 U.S. 241 (1949).

<sup>62</sup> See *United States v. Garrick*, 399 F.2d 685 (4th Cir. 1968) (holding that motion to reduce sentence does not entitle defendant to a hearing, because it is addressed to the discretion of the court).

<sup>63</sup> 372 U.S. 353 (1963).

<sup>64</sup> 386 U.S. 738 (1967).

counsel may not withdraw from an appeal he considers to be frivolous unless he first files a brief setting forth "anything in the record that might arguably support the appeal."<sup>65</sup> Therefore, appeal is one stage where the doctrine of right to counsel may be considered fully implemented.

*The Corrections Stage.* Traditionally, the courts have adopted a "hands-off" attitude with respect to the corrections process.<sup>66</sup> This judicial policy may be the result of a failure to conceptualize corrections as a part of the criminal justice continuum:

The pattern of protective law governing the process of guilt determination constitutes as complex and elaborate a structure of limitations upon the exercise of governmental power as will be found in our system of law. . . . But the mood abruptly changes once guilt is finally adjudicated and the pertinent questions turn on dispositions of the convicted. . . . The dominant theme then becomes the freedom of the official to exercise his discretion rather than the freedom of the individual from the exercise of unconfined power.<sup>67</sup>

It is not surprising, therefore, that *Mempa v. Rbaj*,<sup>68</sup> decided in 1967, is the first Supreme Court case to hold that the right to counsel exists at a post-conviction stage (revocation of probation). Most courts continue to hold that a *parolee* is not entitled to so much as a hearing upon parole revocation<sup>69</sup> and, consequently, is not entitled to counsel.<sup>70</sup>

Some courts assign counsel in post-conviction habeas corpus cases, but it is on an ad hoc basis, according to the difficulty and apparent validity of the issues raised by the pleadings.<sup>71</sup> By contrast, when a case is on *first* appeal, the Supreme Court has refused to sanction any scheme allowing the appellate court to survey the probity of the allegations before a lawyer is assigned.<sup>72</sup> There is good reason to believe that the Supreme Court has no present intention of extending the right of counsel to post-conviction habeas corpus. The Court denied certiorari in the case of *United States ex rel. Coleman v. Denno*<sup>73</sup> wherein the circuit court had answered the following question in the negative: "Does the refusal of New York through its Court of Appeals to assign to a defendant, convicted in a capital case

<sup>65</sup> *Id.* at 744.

<sup>66</sup> See generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

<sup>67</sup> Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961). Recently, the courts are displaying more willingness to act in this area. See generally Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967).

<sup>68</sup> Note 58 *supra*.

<sup>69</sup> Compare *Mottran v. State*, 232 A.2d 809 (Maine 1967); *Martin v. Board of Parole*, 350 Mass. 210, 213 N.E.2d 925 (1966), with *Shelton v. United States Bd. of Parole*, 388 F.2d 567 (D.C. Cir. 1967).

<sup>70</sup> See *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); *Milligan, Parole Revocation in California and the Federal System*, 4 CALIF. WEST. L. REV. 18, 29 (1968).

<sup>71</sup> E.g., *Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962). At least one state has codified this approach. See generally Note, *The Ohio Post Conviction Determination of Constitutional Rights Act: Recent Developments, New Problems, and Suggested Solutions*, 37 U. CIN. L. REV. 310 (1968).

<sup>72</sup> "The assistance of . . . counsel in preparing and submitting a brief . . . which designates and interprets the relevant portions of the trial transcript . . . may not be denied to a criminal defendant." *Swenson v. Bosler*, 386 U.S. 258, 259 (1967).

<sup>73</sup> 313 F.2d 457 (2d Cir.), *cert. denied*, 373 U.S. 919 (1963).

and sentenced to death, counsel to serve in post appellate and Federal Court proceedings constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment?<sup>74</sup>

In the recent case of *Johnson v. Avery*<sup>75</sup> the Court ignored another opportunity to extend the doctrine of right to counsel to post-conviction relief. The question in *Johnson* was whether or not a prisoner could be denied the right to assist other inmates with their petitions for post-conviction relief. Instead of relying on the doctrine of right to counsel, the Court employed the issue of access to the courts as the rationale for the decision: "[I]t is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."<sup>76</sup> It appears, therefore, that the present Court does not consider post-conviction relief to be one of the "critical stages" of the criminal process.

*Summary.* From the foregoing discussion a list of some of the specific procedural points in the continuum where right to counsel has been extended may be made as follows:

*Arrest:* Right effectively limited to interrogation and line-up.

*Grand Jury:* No right.

*Preliminary Hearing—Arraignment:* Right limited to instances where the hearing results in waiver of rights, or the hearing seriously incriminates the defendant.

*Trial:* The only limitation is the potential length of punishment.

*Sentencing:* Apparently unlimited right.

*Appeal:* Unlimited right.

*Probation Revocation:* Apparently unlimited right.

*Parole Revocation:* No right in most courts.

*Post-Conviction Relief:* An ad hoc right in some courts.

This list demonstrates that the doctrine of right to counsel is like a light bulb, sometimes lit, sometimes dimly flickering, and sometimes completely extinguished. What accounts for this on-again, off-again status? At the beginning of this section the question was asked: "How does the Court select the particular stages where fairness to the accused dictates that the right to counsel must be extended?" Is it possible to posit an answer to this question through an analysis of the above list of stages in the continuum? It may be argued that the risk of conviction serves as the answer to the question of how the Court singles out a particular stage for the extension of right to counsel. A conviction results in far more than the imposition of a punishment; it results in a stigma, a social stamp which is often more painful than the physical discipline itself.

In order to test this postulate, it is helpful to re-examine each point at which right to counsel has been said to exist. For instance, counsel is not required while a person is being detained in custody unless he is to be interrogated or placed in a line-up. It is activities such as interrogation and

<sup>74</sup> *Id.* at 460.

<sup>75</sup> 393 U.S. 483 (1969).

<sup>76</sup> *Id.* at 485, 487.

line-up that produce the greatest risk of conviction; not the act of arrest itself. The knowledge or suspicion which resulted in the arrest is not increased by the mere act of arrest, but that knowledge or suspicion may be increased by interrogation or line-up. Accordingly, the right to counsel is extended to such activities, but not at other points throughout the arrest and detention. Similarly with the preliminary hearing-arraignment stage, there is no right to counsel unless the procedure is apt to affect the trial or its outcome. If the preliminary hearing-arraignment is a mere mechanical device preparatory to trial, right to counsel is not extended.

Consistent with this hypothesis, right to counsel has been fully extended to the stages of trial and appeal. It is at these stages that the risk of final conviction is most obvious. Counsel has been extended to the sentencing stage, because the degree of social stigma which results from the conviction is dependent upon the type of sentence assessed. As pointed out earlier, the social stigma of conviction is often as painful for the accused as the conviction itself. In part, this fact accounts for the Court's refusal to extend right to counsel to all misdemeanor cases. If the offense is slight, then the stigma of the conviction is diminished.

Admittedly, the paradox between requiring counsel at probation revocation and not at parole revocation is difficult to justify with *any* unifying principle. It is submitted, however, that the parolee in our society already suffers from the stigma of his prior incarceration. Therefore, most courts do not afford him the same consideration as the probationer who has not yet been stamped as "an ex con."<sup>77</sup> For similar reasons the right to counsel has not been extended to prison inmates, because they are in the very state of conviction and detention, and already subject to the ultimate stigma.

#### IV. A RIGHT TO COUNSEL AND A ROLE FOR COUNSEL

Whatever the reason or justification, the courts are, in fact, extending the doctrine of right to counsel to an increasing number of stages throughout the criminal justice continuum. Therefore, it is important to ask: Just what is the role of the lawyer in this continuum? What is it about a lawyer that causes the courts to put so much faith in his presence? For the purposes of this discussion, the "role" of the lawyer is defined as the contribution which the lawyer makes as he participates in the criminal justice process. The lawyer's ultimate contribution (role) at any point may be the result of a whole series of specific tasks or jobs. For example, one role of the lawyer which is most significant to the defendant is that of obtaining the best result. In order to play this role, the lawyer has a number of specific jobs to do. He must investigate the case, research the law, and negotiate with the prosecution.

The following discussion of the roles of the lawyer is divided into two parts. The first part deals with some of the attorney-client roles. The second part deals with the attorney-system roles. It will be argued that as the attorney fulfills his attorney-client roles, he simultaneously fulfills

<sup>77</sup> In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court judicially recognized the "disabilities or burdens" which may flow from a conviction.



certain roles for the criminal justice system which are indispensable to its operation.

### A. *The Attorney-Client Roles*

*The Interpersonal Role.* The most easily understood role of the attorney is in the interpersonal relationship he has with his client. The contribution of the lawyer in this interpersonal role is to interpret the criminal process to the client, and to offer him a guiding hand through it. One task the lawyer could perform as a part of this interpersonal role is to make the application of the criminal sanction socially meaningful to the client. If the lawyer is able to inject the client with a sense of full and fair treatment, the client may be more receptive to the rehabilitation that is theoretically available upon conviction.<sup>78</sup> Scant attention has been given to this aspect of the lawyer's interpersonal role, and lawyers rarely attempt to interpret the social significance of the sanction to the client.<sup>79</sup>

A common task of the lawyer in the interpersonal role is to continually analyze the client's bargaining position, and communicate the alternatives to him.<sup>80</sup> The significance of this task goes beyond the obvious necessity of giving technical advice to the client. In fact, the client may become mentally and emotionally debilitated unless he is regularly advised of his status. If the client is suffering from frustration and tension which come from a lack of information about his legal status, then the potential for satisfactory fulfillment of the attorney-client relation is diminished.

*The Agent Role.* Another role which the lawyer plays as a part of the attorney-client relationship is the role of agent for the client. Rather than attempt to list all the jobs performed or performable by lawyers in the agent role, some of the more typical will be discussed. It may seem trite to state that the lawyer, as the client's agent, must investigate the facts of the case. However, one court has held that this is *not* a compelling lawyer task. In *State v. Childs*<sup>81</sup> a defendant was held one hundred and twenty-one days without counsel being assigned. The defendant contended that the failure to assign counsel during this period deprived him of an investigative agent to contact witnesses in his behalf. The court made this response: "In such a case, counsel would be performing only a notification function, and not a legal advice-giving or truth-testing function that only a lawyer can perform. In most cases, including this one, such notification would not require legal expertise."<sup>82</sup> The court seems to have mis-

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<sup>78</sup> D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 199 (1966). See also Holton, *Prevention of Delinquency Through Legal Counseling: A Proposal for Improved Juvenile Representation*, 68 COLUM. L. REV. 1080 (1968).

<sup>79</sup> "Perhaps a broader view of the lawyer's role should include within the counseling function the duty to attempt to make the client aware of the fact that he has a problem and of his need for some correctional program. Thus far, however, lawyers have preferred to avoid the welfare implications of their role as counselors and the conflicts this role would create and to limit their role to getting the client 'as good a deal' as they can." TASK FORCE REPORT: THE COURTS 111 (1967).

<sup>80</sup> NEW YORK CITY BAR ASS'N, EQUAL JUSTICE FOR THE ACCUSED 35 (1959). See, e.g., Evans v. Rives, 126 F.2d 663, 637 (D.C. Cir. 1942).

<sup>81</sup> 140 Ohio St. 2d 56, 236 N.E.2d 545 (1968).

<sup>82</sup> *Id.* at 548.

interpreted the lawyer's agent role. As an agent for the client, the lawyer may perform a variety of functions which do not require legal expertise. The importance of having a lawyer as an agent is that he can perform many functions, only some of which require legal expertise. Even when the lawyer performs some lay function, he does it with the aid of lawyer status. Thus the client may receive the benefit of what the lawyer can obtain by a simple show of authority.

Another task of the lawyer as agent is to be a sort of ambassador between various participants as they come and go throughout the continuum. For example, the lawyer may work with the complainant, the prosecutor, and the judge to bring about a dismissal of a substantially weak case. Recent emphasis on the role of lawyers in juvenile proceedings has stimulated discussion of this envoy function.<sup>83</sup> There is often an interlocking sense of embarrassment, resentment, and fear between case worker, parent, and child in delinquency cases. The lawyer may be the only participant with adequate linkage to move freely among all the parties. This allows him to interpret and placate, and at the same time structure a result in the best interests of his client.

The lawyer, as agent for his client serves to marshal and present facts and law in logical fashion.<sup>84</sup> This includes the burden of challenging disputed facts,<sup>85</sup> and submitting appropriate legal defenses.<sup>86</sup> In addition, the lawyer is expected to protect his client from being subjected to unlawful procedure.<sup>87</sup> Since the lawyer has entered into a personal relationship with his client, he is often the participant in the best position to recognize and assess the validity of the assumptions which have been made by the other participants. He may quickly know if the police have arrested the wrong man, or if there is a prima facie case, or if the exclusionary rule makes the showing of a prima facie case impossible. The lawyer may protect the client from further illegitimate harassment by making these facts forcefully known to the court and to the prosecution at the outset.

### B. *The Attorney-System Roles*

The doctrine of right to counsel is generally thought to reflect a concern to protect the individual. However, the presence of a lawyer is as useful and necessary to the criminal justice system as to the client. In other words, there are attorney-system roles which are just as operative and functional as attorney-client roles. The implications of the doctrine of right to counsel become more apparent when this transcendent quality of the lawyer is understood. Some of the tasks of the lawyer which were just discussed in the attorney-client context will be re-examined at this point,

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<sup>83</sup> E.g., Levin, *The Role of the Lawyer in Juvenile Proceedings*, 39 PENN. B.A.Q. 427 (1968).

<sup>84</sup> E.g., Darnell v. Peyton, 160 S.E.2d 749, 751 (Va. Sup. Ct. App. 1968); TASK FORCE REPORT: THE COURTS 19.

<sup>85</sup> E.g., Kent v. United States, 383 U.S. 541, 563 (1966).

<sup>86</sup> E.g., Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

<sup>87</sup> See United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436, 470 (1966). Just how the lawyer is supposed to protect his client from unlawful procedures is not altogether clear. See Gilbert, *The Role of the Defense Lawyer at a Line-up in Light of the Wade, Gilbert and Stovall Decisions*, 4 CRIM. L. BULL. 273 (1968).

in the context of the attorney-system role. This will serve to demonstrate the transcendent quality of the lawyer.

*Contributor of Information.* The analogue of the attorney-client task of investigation is the attorney-system task of the contribution of information. The criminal justice system is such that prosecution may be commenced upon inadequate or incomplete information. If some facts are missing (*i.e.*, evidence of innocence or lack of responsibility) the criminal justice system relies upon the defendant's lawyer to complete the factual picture. If he fails to do so, it tends to confirm the accuracy of the information already on hand. In this way the lawyer contributes substantially to the investigative capacity of the various stages of the criminal continuum, and consequently to the legitimacy of the final result. As a practical matter, the lawyer saves the prosecution the time and expense of a *complete* investigation; a very substantial attorney-system contribution. Of course, the lawyer does not provide the prosecution with information which is subversive to his client; supposedly the prosecution already has that information.

*The Lawyer as Expeditor.* As the lawyer goes about the task of representing the client, he also acts as an expeditor of the system's formalities. The substantive law, the rules of evidence, and the order of procedure are all supplied by the criminal justice system. The system relies upon the lawyer to carry out its substantive and procedural ritual in proper order. Thus, the lawyer makes objections, raises defenses, files pleadings, and otherwise fulfills this purpose.<sup>88</sup> This role is not as mundane as it first sounds if one considers the systemic consequences of not having a lawyer to carry it out. In the lawyer's absence, some other party, such as the judge, or prosecutor, or the defendant himself, has to play the mechanical part. Indeed, this situation may now be found in the lower courts, with the consequence that these courts, and the quality of their justice, have lost the respect of the community.

From the context of the attorney-client roles, this mechanical task of activating the system's rituals has a very different significance. What is mechanical in the attorney-system roles, is persuasive in the attorney-client roles. The system relies upon the lawyer to make the objection; the client, however, relies upon the lawyer not only to make the objection but to make it in a manner so that it will be sustained. The system is concerned that its rules be operational; the client, however, is concerned that they operate in his favor.<sup>89</sup> Thus the lawyer makes a contribution to the client and to the system simultaneously. The realization that the lawyer plays this dual role may lead to the conclusion that the lawyer is a sort of invidious "double agent."<sup>90</sup> In fact, however, the lawyer's responsibility to

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<sup>88</sup> See, *e.g.*, *Swenson v. Bosler*, 386 U.S. 258 (1967); *Holt v. Virginia*, 381 U.S. 131, 136 (1965).

<sup>89</sup> See generally D. NEWMAN, *supra* note 78, at 218-23.

<sup>90</sup> Blumberg, *The Practice of Law as Confidence Game*, 1 L. & Soc'y REV. 15 (1967).

his client is not compromised by his dual role. The effect is simply that the particular usefulness of the lawyer changes with the frame of reference.

*The Lawyer as a Policeman.* It is questionable whether some of the criminal justice participants are especially concerned with accuracy. Were it not for the mandate of due process, they might completely succumb to a bureaucratic desire to facilitate case flow at the expense of a few "mistakes." Therefore, when a lawyer protects his client from some ill considered act he also polices the system. The system cannot adequately police itself, because of an inherent bureaucratic flaw.

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it . . . . [W]hat starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.<sup>91</sup>

Courts usually respond to this bureaucratic phenomenon by imposing judicial-type procedures on an agency or institution.<sup>92</sup> In part, this is a recognition of the fact that the lawyer *does* perform a service for the system as a policeman, because the presence of a lawyer is often a part of the judicial-type procedure which is imposed. This habit of imposing these procedures on administrative agencies overlooks the fact that the agency may have been created just because the courts could not contend with the work assigned to that agency.<sup>93</sup> The adversary process which is inherent in judicial-type proceedings is not always suitable for the work assigned to an agency. In other instances, the work of the agency may have a low priority in the traditional pattern of court functions.

Whenever an agency is faced with the presence of a lawyer it tends to react by tightening its routine, not necessarily because of what the lawyer does, but because of the threat of what he *might* do. This "implicit threat syndrome" is due, in part, to some intangible fear that the lawyer will make visible some heretofore invisible deficiency. This fear is apt to remain as long as the agency is not sure of what the lawyer may do if present; it is most prominent therefore, when the lawyer is not a programmed part of the procedure.

It is unrealistic to expect to completely judicialize the administration of criminal justice because it is too expensive and too inefficient to do so. The "implicit threat syndrome" could serve as a device for compromise between judicial due process, and some lesser form of procedural fairness for those stages where use of administrative format and discretion is a paramount consideration. The occasional appearance of counsel before an agency might be more effective insurance against abusive practices than

<sup>91</sup> ABA Rep. of the Joint Conf. on Prof. Responsibility, 44 A.B.A.J. 1159, 1160 (1958).

<sup>92</sup> E.g., "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18 (1967).

<sup>93</sup> See Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

having counsel routinely present. Obviously, the random use of right to counsel would be less expensive than universally extending it at any particular stage. If counsel were only randomly assigned at some stages there would be more money available to appoint counsel for a greater range of cases than at present.

### *C. Summary of the Roles of Counsel*

The outstanding characteristic of the lawyer is his ability to induce a standard of fairness into the inherent conflict between the desire of the accused to be free from punishment, and the desire of the criminal justice system to impose punishment as a sanction for misconduct. To accomplish this purpose the lawyer must serve both sides of the conflict in a fashion germane to their own frames of reference. The lawyer has developed a skill which allows him to maintain a single professional identity as he plays out his attorney-client and attorney-system roles. Thus, regardless of the difference in the contribution that the lawyer makes to the client or to the system, both of them afford the lawyer the same type of professional identity. The lawyer serves both the client and the system as an indispensable party charged with the responsibility of bringing fairness to the tension between the client and the system. Because of this transcendent quality of the lawyer, the expansion of the doctrine of right to counsel will have an impact far beyond increased assistance to individuals charged with crime. As the doctrine of right to counsel expands, and as the lawyer begins to perform new tasks for the client, he will simultaneously bring about changes in the criminal justice process.

## V. THE IMPACT OF RIGHT TO COUNSEL UPON THE CRIMINAL JUSTICE PROCESS: SOME PREDICTIONS

Any attempt to measure the impact of the doctrine of right to counsel should be done in terms of what is true today, together with what might be true should the doctrine be fully implemented. The combined effect of increased use of lawyers plus their ability to mix freely among other functionaries in the criminal justice system dictates that the system will undergo considerable modification: "Experience has shown that when good lawyers are brought into criminal practice, their impact is felt far beyond the cases they handle. They ask questions and put pressure on everyone in the system to examine what they are doing and why. They organize reform, and become a powerful force for change."<sup>94</sup> Some of the changes which may be expected as a result of the expansion of right to counsel are discussed below.

### *A. The Impact of Counsel on Case Flow*

The proficiency of the criminal justice continuum for moving cases seemingly depends upon three factors: (1) the rate at which cases are ingested; (2) the rate at which cases are discharged at all stages; and (3) the rate at which cases are passed from one stage to another. The rate at

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<sup>94</sup> TASK FORCE REPORT: THE COURTS 57.

which cases are ingested into the continuum is largely a function of arrests by police. Several variables affect arrest rates, but the availability of lawyers for indigent defendants is not one of them. The only caveat is the extent to which lawyers may serve as a force to inhibit harassment or suspicion arrests. Essentially, however, the doctrine of right to counsel has little to do with how many cases are ingested into the continuum.

Beyond arrest, each stage of the continuum serves as a screen, so that a portion of the population (suspects, defendants, or convicts) is eliminated at each stage.<sup>95</sup> Obviously, the presence of lawyers serves to increase the population attrition at each stage. The "implicit threat syndrome" teaches that even the occasional presence of a lawyer will likely increase attrition.

The last of the three factors that regulate case flow in the continuum is the rate at which cases are passed from one stage to another. Some melding of the continuum stages might be expected as the impact of the lawyer's increased presence takes full effect. As an example, it is reasonable to assume that the sooner counsel is given an opportunity to represent the client, the sooner such counsel can make definitive decisions. Therefore, if counsel were present soon after all arrests, he might quickly decide to enter into plea bargaining, thus advancing the sentencing stage in the continuum.

There is a popular notion that the presence of lawyers causes delay and a resultant backlog of cases.<sup>96</sup> One study has shown that after right to counsel was extended to juvenile courts the backlog of cases did increase, even with the addition of more judges.<sup>97</sup> Another writer has reported that, partly because of right to counsel, guilty pleas in Washington, D.C. have declined 40% in the last two years.<sup>98</sup>

What if this reduction in case flow is accompanied by an increase in dismissals due to lack of evidence? In New York the "law guardian" concept resulted in a 74% increase in the use of lawyers in juvenile cases and, as a consequence, the number of cases dismissed for lack of evidence increased.<sup>99</sup> It could be argued that whether or not lawyers delay case flow is partially dependent upon the quality of police work. If the police do a thorough and legal job of detection, then less time need be spent weeding out weak cases. In any event, there can be little doubt that the expansion of the doctrine of right to counsel will reduce the speed with which cases are moved from one stage to another through the continuum.

### B. *Impact of Counsel upon Corrections*

One noticeable impact of right to counsel should be to encourage the development of more and better forms of community treatment for offenders. There is already general agreement among penologists and crimi-

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<sup>95</sup> Of 300,000 felony arrests annually, only 140,000 are sentenced. L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 9 (1965).

<sup>96</sup> TASK FORCE REPORT: *THE COURTS* 52-53.

<sup>97</sup> COXE, *Lawyers in Juvenile Court*, 13 *CRIME AND DELINQUENCY* 488 (1967). See generally Ketcham, *Can Gault's Guidelines Protect Public Interest*, *TRIAL* at 15 (April/May 1968).

<sup>98</sup> Wright, *The Need for Education in the Law of Criminal Correction*, 2 *VAL. U.L. REV.* 84 (1967).

<sup>99</sup> Isaacs, *The Lawyer in the Juvenile Court*, 10 *CRIM. L.Q.* 222, 227 (1968).

nologists that sentences are too high and that probation and parole are not used enough.<sup>100</sup> The initiation of the lawyer into the post-trial stages would provide a persuasive articulation of that viewpoint. If the use of community treatment is increased, it naturally follows that the characteristics of institutionalized convicts will change. "A decision during the pre- or post-trial periods to incarcerate fewer offenders very likely will mean that those who are eventually incarcerated may be the least promising of all offenders and thus make more difficult the tasks of dealing with them. If this is the case, the impact on both prisons and parole will be noticeable."<sup>101</sup> It seems reasonable to assume that if the prisons are filled with inmates who are more recalcitrant than at present, the spate of cases seeking post-conviction relief and prisoners' rights will probably increase. In turn, this would further increase the need for extension of the doctrine of right to counsel to the post-conviction stage. This is an excellent example of how the presence of a lawyer at one point in the continuum can serve to increase the need for lawyers at another point in the continuum.

Even now, consideration is being given to the advantages of extending right to counsel to prison inmates.<sup>102</sup> The President's Task Force on Corrections has listed some of the correctional benefits which could flow from assigning counsel to prisoners, which may be paraphrased as follows:<sup>103</sup>

- (1) Facilitated access to the courts.
- (2) Increased visibility of the legal process to the inmates.
- (3) Mobilized forces for reform.
- (4) Discouragement of inhuman or illegal practices by virtue of lawyer's presence.

It is patently unfair to fault prisoners for seeking court relief of their grievances. In the words of one prison writ writer: "[I]t is not unusual, then, in a subculture created by the criminal law, wherein prisoners exist as creatures of the law, that they should use the law to try to reclaim their previously enjoyed status in society."<sup>104</sup> Nevertheless, one possible impact of extending right to counsel to prisons is that it will be easier for prisoners to make frivolous claims. However, the empirical evidence absolutely refutes this theory. The University of Kansas operates legal clinics in both federal and state prisons. The Kansas experience has been that a prisoner usually is willing to drop a frivolous claim if the law is explained and clarified to him.<sup>105</sup> Furthermore, the Public Defender of Wisconsin reports

<sup>100</sup> See generally M. GRUNHUT, *PENAL REFORM, A COMPARATIVE STUDY* (1948); D. NEWMAN, *CONVICTION* 229 (1966); England, *What is Responsible for Satisfactory Probation and Post-Conviction Outcome?*, 47 J. CRIM. L.C. & P.S. 667 (1957).

<sup>101</sup> Empy, *Alternatives to Incarceration*, in *STUDIES IN DELINQUENCY* 11 (U.S. Dept. H.E.W. 1967).

<sup>102</sup> One obvious advantage is relief to the courts which are flooded with inarticulate writ petitions. See *Johnson v. Avery*, 37 U.S.L.W. 4128 (U.S. Feb. 24, 1969); Judicial Conference of the United States, Report of the Committee on Habeas Corpus, 33 F.R.D. 367 (1963).

<sup>103</sup> PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND AD. OF JUSTICE, *TASK FORCE REPORT: CORRECTIONS* 85 (1967). [hereinafter cited *TASK FORCE REPORT: CORRECTIONS*].

<sup>104</sup> Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 347 (1968).

<sup>105</sup> Letter from Benjamin G. Morris, Associate Director, Clinics Programs, University of Kansas to Walter W. Steele, Jr., Aug. 6, 1968; see Hubanks and Linde, *Legal Services to the Indigent Imprisoned*, 23 LEGAL AID BRIEFCASE 214 (1961); Wilson, *Legal Assistance Project at Leavenworth*, 24 LEGAL AID BRIEFCASE 254 (1966).

that in one ten-month period he declined thirty frivolous cases, after explaining to each prisoner that their claims were without merit. Only six of these thirty prisoners requested another attorney, although they all had a right to do so under the Wisconsin statutes.<sup>106</sup> Another example is the experience of the Public Defender of Oregon. He reports that after three years of operation, the number of requests for post-conviction relief in his jurisdiction has stabilized.<sup>107</sup>

Statistics from the Oregon Public Defender indicate the extent to which post-conviction relief appeals may actually be frivolous. Of direct appeals brought by this office, 24% have resulted in reversal of conviction. In the same period, of post-conviction appeals brought by this office, 22% have resulted in reversal of conviction.<sup>108</sup> This provides some support for the notion that, when supervised by a competent attorney, post-conviction appeals are no more frivolous than direct appeals.

Prison officials, as a group, are probably the most susceptible to the impact of counsel on corrections, because of the threat it poses to their broad discretion.<sup>109</sup> Even so, those prison officials who were interviewed by this writer recognized the correctional benefits to be had from the availability of some sort of prison house counsel. They were anxious to be rid of the jailhouse lawyer, and to free their own personnel from the chore of attempting to give legal advice.<sup>110</sup> They also spoke of the boost to overall prison morale which the availability of lawyers would bring to the prisoners.

Courts are slowly beginning to accept the proposition that constitutional safeguards protect all men, including prisoners.<sup>111</sup> Although the right to counsel has not been extended to prisons, lawyers have an essential role to play in corrections. The correctional system will benefit as much as the inmates should the courts extend the doctrine of right to counsel to that stage. With lawyers representing prisoners, the rehabilitative ideal may become an operational policy, instead of a mere philosophical notion.

### C. *The Impact of Counsel on the Parole Process*

Most courts have not yet extended right to counsel to the parole stage, but the momentum of the doctrine indicates that eventually all indigent

<sup>106</sup> Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514, 527-28.

<sup>107</sup> Office of the Public Defender of the State of Oregon, Supplemental Report to Public Defender's Program Statement X (undated and unpublished report of Oregon Public Defender); letter from Gary D. Babcock, Public Defender, State of Oregon to Walter W. Steele, Jr., Aug. 1, 1968.

<sup>108</sup> Office of the Public Defender of the State of Oregon, Supplemental Report to Public Defender's Program Statement X, *supra* note 107, at i-ii.

<sup>109</sup> E.g., "Some correctional authorities believe that legal controls will make it difficult to maintain security within institutions and to protect the community against dangerous offenders." TASK FORCE REPORT: CORRECTIONS 83.

<sup>110</sup> Mr. Justice Douglas has recognized the fact that when prisoners are denied lawyers they will create their own substitutes: "Where government fails to provide the prison with the legal counsel it demands, the prison generates its own. In a community where illiteracy and mental deficiency is notoriously high, it is not enough to ask the prisoner to be his own lawyer." *Johnson v. Avery*, 393 U.S. 483, 496 (1969).

<sup>111</sup> Compare *Eaton v. Bibb*, 217 F.2d 446 (7th Cir. 1954), *cert. denied*, 350 U.S. 915 (1955), with *United States ex rel. Yaris v. Shaughnessy*, 112 F. Supp. 143 (S.D.N.Y. 1953). See generally Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PENN. L. REV. 985 (1962).



parolees will have the right to assigned counsel.<sup>112</sup> At present, there is no effective judicial force limiting parole administration. Therefore, the presence of counsel at the parole stage will mean that fundamental concepts of individual rights and due process will, in many instances, become operative at this stage for the first time. If the presence of counsel slows the parole system (as it undoubtedly will) then it will only indicate that the system, at present, is sacrificing the individual for the sake of speed and efficiency. The administration of parole relies upon two largely fictitious rationales: (1) parole is a matter of grace, and not a matter of right, and (2) parole is a statutory-administrative institution, and as such is immune from judicial interference.<sup>113</sup> It is reasonable to assume that these two rationales will be vigorously and successfully attacked once the right of counsel is extended to the parole stage.<sup>114</sup>

Whether the number of paroles granted would increase or decrease as a result of the extension of the right to counsel to the parole stage is uncertain. It seems fallacious to attribute any increase or decrease in parole rates solely to the fact that lawyers are representing prospective parolees. The grant or denial of parole should depend upon the characteristics of the prospective parolees, not the quality of their legal representation.

Parole administration is replete with examples of coercive and legally questionable practices that might be abated by counsel. For example, restrictive conditions in parole "contracts," such as limitations on travel and marriage, frequently have no tenable connection with parole success. Another example of coercive parole administration is the practice of "jail-house counseling," which occurs when a field agent feels that a parolee is becoming recalcitrant, and places him in jail for a few days on the pretense of a parole violation. The parolee is not released until he displays the proper respect for the agent and the parole contract. In other cases, prosecutors have attempted to use the parole status to short circuit the law. For example, parole agents are sometimes used to conduct custodial interrogations of parolees on the premise that *Miranda* does not apply to such situations.<sup>115</sup>

As it now operates, parole administration is exempt from many of the guarantees of fairness which are present in the other stages of the continuum. The convict must feel a sense of helplessness and despair when he attempts to deal with a parole board he rarely sees, and one whose policies and practices sometimes violate basic standards of justice. The extension of the doctrine of right to counsel to the parole stage will insure the pre-

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<sup>112</sup> In the state of Washington an attempt is being made to extend right to counsel to parole by statute. Letter from J. Walter Gearhart, Administrative Assistant, Board of Prison Terms and Parolees, State of Washington to Walter W. Steele, Jr., Sept. 11, 1968.

<sup>113</sup> See generally S. RUBIN, *THE LAW OF CRIMINAL CORRECTIONS* 551-53 (1963).

<sup>114</sup> See *Menechino v. Board of Parole*, 293 N.Y.S.2d 741 (Sup. Ct. 1968); *Commonwealth v. Tinson*, 249 A.2d 549 (Pa. 1969); *Cohen, Sentencing, Probation, and the Rehabilitative Ideal: The View From Memphis v. Rhy*, 47 TEXAS L. REV. 1 (1968).

<sup>115</sup> The Supreme Court expressly disapproved of this practice in a case where an internal revenue agent conducted the interrogation: "We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." *Mathis v. United States*, 391 U.S. 1, 4-5 (1966).

sence of lawyers to successfully articulate the need for improvement at this stage.

#### D. *The Impact of Counsel on Operational Costs*

It is not possible to make a realistic economic appraisal of the overall impact of right to counsel on the criminal justice continuum. However, changes in certain specific cost factors are reasonably foreseeable. On the side of increased cost is the obvious expense of paying for the expanded employment of lawyers at various stages of the continuum. This will be discussed in detail in a later section dealing with logistics of providing counsel. Additional money will be needed to provide staff for the increased use of non-custodial penal sanctions such as probation and parole. Furthermore, any slowing of the flow of cases as a result of the lawyers' insistence upon the rigid demands of due process will result in a natural increase in costs. On the other hand, if the predictions made herein prove correct, the tendency will be an increased utilization of the *least costly parts* of the continuum. Thus operation of the continuum would involve less trial time, less use of appellate and post-conviction remedies, and less institutionalization. It is impossible to say where the final financial balance will be struck.

### VI. THE IMPACT OF RIGHT TO COUNSEL UPON THE LEGAL PROFESSION

The criminal justice continuum is not the only institution that will be altered by the impact of the doctrine of right to counsel. The legal profession will also be forced to undergo some modification. Bluntly stated, the doctrine of right to counsel (when fully extended) will demand more legal services than the profession is currently prepared to deliver. For instance, one of the most frequent allegations in post-conviction petitions is that the trial attorney was incompetent,<sup>116</sup> and some courts have reversed cases because the trial attorney was not sufficiently experienced.<sup>117</sup> In each of these instances, the attorney involved had previously been declared

<sup>116</sup> H. Kerper, Development of a Theoretical Foundation for Use of Writs in the Resocialization Process in the Correctional Setting (unpublished LL.M. thesis in the Library of Florida State University). The frequency of complaints in writs filed by Florida state prisoners in 1964 and 1965 was stated to be as follows (disregarding all of those solely *Gideon* related):

- 45.29% — incompetent or dishonest counsel
- 35.29% — no counsel at non-trial stages
- 15.29% — both of above
- 27.64% — tricked or coerced confession or plea
- 18.82% — illegality of arrest
- 17.64% — delays in legal process
- 16.47% — no preliminary hearing
- 14.70% — not properly advised of rights
- 14.70% — illegal search
- 14.70% — conspiracy involving police, court, or counsel
- 14.11% — no grand jury hearing
- 11.76% — cruel or brutal treatment
- 7.65% — complaints about sentence

<sup>117</sup> *Ex parte* Larkin, 420 S.W.2d 958 (Tex. Crim. App. 1967) (attorney licensed ten years had appeared in only two suits); *Rodriguez v. State*, 340 S.W.2d 61 (Tex. Crim. App. 1960) (attorney licensed four years, but no prior felony experience; see *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958)).

competent to practice law by the organized bar and the state. This is just one example of the gap between the doctrine of right to counsel and the current norms of the legal profession.

#### A. *The Need To Define and Articulate New Roles*

It is commonly understood that lawyers and trials go together, like bread and butter. But what happens when a lawyer is suddenly thrust into some new and unfamiliar stage of the criminal justice continuum? He may find himself with no apparent role to play, and no training to guide his actions. It is up to the legal profession to define and articulate roles for lawyers in these situations. Should the profession fail to do so, the average lawyer will amount to no more than an irrelevant appendage at these stages.

Sentencing is a stage in the continuum where improvement in the definition of the lawyer's role must be made. During interviews conducted as a part of the research for this Article, judges, prosecutors, and probation officers were almost unanimous in their opinion that lawyers have very little impact on a judge's sentencing decision. The most frequently mentioned failings of lawyers at sentencing were as follows:

1. Failure to sincerely present the character of the defendant as an individual person.
2. Attempts to qualify or minimize the guilty plea.
3. Failure to verify statements presented as fact.
4. Failure to suggest sentencing alternatives.
5. Failure to present witnesses.
6. Failure to logically articulate rehabilitation plans.

It is encouraging to note that the American Bar Association has recently described a very responsive and realistic role for lawyers at sentencing.<sup>118</sup> The lawyer's role is formulated in a series of specific tasks which the lawyer is encouraged to complete prior to the sentencing hearing as follows:

1. Ascertain what sentencing alternatives are available to the court.
2. Ascertain what community facilities are available to meet the needs of the particular defendant.
3. Explain consequences of likely sentencing alternatives to the defendant, and solicit his views.
4. Develop special alternatives for the particular defendant through combination of all the above.<sup>119</sup>

This response by the ABA to the need for definition and articulation of the role of the attorney at sentencing is a perfect example of what must be done for other non-trial stages of the criminal justice continuum.

Parole is a stage where the legal profession has not yet defined and articulated its role. Consequently, there is a popular feeling that lawyers have no place in the parole process. As one court has said:

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<sup>118</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES 32-34 (1968). See also Pharr, *On Sentencing: What A Judge Expects From Defense Counsel*, 1 PRAC. LAW. 76 (1955).

<sup>119</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES 32-34 (1968).

The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition . . . .<sup>120</sup>

It is submitted that there is a place for the lawyer at the parole stage, although the legal profession has failed to clearly define it. After all, the parole process is involved with the collection, presentation, and interpretation of facts—just like the trial process. A social history should be as essentially factual and fairly composed as a confession, a deposition, or a bill of particulars. Parole administrators and lawyers alike would benefit if the organized bar would act now to define and articulate the role of lawyers in parole. Without such a professionally sponsored movement, the tension between parole boards and the bar will increase as the court decisions approach the extension of right to counsel to the parole stage.

#### B. *The Necessity To Distinguish the Adversary Model from the Advocacy Model*

As long as the lawyer was confined to the courtroom, the adversary model was quite adequate. In this setting each lawyer is called upon to present only those facts which best support his side of the issue. The opposing lawyer can be relied upon to complete the factual picture. When the doctrine of right to counsel took the lawyer out of the courtroom he brought this adversary model with him. But such a model does not always harmonize with some of the new responsibilities of the lawyer. In the past, lawyers were concerned mainly with issues of guilt or innocence. Once guilt was determined, other functionaries were viewed as primarily responsible for the job of applying sanctions and treatment. The expansion of the doctrine of right to counsel has changed this view.

As the lawyer has been initiated into new stages of the continuum, he has incurred additional responsibilities. As a result, the lawyer must now concern himself with more than the guilt or innocence of his client. At some of the new stages the lawyer is cast into the role of overseer, or interpreter, or contributor of alternatives. In some of these roles it is more appropriate for the lawyer to be an *advocate*, rather than an *adversary*. The failure of the legal profession to make any distinction between the responsibilities of the lawyer as an advocate and the responsibilities of the lawyer as an adversary results in an awkward ethical contradiction. As stated by the President's Task Force on the Courts: "Sworn to uphold the law and at the same time to serve his client's best interests, counsel may be faced with an insoluble human and professional conflict. . . . At present we have no idea of the extent of this role conflict and its consequences to the profession."<sup>121</sup>

The confusion which results from failure to make any distinction be-

<sup>120</sup> *Washington v. Hagan*, 287 F.2d 332, 334 (3d Cir.), cert. denied, 366 U.S. 970 (1961).

<sup>121</sup> TASK FORCE REPORT: THE COURTS 114.

tween the lawyer as an advocate and the lawyer as an adversary is aptly demonstrated in two statements, both from the same source:

[T]he presence of a lawyer, playing an adversary role, is the best single means of insuring that a juvenile court judge will focus solely on deciding the case before him according to law. . . .

. . . .  
A sensitive lawyer will recognize that his role is not necessarily to help a kid beat the rap. A sensitive lawyer, like a sensitive judge or a sensitive social worker, knows when confession is good for the soul.<sup>122</sup>

The confusion extends to the Canons of Ethics. ABA Canon 37 requires a lawyer to keep his client's confidences—characteristic of an adversary—while Canon 22 requires fairness and candor when dealing with the court—characteristic of an advocate. What, for example, is the position of the lawyer at sentencing if the court asks him to reveal his client's previous convictions? The ABA Committee on Legal Ethics and Grievances suggests that the lawyer should refrain from answering; a solution which does not appear to be either functional or professional, and which seems at odds with the rhetoric of candor and fairness.<sup>123</sup>

Plea bargaining is a stage where the advocate-adversary distinction is more obvious. While the need for counsel at plea bargaining is well recognized,<sup>124</sup> there is little need for an adversary at this stage. At plea bargaining, like some of the other non-trial stages of the continuum, the trial court type of adversary simply is not relevant. From the client's result-oriented perspective what is needed, however, is an advocate; someone to initiate negotiations, pick the most lenient court, and make the "best deal."

The professional ambivalence over the characterization of the lawyer is largely responsible for the reluctance of many criminal justice functionaries to favor the extension of the doctrine of right to counsel. This doctrine has taken the lawyer out of the courtroom, but the lawyer has, in effect, tended to take the courtroom with him. Too many people, lawyers included, continue to think of the criminal lawyer as a pyrotechnist. The profession must modify its operational models, or run the risk of losing its monopoly on the delivery of legal services.<sup>125</sup>

## VII. IMPLICATIONS FOR LEGAL EDUCATION

Since lawyers are being called upon to practice in new settings and to perform new and different jobs, some thought should be given to their

<sup>122</sup> Coxe, *Lawyers in Juvenile Court*, 13 CRIME AND DELINQUENCY 488, 490 (1967).

<sup>123</sup> Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. REV. 65, 74-75 (1965). Because of this enigma, it has been suggested that lawyers be replaced altogether by some new functionary. Rossett, *The Negotiated Guilty Plea*, 374 ANNALS 70, 78-79 (1967).

<sup>124</sup> "Whether or not plea bargaining is a fair and effective method of disposing of criminal cases depends heavily on whether or not defendants are provided early with competent and conscientious counsel." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY 11 (1967). See e.g., *Austin v. State*, 422 P.2d 71 (Idaho 1966).

<sup>125</sup> The Supreme Court has already attacked the "closed shop philosophy" of the legal profession: "We think of claims as the grist mill for the lawyers . . . . There are not enough lawyers to manage or supervise all of these affairs . . . . Yet, there is a closed shop philosophy in the legal profession that cuts down drastically active roles for laymen." *Johnson v. Avery*, 393 U.S. 483, 491 (1969).

educational preparation. It serves no useful purpose to enter into the debate over whether or not law schools ought to graduate a lawyer who is prepared to practice law. A multitude of authors have already spoken to that subject ad nauseam.<sup>126</sup> Perhaps legal education should simply get on with the business of doing what it claims to do, *i.e.*, training legal minds. In that context, the issue becomes: What can legal education do to respond to the growth of the right to counsel doctrine?<sup>127</sup>

Law schools might begin by explaining the relationships between social conduct and rules of law. So far, the jurisprudence of social control has been haphazard and unscientific. Laws are passed and enforced without regard for consequences which are often more harmful than the initial evil.<sup>128</sup> The tendency to ignore social sciences is not easy for law schools to overcome, because their own self-interest is at stake:

Since judges are less well-educated than the average . . . teaching bar, there is never any deficit of judicial limitations to be pointed out. This work of the law professor is so pleasant and so lacking in risk, . . . that it is a real sacrifice, a labor of love, for a law professor to get deeply involved in interdisciplinary exploration, since this means surrender of that sanctuary.<sup>129</sup>

Difficult as it may be to accept, it is increasingly obvious that some traditional law courses are irrelevant. For instance, when 60 to 80% of all defendants plead guilty, is it rational to concentrate upon the intricacies of trial procedure—and teach little or nothing about plea bargaining?<sup>130</sup> The modern lawyer must deal as much with legal *systems* as legal *cases*. The well known third-year doldrums might be avoided with courses utilizing interdisciplinary materials that help the graduating senior to define his professional roles in systemic terms.<sup>131</sup>

The cooperative education method offers a promising approach to the improvement of legal education. The use of cooperative education plans

<sup>126</sup> An analysis of the many philosophies and theories is presented in Rutter, *A Jurisprudence of Lawyer's Operations*, 13 J. LEGAL ED. 301 (1961). See also Note, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 710 (1964). Educational systems for other professions are also being criticized for failing to graduate a student equipped to practice. See David, *Education for the Professions: Common Issues, Problems and Prospects*, 3 J. ED. SOC. WK. 5 (1967).

<sup>127</sup> For a few basic recommendations see, Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 412 (1966).

<sup>128</sup> For an excellent discussion of how the law can create unforeseen social consequences see, Rose, *Law and the Causation of Social Problems*, 16 SOCIAL PROBLEMS 33 (1968).

<sup>129</sup> Riesman, *Law and Sociology: Recruitment, Training and Collegueship*, 9 STAN. L. REV. 643, 653 (1957).

<sup>130</sup> "Effective counseling regarding the likely consequences of the guilty plea requires the lawyer to have intimate knowledge of sentencing provisions and procedures, correctional programs, and parole procedures, as well as, of common criteria used by judges in selecting types and lengths of sentences. Such knowledge is traditionally less a part of formal law training than is preparation for defense at trial and calls for additional skills on the part of lawyers in guilty plea cases." D. NEWMAN, *CONVICTION* 209 (1966); see Rubin, *The Law Schools and the Law of Sentencing and Correctional Treatment*, 43 TEXAS L. REV. 332 (1965).

<sup>131</sup> It has been established that there is a general decline in interest as the students progress through law school, and that the decline is greatest in the upper half of the class. Furthermore, those students in the upper half of the class who are occupied by law review, research assistantships, or outside jobs lose interest in school more than those who have no outside interests: "Some activities, then were sufficiently absorbing to draw student energy and interest away from the classroom, or much the same thing, to throw class work into unfavorable contrasts." W. Thielens, Jr., *The Socialization of Law Students* 345-50 (1965) (unpublished Ph.D. thesis submitted to the Faculty of Political Science, Columbia University).

generally appears to be increasing.<sup>132</sup> Other disciplines, such as engineering, teaching, and social work, have successfully adopted this educational method, which combines formal schooling with work experience.<sup>133</sup> One advantage of cooperative education is that it forces educators and practitioners to function in harmony and partnership, rather than becoming caught up in dichotomous philosophies.<sup>134</sup> The doctrine of right to counsel requires lawyers to perform jobs which call for unique combinations of skill and intellectual appreciation of systems. The cooperative education approach helps to achieve the proper balance between skills and doctrine in legal education. One thing is clear, legal education must adjust its methods if it is going to meet the demands of the doctrine of right to counsel. There is a new relevancy for lawyers in the administration of criminal justice which cannot be taught by the conventional doctrinal approach to law.

#### VIII. THE LOGISTICS OF THE RIGHT TO COUNSEL DOCTRINE

When a court orders the extension of right to counsel to some stage of the continuum, the public and the legal profession must struggle with the problem of how to deliver and pay for the new service involved. The manner in which any jurisdiction responds depends upon two factors: (1) the format which is chosen for the delivery of legal services, and (2) the costs involved.

##### A. *The Auspices for Furnishing Right to Counsel*

The choice of formats for delivery of legal services to indigent defendants is a choice between two basic devices: (1) assigned counsel, and (2) full time defender:

The central question is whether we should try to meet the need for defense counsel with lawyers working full-time as defense counsel, presumably paid wholly or partly from public funds, or to meet it with a vastly expanded program of assignments of counsel, calling on the bar to provide its services in cases which would otherwise go undefended.<sup>135</sup>

In most localities the need to provide counsel for the accused has not been characterized as a social welfare problem calling for community-wide concern. Viewed as an inherent feature of the legal system, it becomes convenient to assign the solution of the need for counsel to the organized bar. The bar's typical response to the problem has been the assigned counsel

<sup>132</sup> The Northeastern University School of Law has recently been reactivated under a cooperative educational format. O'Toole, *Realistic Legal Education*, 54 A.B.A.J. 774 (1968).

<sup>133</sup> Interview with Mr. William A. Bennie, Director of Student Teaching, College of Education, University of Texas at Austin, Sept. 5, 1968; Kindelsperger, *Modes of Formal Adult Learning in Preparation for the Service Professions*, FIELD LEARNING AND TEACHING (Council on Social Work Education 1968).

<sup>134</sup> "One aspect of the conflict, common to all professions, is the value attached to knowledge: in the university, knowledge is valued for its own sake, and in the world of practice knowledge is valued for use. But the pattern does not end there. What seems to occur is that the activities involved in the search for knowledge and the activities involved in using knowledge become valued for their own sakes." Schubert, *Curriculum Policy Dilemma in Field Instruction*, 1 J. ED. SOCIAL WK. 35 (1965).

<sup>135</sup> Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 405-06 (1966).

system. This system has been operative in the United States for over a century, and is employed in a majority of the jurisdictions today.<sup>136</sup> One source has noted that while there are distinct advantages to the assigned counsel system, there are also disadvantages.<sup>137</sup> Such a solution preserves the independence of the attorney-client relationship and the bar; while at the same time, it provides an opportunity for a wide segment of the bar to participate in the continuum. It also provides valuable experience for young lawyers and a source of income for the bar. On the other hand, the assigned counsel system sometimes provides the client with a lawyer who is inexperienced in the criminal justice continuum or who is appointed too late to be effective. It has also been argued that this system places an excessive burden on the private bar for which it receives inadequate compensation.

The most common argument in favor of the assigned counsel system is that it affords an opportunity for widespread participation by the bar in criminal cases. The reasoning is that if every lawyer is afforded an opportunity to participate in the criminal justice system, it will be continuously challenged and modernized.

An almost indispensable condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the bar as a whole. There is no better way to develop such interests and awareness than to provide wider opportunities for lawyers to participate in criminal litigation at reasonable rates of compensation.<sup>138</sup>

In fact, it is facetious to imply that noticeable improvements will be made in criminal justice by a smorgasbord of general practitioners and commercial specialists. Such logic is part of the self-serving myth that all ordinary lawyers are willing to devote themselves to the cause of an indigent client. The unspoken assumption of this myth is that the "civil lawyer" has as much skill as a "criminal lawyer" in criminal cases. More rational support for this assumption would be provided if it was conceded that many "civil lawyers" spend an abnormal amount of time preparing for court appointed cases because of fear of their inexperience in criminal cases. If this is true, it nevertheless appears that the appointive method is a circuitous means of providing adequate and competent counsel to the indigent.

Another method of delivering legal services to the indigent defendant is to pay full time defenders. The defender system is only about fifty years old in the United States, and already there are approximately two hundred publicly supported offices.<sup>139</sup> The obvious advantages of this system are that it provides experienced, competent counsel; eliminates many unethical practices; is more economical to operate, at least in metropolitan areas; and it assures continuity and consistency in defense of the poor.<sup>140</sup>

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<sup>136</sup> L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 15 (1965).

<sup>137</sup> *Id.* at 18-32.

<sup>138</sup> ATT'Y GEN., REP. ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 34 (1963).

<sup>139</sup> Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, in TASK FORCE REPORT: THE COURTS 158.

<sup>140</sup> L. SILVERSTEIN, DEFENSE OF THE POOR IN AMERICAN STATE COURTS 45-48 (1965).



The public defender office can be organized so as to retain many of the best features of the assigned counsel system. For instance, novice attorneys may still obtain experience in criminal cases by working in the office on a paid or volunteer basis. The advantages to the defendants from being assigned lawyers who are thoroughly familiar with the criminal justice processes are obvious. Furthermore, the public defender spreads the cost of providing legal services to the entire community, where it appropriately belongs. Most significantly, the public defender system is cheaper to operate than the assigned counsel system.

### B. *The Cost of Furnishing Right to Counsel*

In attempting to evaluate the cost of right to counsel, the first measure must be of the need for service. In other words, how many indigent defendants are there? It is estimated that each year 314,000 people are charged with felonies, and an additional 168,000 are involved in appeals, collateral attacks, revocation proceedings, etc.<sup>141</sup> Estimates of the proportion of defendants who are unable to pay for an attorney vary from 60% to 80%.<sup>142</sup> One compromise is to apply the low of 60% to the 314,000 persons charged with felonies each year, and the high of 80% to the 168,000 annual appeals, revocations and post-conviction remedies. This results in a total of 322,800 felony matters each year which involve indigent persons. We may deduct the 22,800 cases handled annually in the federal system under the Criminal Justice Act.<sup>143</sup> This leaves 300,000 cases which must have counsel provided by the local jurisdictions.

The second step in estimating the cost of right to counsel is to compare the cost of the assigned counsel system with the cost of the full time defender system. An excellent barometer of the cost of an adequate assigned counsel system is provided by the federal experience with the administration of the Criminal Justice Act. In 1967, the average cost per case was \$99.00 in the federal system.<sup>144</sup> If the same average held true for the 300,000 cases in local jurisdictions, the total cost for assigned counsel would be \$29,700,000.<sup>145</sup> On the other hand, a 1966 study of 185 public defender offices by the American Bar Association revealed that the average cost per case was \$35.00.<sup>146</sup> Therefore, if public defenders handled the 300,000 indigent cases, the total cost would be approximately \$10,500,000, a figure well under the cost of the assigned counsel system.<sup>147</sup>

<sup>141</sup> TASK FORCE REPORT: THE COURTS 55-56. It is estimated that an additional 5,000,000 people are charged with misdemeanor offenses each year. Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 398 (1966).

<sup>142</sup> *Id.* at 397.

<sup>143</sup> 1967 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANN. REP.

<sup>144</sup> *Id.*

<sup>145</sup> In fact the states currently spend only about \$17,000,000 on defense of the indigent. TASK FORCE REPORT: THE COURTS 152.

<sup>146</sup> ABA, REPORT OF THE STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS 468, 472 (1967).

<sup>147</sup> There are numerous studies comparing the costs of operation of the public defender with the assigned counsel system. They all conclude that the public defender system is generally cheaper to operate. See NEW YORK CITY BAR, EQUAL JUSTICE FOR THE ACCUSED 30 (1959); L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 63-74 (1965).

### C. A New Alternative

If we must spend additional money for representation of the indigent, and the statistics suggest that we must, we can at least strive to get the "most" solution per amount of money spent. One recent suggestion is to make use of some type of sub-professional or para-professional as a partial substitute for the more expensive lawyer.<sup>148</sup> For purposes of discussion, this class of workers will be referred to as "law agents." The combination of a number of circumstances makes the eventual use of law agents inevitable. Most compelling is the relative scarcity and expense of lawyers. Since many of the new lawyer tasks in criminal justice are such that they can be made mechanical, and thus be performed by laymen, the proposal becomes even more appealing.

A number of factors must be considered in order to locate the services that a law agent might perform. There must be a demand for the service that is large enough to keep the law agent constantly occupied, otherwise it probably would be cheaper to have the lawyer continue to supply the service personally. Furthermore, a large volume of work is necessary in order to create mechanical routines which can be taught to the law agent with ease.<sup>149</sup>

Public relations is another factor to be considered in identifying those services that a law agent might perform. One essential practice in maintaining good public relations is to utilize the law agent in conjunction with the lawyer, rather than in lieu of him. In the present state of affairs a "client" receives legal services from a layman (real estate agent, insurance adjustor, trust officer, etc.) without ever seeing a lawyer. In fact, the "client" in such situations is often relieved that it will not be necessary for him to consult a lawyer. Contrast this to a typical patient who spends one hour in a doctor's office. The patient is apt to spend thirty minutes waiting (attended by secretaries dressed in white); twenty minutes being interviewed and tested (by nurses and technicians); and only ten minutes with the doctor himself. Yet that patient leaves with a sense of well being, telling himself he has "been to the doctor" (and experienced the solicitous care of a whole team of supervised sub-professionals).

Assuming a public defender's office as the employer, how might a law agent be utilized? The goal is to create a job description consisting of tasks normally done by a lawyer which could be done more economically by a reasonably skilled layman. Plea bargaining, because it follows patterns

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<sup>148</sup> See ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 23 (1968). In 1968 the ABA resolved: "(1) That the legal profession recognize that there are many tasks in serving a client's needs which can be performed by a trained non-lawyer assistant working under the direction and supervision of a lawyer; (2) That the profession encourage the training and employment of such assistants . . ." *Proceedings of the August 1968 Meeting of the House of Delegates of the American Bar Ass'n*, 54 A.B.A.J. 1021 (1968). See also THE AM. ASSEMBLY, REPORT ON LAW AND CHANGING SOCIETY 2 (1968).

<sup>149</sup> Of course, the availability of the law agent enhances the lawyer's intrinsic capacity to accept more cases. For instance, one firm in the United States that handles defense of workman's compensation and other insurance claims employs only three lawyers and twenty-three lay personnel. The operations of this firm are described in the NATIONAL INSTITUTE FOR JUSTICE AND LAW ENFORCEMENT, UNIVERSITY RESEARCH CORPORATION, PARAPROFESSIONALS IN LEGAL SERVICE PROGRAMS: A FEASIBILITY STUDY 73-78 (report to the Legal Services Program, U.S. Office of Economic Opportunity 1968).

which are usually routine, is an appropriate example of a job that might include the use of a law agent. The following is an attempt to list most of the separate tasks involved in plea bargaining, and to suggest which ones might be performed by a law agent and a lawyer.

<i>Task</i>	<i>Performed by</i>
Securing release from detention	law agent
Examination and analysis of charging instrument	both
Initial counseling with client relative to plea	law agent
Investigation	law agent
Briefing	law agent
Analysis and examination of elements of the crime	both
Analysis and examination of admissibility of evidence	lawyer
Negotiation with prosecutor	lawyer
Making final decision as to plea with client	lawyer

Division of labor along these lines would insure that the lawyer remains the person who analyzes, counsels, and negotiates, thus making maximum use of his expertise. The tasks performed by the law agent do not detract from the image of the legal profession, and they dramatically increase the volume of cases one lawyer might handle.

The sentencing stage of the criminal process is another example of an area where law agents might be utilized effectively. From the lawyer's perspective, the sentencing process has four parts: (1) verification of the presentence report, (2) development of sentencing alternatives, (3) the presentation to the judge, and (4) interpretation of the sentence to the defendant. There appears to be no logical reason why a law agent could not perform the tasks of verifying the presentence report and developing sentencing alternatives.<sup>150</sup> These tasks are essentially investigative, and may be performed by any person with some training in social work. In fact, a law agent with proper training could probably perform these tasks better than the average lawyer since the lawyer normally does not have the type of training necessary to conduct a thorough presentence analysis.

Admittedly, the efficient and economic use of law agents is limited to a high volume, institutionalized type of law practice, such as that normally found in a public defender's office. The use of the law agent is further limited to predetermined routine matters, and thus the law agent lacks the versatility of the lawyer. Given these inherent limitations, the law agent offers the legal profession an opportunity to improve the delivery of legal service by diverting many of the time consuming mechanical tasks away from the lawyer. The legal profession is being damaged by its reluctance to grasp the concept of para-professionals. As the doctrine or right to counsel expands, it will force the issue of the futility of lawyers continuing to perform mechanical tasks.<sup>151</sup>

<sup>150</sup> Laymen are performing these tasks now in one experimental program. See Keys, *Extra-Legal Help for Defendants*, 24 LEGAL AID BRIEFCASE 15 (1965).

<sup>151</sup> "The cooperation and help of laymen, as well as of lawyers is necessary if the right of reasonable access to the courts is to be available to the indigents among us." Johnson v. Avery, 393 U.S. 483, 498 (1969).

## IX. CONCLUSION

The sixth amendment states that in all criminal prosecutions an accused should have the right to counsel for his defense. At the time the sixth amendment was written the most conspicuous stage of the criminal justice process was the trial stage where the question of guilt and punishment were adjudicated. Accordingly, the right to counsel as written in the sixth amendment was probably intended to encompass counsel at trial only. As new stages were recognized and developed through the years, the criminal justice process grew into a series of interdependent stages in the form of a continuum. Some of these new stages occur before trial, for example the stage where a line-up is conducted for identification. Other stages in the continuum occur after trial, as in the case of parole or post-conviction relief.

As the stages in the criminal justice continuum grew in number and complexity it became apparent that the defense of an accused in a criminal prosecution involved much more than simply the trial of a criminal case. Accordingly, the Supreme Court set out to expand the doctrine of right to counsel to include many of the preadjudication and postadjudication stages of the continuum. Since it is not yet feasible to provide every accused with a lawyer at every stage in the continuum the Court has chosen to require counsel at those stages where the risk of incurring the stigma of conviction is the greatest.

In order to accomplish its objective of requiring a lawyer at selected stages in the criminal justice continuum, the Supreme Court has been forced to deal with the language of the sixth amendment. In some ways this amendment proved to be a millstone; the language requiring counsel at "criminal prosecutions" was too narrow, while the language requiring counsel at "*all* criminal prosecutions" was too broad. Where the Court is challenged to extend the right to counsel to a non-adjudicatory stage of the continuum, it is faced with the constraining language of "criminal prosecutions." Where the Court is not ready to extend the right to counsel (*i.e.*, misdemeanors) it is faced with the expansive language of "all criminal prosecutions."

The Court has solved this dilemma by the substitution of the fourteenth amendment for the sixth as the doctrinal basis in some right to counsel cases. In this fashion the Court has succeeded in expanding the right to counsel to some of the non-trial stages of the continuum. At the same time, the Court has succeeded in limiting the scope of right to counsel so that it does not overburden the resources of the bar and the states which must supply the additional lawyers required.

The Supreme Court's apparent motive for requiring the presence of lawyers at these new stages of the continuum is to insure fairness to the accused, but, in fact, the lawyers' presence will have a far greater impact. The extension of the right to counsel to the preadjudication and postadjudication stages already has resulted in a plethora of new tasks for the lawyer. The whole thrust of the lawyering job is moving from the trial

stage to other stages where, heretofore, men of "goodwill" have reigned and ruled without interference. As a result, the entire criminal justice continuum may undergo some basic systemic changes. For example, in order to insure fairness to the accused, the right to counsel was recently extended to probation revocation hearings. But, from the standpoint of the criminal justice system, the presence of lawyers at those hearings may mean that they will become more formal, and perhaps less frequent, due to the lawyers' constant insistence upon the due process model.

The legal profession will also feel the impact of the doctrine of right to counsel. The profession will be forced to improve its capacity for the delivery of more and better justice. The doctrine of right to counsel has dramatized the nexus between the lawyer and the due process norm in criminal justice. Lawyers cannot expect to maintain their position as insurers of fairness unless their qualifications, availability, and acceptability are coordinated with the expectations of their clients and the public generally. This means that the legal profession must find a way to supply affordable legal service.

The legal profession and legal education have not caught up with the doctrine of right to counsel. There are not enough affordable lawyers to fulfill its promise. Even if such lawyers were available, they would not be intellectually prepared to render the type of legal service most appropriate for many of the non-trial stages of the criminal continuum. In order to keep pace with the new roles that are developing for lawyers, the legal profession and its educational system must shift its focus from the adversary model towards a more rational model, one that emphasizes the discovery, presentation, and assessment of facts. Furthermore, the profession must give more consideration to the use of para-professionals to render routine legal service in the criminal justice continuum.

These are the challenges of the doctrine of right to counsel.

# Southwestern Law Journal

VOLUME 23

August 1969

NUMBER 3

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