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A Foreword

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The sixth amendment's provision that in all criminal prosecutions the accused shall enjoy the right "to have the Assistance of Counsel for his defence" is the beginning of our problem. Some still maintain that that provision has the implied limitation, "if the defendant is rich enough to hire one." In federal proceedings, of course, the right to counsel is a right to counsel for all, including indigents.[1] It is a right to counsel at every stage of the proceeding, on appeal as well as in the trial court.[2] But a defendant's federal right to counsel in state criminal prosecutions is less secure. The relationship of the sixth amendment to the due process clause of the fourteenth amendment has been much litigated, as the landmark decisions from *Powell v. Alabama*[3] to *McNeal v. Culver*[4] indicate.

The refusal to recognize the right of counsel in every criminal case has long seemed to me to be a denial of the equal protection of the law. Certainly he who has a long purse will always have a lawyer, while the indigent will be without one. I know of no more invidious discrimination based on poverty. And the old saying that he who represents himself in litigation has a fool for a client is as applicable to the indigents as to others. It would be unfair, however, to the proud traditions which many of the states have established in this regard not to recognize that the right of counsel for all is assured in felony cases in a large majority of our states.[5] In many states this right is not limited to those charged with felonies, but is extended "in all cases." These are developments of which those states may be justly proud, for as Mr. Justice Brennan has said in his recent James Madison Lecture at New York University Law Center, *The Bill of Rights and the States*: "Without the help of a lawyer all the other safeguards of a fair trial may be empty."

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1. FED. R. CRIM. P. 44.
2. Ellis v. United States, 356 U.S. 674 (1957); Johnson v. United States, 352 U.S. 565 (1957).
3. 287 U.S. 45 (1932).
4. 365 U.S. 109 (1961).
5. See McNeal v. Culver, *supra* note 4, at 119–22 (appendix to concurring opinion).

But the need for the advice and guidance of counsel is not limited to formal courtroom proceedings. The need for counsel exists wherever the procedural and substantive rights of a person may fail to be asserted fully because of his ignorance or inexperience. It exists wherever "that which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."[6] It also exists wherever officialdom seeks to take advantage of its own power or the weakness of the individual. Police interrogation is a very relevant example of where this latter need arises, although the federal law here is still halting or yet unborn.[7]

I often think that a person has to go to a communist country or see some other totalitarian regime in operation fully to appreciate the role counsel can perform. Those who live where the police are supreme may appreciate protective procedural devices more than those who live in the environment of freedom, where they themselves never feel the fierce impact of criminal law. Perhaps that is the reason why the Bar of Soviet Russia proposed an amendment to the Soviet criminal code which would recognize the right of a person to a lawyer from the time of his arrest. The recommendation is one that many thoughtful Americans have believed appropriate, even in a country where the police are not supreme. The reaction of the Supreme Soviet to the proposal of the Russian Bar was decisive. They not only rejected the proposal, but they increased the period during which a person could be held *incommunicado*. Up to December, 1958, that period had extended for 63 days, at the end of which a person detained was to be brought to trial. Under the 1958 revised code that period was extended to a possible six months.

Right of counsel at the moment of arrest is a proposal that would be opposed by police everywhere. It takes an advantage from them—the leverage of detention *incommunicado* during which a confession is expected. India is the only nation that has faced the problem squarely.[8] Statements to a policeman are inadmissible at an Indian trial. Only confessions to a magistrate can be introduced in evidence.

When we drop to the level of the police courts and face the mounting load of vagrancy cases, the problem becomes even more acute.[9] Few are bold enough to suggest that these pieces of human

6. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

7. *Compare* Crooker v. California, 357 U.S. 433 (1958) *and* Cicenia v. LaGay, 357 U.S. 504 (1958), *with* Spano v. New York, 360 U.S. 315, 324 (Douglas, J., concurring), 326 (Stewart, J., concurring) (1959).

8. DOUGLAS, WE THE JUDGES 372 (1956).

9. See Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

jetsam (who are largely victims of poverty and unemployment) are entitled to counsel. Yet the need may be as great there as in the other cases.[10] The need for the guiding hand of counsel in juvenile cases, in congressional hearings, during administrative investigations or inquiries,[11] or in civil proceedings also raises large problems in our complex society.

The Legal Aid Society, the New Jersey assignment system, the public defender—these are alternative methods of supplying counsel to those in need and without funds. Our medical clinics that offer service at the lowest level are advanced over our legal clinics. Yet the ferment at the Bar indicates our resolution to make the American legal system the shining example of equal justice under law.

10. See Thompson v. City of Louisville, 362 U.S. 199 (1960); Edelman v. California, 344 U.S. 357 (1953); Edwards v. California, 314 U.S. 160 (1941).

11. See *In re* Groban, 352 U.S. 330 (1957).