THE CONSTITUTIONAL RIGHT TO COUNSEL IN AMERICA

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What I propose to do in this paper, is to survey the present status of American constitutional law on major aspects of the right to counsel. I shall give most attention to the scope of the right in criminal court proceedings, including the question at what stages of a criminal proceeding the right accrues. I shall more briefly consider the question in what *non*-criminal court proceedings and what administrative proceedings the right has been or might be recognized.

I. *Criminal Cases, and Proceedings Connected Therewith*

A. *The Right in General*

In the landmark case of *Powell v. Alabama*[1] in 1932, the U.S. Supreme Court described the importance of having counsel in a criminal case. Even the educated layman, said Justice Sutherland for the Court, cannot determine "whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue, or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." And this is even more true, he said, when the defendant is ignorant, illiterate or below average in intelligence.

It is not surprising, then, that the 6th Amendment to the U.S. Constitution, ratified in 1791, and applicable to the federal courts, declares: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." And — again speaking of the federal courts — the Supreme Court held in 1938 that a defendant in a criminal case who could not afford to pay for counsel was entitled to have one appointed by the government free of charge.[2] Under the system that developed thereafter, for about 25 years, *i.e.*, until 1964 when Congress passed legislation providing for payment, the attorneys who were thus appointed in the federal courts received no compensation from the government. This treatment of lawyers was indefensible — not only

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[1]287 U.S. 45, 53 S.Ct. 55, 84 A.L.R. 527, 77 L.Ed. 158 (1932).

[2]Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 146 A.L.R. 357, 82 L.Ed. 1461 (1938).

because a lawyer who isn't being paid is tempted to do less than a thorough job for his client, but also because lawyers representing indigent defendants in the *state* courts usually *were* being paid. It was for anyone to see any rational basis for this difference in treatment.

This brings me to the general subject of the right to counsel in *state* courts. The case of *Powell v. Alabama,* which I mentioned at the outset, did lay down a rule for the state courts, when it said that an indigent was entitled to appointment of free counsel and at an early enough stage in the proceeding so that counsel's aid can be effective. But the Court was speaking of a capital case — *i.e.,* one in which the death penalty was applicable (even though some of the reasoning seemed to be just as suitable for any other criminal case). And the *Powell* decision was for many years interpreted by the Court to apply *only* to capital cases.

As the Court made clear in *Betts v. Brady*[3] in 1942, the right of an indigent to have free counsel appointed was required by the "due process" clause only in some non-capital state cases — *i.e.,* those wherein the trial would be rendered obviously unjust by the absence of counsel. This would be true, for example, where the defendant was illiterate, very young, or below-average in intelligence.

Why was the Court so unwilling to recognize that the right to counsel was of fundamental importance for *any* state criminal case? Obviously the cost factor had something to do with it. But history had something to do with it too. The opinion in *Powell v. Alabama* points out that in England for centuries the rule was that in felony cases — *i.e.,* serious cases — *you could not have counsel, even if* you were ready to pay him yourself. The rule was to the contrary in less serious cases — *i.e.,* misdemeanor cases. The theory according to Lord Coke was that the Crown would not charge the commission of a serious crime unless the evidence was so "clear and manifest" that there could be no defense. This showed a remarkable faith in the prosecution. Other authorities, like Blackstone, criticized the rule. Not until 1836 was a right to employ counsel recognized for all felony cases in England.

In America, the right to *employ* counsel in *all federal criminal* cases was recognized in 1791 when the 6th Amendment was ratified. The right of an *indigent* defendant in a federal court to appointment of free counsel was recognized in 1938, in *Johnson v. Zerbst.* In *state* cases, it came to be recognized that one had a right to employ one's own paid counsel;[4] but the right of the indigent to appointed counsel was limited for a long time to (a) capital cases, and (b) those non-capital cases in which, be-

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[3]316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).
[4]Chandler v. Freitag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954).

cause of the special circumstances, failure to appoint counsel would be a great injustice.

Then came the 1963 decision in *Gideon v. Wainwright*[5] which declared, in a state prosecution for burglary, that the 14th Amendment due process clause guaranteed to Mr. Gideon, the right of appointed counsel because he was an indigent. This was so in spite of the fact that it was a non-capital case, and regardless of whether there were special circumstances of the kind which had been required by *Betts v. Brady* — a case that was now being overruled.

The new rule announced by *Gideon* for the state courts was not a sudden, unexpected change in the law. There had been many signs pointing to the probability that the *Betts v. Brady* rule would be overruled. The rule had for many years been attacked by criminal law scholars; and there were indications in subsequent opinions that the precedent was a shaky one.[6] Indeed, in the *Gideon* case itself, the Court in its order granting review, asked the attorneys specifically to discuss whether the *Betts v. Brady* rule should be reconsidered.[7]

In *Gideon*, the burglary offense was a felony. Would the rule also be applied to misdeameanors? The answer came in 1971, in *Argersinger v. Hamlin*,[8] and it was a qualified *"yes."* The defendant Argersinger had pleaded guilty to the misdemeanor of carrying a concealed weapon (an offense punishable by up to 6 months in jail and $1,000 fine) without being informed of a right to counsel. His sentence was a $500 fine or 90 days in jail. The Supreme Court reversed the conviction, but did not go so far as to say that the right of counsel in all misdemeanor cases.

It pointed out that the Sixth Amendment in terms says[9] that the various rights specified therein apply to "all criminal prosecutions;" and

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[5]372 U.S. 335, 83 S.Ct. 792, 93 A.L.R. 733, 9 L.Ed. 2d 799 1963).

[6]In various cases decided since Betts, four of the nine justices had explicitly indicated that they were ready to overrule *Betts* in an appropriate case. In the 20 years or so since *Betts*, the Court had decided a number of cases enlarging various rights (other than the right to counsel) of criminal defendants — *e.g.*, in the area of freedom from coerced confessions and unreasonable searches and seizures. The Court had also recognized the right of an indigent not to be discriminated against in the taking of a criminal appeal by virtue of his inability to pay the costs. In addition, the distinction between a capital case and a non-capital case had been rejected in certain cases not involving the right to counsel. And in the preceding 13 years, the Court in applying the *Betts* rule had always found that the special circumstances existed which would require appointment of counsel.

[7]Another straw in the wind was the following fact: the attorneys-general of only two other states were supporting Florida's position before the Supreme Court in *Gideon*, whereas the attorneys-general of 23 states were supporting the defendant's position.

[8]407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972).

[9]Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

the only one of these rights that had been judicially limited by type of offense involved was the jury trial right, which had traditionally been inapplicable to "petty offenses." Supreme Court decisions of the previous few years on the jury trial right had regarded offenses punishable by more than six months as non-petty offenses;[10] and long before that had held that even a traffic offense of reckless driving for which 30 days in jail and a $100 fine could be imposed, may be "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."[11] But in the case of the right to counsel, the historical support for drawing a line on a type-of-offense basis was lacking. Rather, said the Court, the rationale of the *Powell* and *Gideon* cases was relevant to "any criminal trial where an accused is deprived of his liberty." Hence the general rule is: "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial... Under the rule we announce today, every judge will know when the trial of a misdemeanor starts, that no imprisonment may be imposed... unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefor know when to name a lawyer to represent the accused before the trial starts. The run of misdemeanors will not be affected by today's ruling.* But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."[12]

But notice the difficulty caused by this phraseology. It doesn't say that in any criminal prosecution for an offense *punishable* by imprisonment for any term there is a right to counsel.[13] Rather, in an apparent effort to avoid an immediate drastic drain on funds and personnel, it is in terms of an actual sentence of imprisonment — which of course doesn't occur until after the trial or the guilty plea.

Does this mean that in any criminal case (including even those where more than six months' imprisonment is a potential penalty) the judge can always *avoid* appointment of counsel by not imposing any imprisonment? Such an interpretation would be particularly unwise in the non-petty cases. In the jury cases the Court has stressed that the maximum penalty authorized in the statute, rather than actual penalty imposed, is what counts in determining whether the Sixth Amendment applies, and that a potential

[10]Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968); Baldwin v. New York, 399 U.S. 66, 69, 90 S.Ct. 1886, 26 L.Ed. 2d 437 (1970).

[11]District of Columbia v. Colts, 282 U.S. 63, 73, 51 S.Ct. 52, 75 L.Ed. 177 (1930).

*The overwhelming majority of all misdemeanants are not imprisoned. S.M.

[12]*Supra*, note 8 at 37, 40.

[13]The Uniform Rules of Criminal Procedure (P. F. Draft, 1974), proposed for adoption by the states, provides in Sec. 321(b) that the accused is entitled to appointed counsel if "charged with an offense punishable by incarceration."

penalty of more than six months makes it a "criminal" rather than a petty offense under the Sixth Amendment. Surely an offense serious enough to warrant jury trial is serious enough to warrant counsel — especially in view of the Court's stress on the point that the counsel right is from the traditional limits on the jury trial right, and in view of the further observations on the vital role played by the lawyer for any criminal defendant, at the trial and at the pleading stage. As Professor Duke has strongly urged, *Argersinger* should be read together with the jury cases — so that where the defendant is entitled to a jury trial "*or* he is to be imprisoned in fact for any length of time however short, he has a Constitutional right to appointed counsel."[14]

Moreover, the *Argersinger* majority did *not reject* one of the points in Justice Powell's concurrence, that counsel may be necessary even in cases where the offense is not punishable by imprisonment at all. The majority opinion after noting Justice Powell's position, stated: "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail."[15] Thus, the Court was apparently

[14]Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601, 607 (1975). Elaborating a generally latitudinarian view of the requirements of Argersinger, Prof. Duke argues: (1) The first question faced by the judge is whether the offense is significant, to which the following questions are relevant: what is the maximum penalty authorized by the statute; was the accused arrested, or is it customary to arrest, for this offense; as to fine, what maximum is authorized, and has the legislature indicated significance to the offense by providing jail for non-payment of the fine (even though jail could not constitutionally be imposed where the reason for non-payment is indigency); what are the collateral consequences of conviction (*e.g.*, might it bar the issuance of some occupational licenses, or lead to revocation of probation or parole, or lead to loss of a driver's license); does the offense carry a substantial stigma though the penalty is minor (*e.g.*, drunkenness or minor sex offenses). (2) If the offense is deemed not significant, does the charge nevertheless threaten a "deprivation in fact" because of the peculiar circumstances of the case (*e.g.*, the accused has a peculiarly sensitive job, which may be lost as a result of the conviction; an abnormal stigma may be attached to the offense in the particular community or place of work. (3) *After* conviction, even a presumptively valid uncounselled conviction (where no imprisonment was imposed) ought to be attackable in this sense: the lack of counsel should make dubious the use of the indigent's conviction to impeach him as a witness, deny him a license, enhance a sentence on later conviction, or impose jail for non-payment of the fine originally imposed.

[15]*Supra*, note 8 at 37. The possibility that the Court might extend the *Argersinger* rule to non-imprisonment cases where the fine or the collateral consequences are particularly severe is suggested by Mayer v. Chicago, 404 U.S. 189 (1971), decided in the year before *Argersinger*, and involving a different issue: the right to a free transcript that was needed to present an appeal from a non-imprisonment misdemeanor conviction ($500 fine for disorderly conduct and interference with police officer). The right of an indigent to a free transcript on appeal had been recognized in a felony case (Griffin v. Illinois, 351 U.S. 12 (1956) and the Court extended it here to a non-imprisonment misdemeanor case, saying: "A fine may bear as heavily upon an indigent accused as forced confinement;" and the "collateral consequences may be even more severe as when the impecunious medical student finds himself barred from the practice of medicine because of [the] conviction..." Note also the observation in Wood v. Superintendent, 355 F. Supp. 338 (E.D. Va. 1973) that *Argersinger* "applies to those non-imprisonment cases in which fundamental fairness... mandates the appointment of attorneys."

leaving open the question of whether severity of a potential fine, or the possibly severe collateral consequences of a criminal fine (such as loss of driver's license) might *also* be grounds for recognizing a constitutional right to counsel. In fact, the National Advisory Commission on Criminal Justice Standards and Goals has already urged recognition of the right for all misdemeanants, jailable and otherwise.[16] What the Court was doing was closer to the view of the A.B.A. Project on Minimum Standards for Criminal Justice (which it quoted). That study had counselled distinguishing "those classes of cases in which there is real likelihood that incarceration may follow conviction from those types in which there is no such likelihood."[17]

How have the trial judges been interpreting the *Argersinger* rule? Or (since judicial practice may be based not on an interpretation of what is constitutionally required, but on what sound policy requires beyond the constitutional minimum) what practices have the trial judges followed, after *Argersinger?* The practices have varied, but usually they have not extended the counsel right so broadly as to equal the above National Advisory Commission recommendation, or as narrowly as some language of the *Argersinger* opinion would suggest. The 1973 National Defender Survey[18] found that at one extreme, a minority of jurisdictions (24% of all judges) were indeed going as far as the National Advisory Commission recommendation. They were providing counsel "for all indigent misdemeanor defendants regardless of the possibility of incarceration."[19] At the other extreme were a number of jurisdictions (somewhere below 10% of all judges) where counsel was not being provided for *any* indigent misdemeanor defendants, because of lack of funds or insufficient number of local attorneys, and such defendants were not being incarcerated. These were typically rural areas, with no organized defender programs.[20]

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[16]NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, 27-28 (1973). The rule for the *federal* courts, under Rule 44(a) of the Federal Rules of Criminal Procedure is: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment."

[17]A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 40 (1968).

[18]This was a nation-wide survey of indigent defense services, directed by Laurence Benner, the findings of which are reported in Benner and Neary, The Other Face of Justice (973), and more briefly reported in Benner, *Tokenism and the American Indigent: Some Perspectives On Defense Services*, 12 AM. CRIM. L. REV. 667 (1975).

[19]Benner, *id.* at 667, 675, 678 (1975).

[20]*Id.* at 676, 678. In general, failures to apply *Argersinger* occurred more in jurisdictions with assigned counsel systems rather than public defender systems. *Id.*, 675-8. The defender system is generally preferred by scholars, judges and other participants in the criminal justice system. *Id.*, 671., Goldberg, *Defender Systems of the Future: The New National Standards*, 12 AM. CRIM. L. REV. 709, 716-717 and notes. The Goldberg article mentions (p. 717) the ability of defender systems "to respond to the need for early representation," to "work for new laws which may improve the existing system" as well as: "the greater professionalism and expertise of full-time defenders who are criminal law specialists, cost savings due to ... eco-

In between these extremes: (a) the largest group (40% of all judges) provided counsel where the offense carried a *potential* jail term;[21] (b) the next largest group (20% of all judges) provided counsel if the judge believed a jail sentence would be imposed in the event of conviction (this harmonizes with the narrow reading of *Argersinger*); (c) a small number provided counsel if the prosecutor sought to have a jail sentence imposed (4% of all judges), or if the prosecutor and judge together decide that a jail sentence will be imposed in the event of conviction (3% of all judges).[22] The practices in (b) and (c) above have been "seriously questioned, since the facts of a case and often the defendant's prior record may improperly be considered by the judge prior to the determination of guilt or innocence. Moreover, the provision of counsel at the suggestion of the prosecutor is a 'red flag' indicating to the Court that the defendant has a criminal background or is otherwise particularly pernicious, thus subtly predisposing the Court toward a determination of guilt."[23]

Judicial practices in *advising* defendants of the right to counsel were also found by the Survey to be often inadequate. *E.g.*, the defendant might be advised only if he has pleaded not guilty; or he might be advised he has a right to counsel but not specifically told that counsel will be appointed if he is indigent; or he might be given a mass advisement to all defendants present at the start of a court session (which isn't heard of course by those who happen to be absent, nor by some of those present.[24] And some judges also fail to get an express, knowing and intelligent *waiver* of the right before allowing defendant, advised of his right, to proceed without counsel.[25]

Moreover, many have been deprived of counsel by an overly severe judicial concept of "indigency" — *i.e.*, virtually equating it with destitution,[26] as contrasted to the ABA concept that the accused be "financially unable to obtain adequate representation without substantial hardship to himself or his family;" and counsel is not to be denied "merely because

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nomies of scale . . . access to needed supporting service such as investigative assistance, freedom from conflicting pressures to work on the cases of paying clients," more freedom in handling cases "due to lack of dependence on appointment by friendly judges," less court delay "by avoiding the need for continuance while appointed lawyers are sought," and lesser likelihood of counsel being "waived due to unavailability."

[21]*Id.*, at 675, 678.

[22]*Id.*, at 675-6, 678. Chief Justice Burger's concurring opinion in *Argersinger* contemplated that the decision would require pre-trial prediction by the judge, with assistance from the prosecutor.

[23]*Id.*, at 676.

[24]*Id.*

[25]*Id.* For cases stressing the requirement of clear notice of the right to defendant and a rejection by him that is clear, knowing and intelligent, see Johnson v. Zerbst, *supra*, note 2; Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 (1962); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 10 A.L.R. 3d 974, 16 L.Ed. 2d 694 (1966).

[26]See discussion in Duke, *supra*, note 14 at 625-631.

his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting a bond."[27]

Thus there have been serious limitations, in practice, on full realization of the judicially pronounced constitutional right to counsel. They join another practical limitation which has often been asserted, namely the lesser competence of counsel for the indigent. In the words of a respected federal court of appeals judge: "For criminal defendants with court-appointed lawyers ... the right to counsel too often means little more than *pro forma* representation."[28] An important element in this deficiency is the fact that "the vast majority of appointed counsel and defenders are forced to represent their clients without" funds for the supportive services like those of investigators or experts[29] — though funding for such purposes has been recommended by the A.B.A. Project on Minimum Standards for Criminal Justice (Sec. 1.5), the National Advisory Commission on Criminal Justice Standards and Goals, Courts (Sec. 13.14) and the Uniform Law Commissioners' Model Defense of Needy Persons Act (Sec. 2).

In view of the spottiness of the actual application and implementation of *Argersinger,* one may well ask whether a broad reading of its

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[27]A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Sec. 6.1 (1968).

[28]Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1, 2 (1973). "Unfortunately the standards of legal competence enunciated by appellate courts provide little guidance for trial or habeas courts to follow." Finer, *Ineffective Assistance of Councel,* 58 CORNELL L. REV. 1077 (1973). Some of the lower courts apply a loose standard to the effect that the trial must not be a "farce or mockery" or be "fundamentally unfair;" others are stricter, being willing to find a constitutional violation when the lawyer has functioned below the usual performance of lawyers with ordinary training and skill in criminal law. See Beasley v. United States, 491 F. 2d 687 (6 Cir. 1974). More like the latter view was the Supreme Court attitude expressed in McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973). Some lower courts apply different standards, depending on whether it is retained or appointed counsel, being more ready to find a constitutional violation in the former situation. See Fitzgerald v. Estelle, 505 F. 2d 1334 (5 Cr. 1974). The late appointment of counsel will not necessarily be viewed as a violation of the constitutional right (Chambers v. Maroney, 399 U.S. 42, 99 S.Ct. 1975, 26 L.Ed. 2d. 419 (1970); but a violation does arise where counsel represented two defendants whose interests were celarly conflicting. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[29]Benner, *supra,* note 18 at 679. Generally on this problem, see references cited in Friloux, *Equal Justice Under the Law: A Myth, Not A Reality,* 12 AM. CRIM. L. REV. 691, 693, note 11 (1975). While the Supreme Court has not ruled on whether the right to appointed counsel includes the right to needed assistance of investigators or of experts such as psychiatrists, scientists, or accountants, a number of lower courts have. Some answer in the affirmative, *e.g.,* Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), aff'd. 344 F. 2d 672 (5 Cir. 1965); some look in the other direction, *e.g.,* U.S. *ex rel* Smith v. Baldi, 192 F. 2d 540 (3 Cir. 1951), aff'd 344 U.S. 561 (1951). Often the appointment of experts has been authorized by statute or is made under court rules or practice. Defendant's counsel may be asked to make a special showing of need, but not a showing that would itself be constitutionally unreasonable. See Greenwell v. U.S. 317 F. 2d 108 (D.C. Cir., 1963). In the federal courts today under the Criminal Justice Act, these expenses, when necessary to an indigent's defense, are payable by the Government. See text below at note 68.

requirements or an extension of it to cover virtually all misdemeanants can be expected to have "practical" effect. At least as far as inadequacy of the supply of funds and lawyers is concerned, this was not viewed as a very serious obstacle in Justice Douglas' majority opinion. The opinion referred to an estimate that "between 1,575 and 2,300 full-time counsel would be required to represent *all* indigent misdmeanants, excluding traffic offenders — "compared to the estimated 355,200 attorneys in the United States ... a number which is projected to double by the year 1985."[30] As for traffic offenses, the opinion pointed out that the overwhelming majority of traffic convictions did not result in imprisonment.[31] Finally, the opinion noted the possibility of removing "minor" offenses from the court system, citing an A.B.A. Committee report.[32]

B. *At What Stage?*

1. As to the stage of the criminal proceeding when the right to counsel accrues, the Supreme Court has said that it is any stage which is "critical" — and this includes, said the Court in the 1967 *Wade* and *Gilbert* cases, even the stage of the *"line-up"* of suspects for identification purposes.[33] However, this holding was restricted in the 1972 *Kirby* case, to line-ups occurring "at or after the time that adversary judicial proceedings have been initiated against him," rather than merely after arrest. The right-to-counsel cases, said the Court, had all involved points of time "at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information or arraignment."[34]

But this "adversary judicial criminal proceedings" principle had to be reconciled with one of the most famous of all right-to-counsel cases, *Miranda v. Arizona* in 1966.[35] That case held that the prosecution could not use statements stemming from police questioning of a person who is in custody or otherwise deprived of his freedom of action in any significant way, *unless* certain procedures to safeguard the Fifth Amendment privilege had been complied with: the person in custody must be clearly informed that he has a right to consult with a lawyer and have

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[30]*Supra*, note 8 at 37, fn. 7.

[31]*Supra*, note 8 at 38-9, fn. 10.

[32]*Supra*, note 8 at 38, fn. 9. The Report stated: "Regulation of various types of conduct which harm no one other than those involved (*e.g.*, public drunkenness, narcotics addition, vagrancy, and deviant sexual behavior) should be" legislatively transferred from the courts to "detoxification centers, narcotics treatment centers, and social service agencies." Traffic, housing code violations and other non-serious offenses should also be transferred to "specialized administrative bodies." REPORT OF A.B.A. SPECIAL COMMITTEE ON CRIME PREVENTION AND CONTROL, NEW PERSPECTIVES ON URBAN CRIME IV (1972).

[33]United States v. Wade, 88 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967).

[34]Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972).

[35]384 U.S. 436, 86 S.Ct. 1602, 10 A.L.R. 3d 974, 16 L.Ed. 2d 694 (1966).

the lawyer with him during interrogation, and that if he is indigent, a lawyer will be appointed. Counsel is to be allowed him at any point he asked for one. He is further to be informed that he has a right to remain silent and that anything he says could be used against him in court. As for a claimed waiver of rights, a heavy burden would rest on the government to show that he knowingly and intelligently waived his privilege or his right to counsel.[36] The problem of reconciliation with the *Kirby* principle arises from the fact that *Miranda* had recognized a right of counsel at interrogation *before* any "adversary judicial proceedings." The reconciliation made by the *Kirby* court was this: The *Miranda* requirements, being created to safeguard the suspect's *self-incrimination privilege under the Fifth Amendment* (or the Fourteenth Amendment "due process" clause, in a state case) were not based on the *right to counsel under the Sixth Amendment* (or under the Fourteenth Amendment "due process" clause, in a state case). Since the *Kirby* principle, as to the stage at which the counsel right accrued, was dealing with the latter right to counsel as such rather than with the right as supplementary to the privilege, it was not inconsistent with *Miranda*.[37]

2. What about police identification procedures other than the line-up? In 1973 the Court read the *Wade* line-up identification rule narrowly, refusing to apply its principle to a photograph identification session held after indictment.[38] In *Wade* itself the Court had indicated inapplicability of the rule to the taking and analyzing of "the accused's fingerprints, blood sample, clothing, hair and the like" because these activities unwitnessed by counsel don't involve the same risks as a suggestive line-up procedure unwitnessed by counsel.[39]

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[36]A number of cases have raised the question of what legal consequences flow from police officers' failures to give the required Miranda warnings. The Court has held, for instance, that statements by the defendant that were made in the absence of *Miranda* warnings and hence inadmissible in the prosecution's main case against him, can be used by way of impeachment to attack the credibility of defendant's trial testimony. See Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L. Ed. 2d 1 (1971).

[37]Nor could counsel in the line-up situation in *Kirby* be regarded as necessary for safeguarding the privilege: the privilege, said the *Kirby* court, attaches only to "evidence of a testimonial or communicative nature," and thus doesn't apply to evidence of physical characteristics exhibited in a line-up.

In addition to *Miranda*, the Court also had to distinguish Escobedo v. Illinois 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964) which was in terms decided not under the 5th Amendment but rather under the Sixth (as applied to the states through the 14th). First, the Court stated that after the *Escobedo* decision, the Court had "in retrospect" [*i.e.*, in Johnson v. New Jersey, 384 U.S. 719, 729, 6 S.Ct. 1772, 16 L.Ed. 2d 882 (1966)] perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination.' Second, in the same Johnson v. New Jersey case, "the Court has limited the holding of *Escobedo* to its own facts . . ."

[38]United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed. 2d 619 (1973).

[39]"Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary

3. Let us consider now all of the stages, before and after the trial itself, that have been or may be considered "critical," bearing in mind the *Kirby* case principle that at least the stage would have to be "at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

(a) Would an *arrest warrant issued upon information and oath* qualify as a "formal charge" or other "initiation" of the judicial proceeding, and constitute a "critical" stage? The Supreme Court has not spoken, but a majority of the Second Circuit has answered in the affirmative.[40]

(b) *In-custody interrogation by police* even before initiation of the adversary judicial proceeding also is a stage where the indigent's right to appointed counsel accrues, not under the 6th Amendment but, as we have seen, as a safeguard for the 5th Amendment privilege.

But *line-ups,* as we have also seen, are a critical stage under the Sixth Amendment when occurring *after* initiation of adversary judicial criminal proceedings.

(c) Consider now the *"initial appearance" before a magistrate,* where defendant is informed of the charges and of his right to remain silent, and such rights as he may have to counsel, to preliminary examination, and bail. This *can* be a critical stage, requiring appointment of counsel. The Supreme Court found it so where the accused had been asked to enter an informal non-binding plea at this stage, and the fact that he had pleaded guilty at that stage was introduced against him at the trial.[41] Perhaps this stage will also be viewed as critical if it is the time when he waived his right to *preliminary examination* — particularly since the preliminary examination itself has been held by the Supreme Court to be a critical stage (though failure to appoint counsel might not require reversal of the conviction if it were shown to be "harmless error," not

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processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts... (T)here is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." United States v. Wade, 388 U.S. 218, 227-8, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967).

One should note also that apart from the question of counsel, there is a possible "due process" attack on convictions based on eyewitness identification at trial following a pretrial identification by photograph (Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968) or by confrontations, including one-man showups [Stovall v. Denno, 388 U.S. 293, 87 S Ct. 1967, 18 L.Ed. 2d 119 (1967)] — when the identification procedure is so impermissibly suggestive as to make irreparable misidentification very likely. See also Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972).

[40]U.S. *ex rel* Robinson v. Zelker, 468 F. 2d 159 (2 Cir. 1972).

[41]White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed. 2d 193 (1963).

affecting the particular trial),[42] and a few of the reasons for thinking it critical would apply to initial appearance as well.[43]

(d) As for *grand jury proceedings,* there is even no constitutional right to have one's own retained counsel present. The Supreme Court stated in 1957 that a "witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies."[44] The case involved an Ohio fire marshal's investigation of the causes of a fire. The fact, said the Court, that the witnesses' testimony before the fire marshal "might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel;" a witness who feared self-incrimination was free to invoke the privilege. The 1976 *Mandujano* case[45] squarely involved, for the first time, the right of a grand jury witness, who was a potential defendant, to receive the "*Miranda* warnings" concerning the right to silence and to counsel. Four of the six justices who reached the counsel issue thought the Miranda warnings unnecessary: (1) There was no right to counsel under the Sixth Amendment (under the *Kirby* rule, previously discussed, no criminal proceedings had yet been instituted against him when he was called before the grand jury); (2) the right under the *Miranda* rule, to counsel and to the Miranda warnings was inapplicable. The Miranda rule "was fashioned to secure the suspect's Fifth Amendment privilege in a setting thought inherently coercive;" the *Miranda* opinion itself had recognized a difference between the abuse-prone police station setting and the setting of "courts or other official investigations."[46] The *Mandujano* plurality opinion went on to quote the language of the fire marshal case to the effect that a witness "before a grand jury cannot insist as a matter of constitutional right, on being represented by counsel;" and again asserted

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[42]Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970).

[43]I have in mind the Court's statement that counsel could be "influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." The other reasons why the Court thought the preliminary examination a critical stage were 1) the lawyer can expose fatal weaknesses in the prosecutor's case, causing the magistrate to find there is no "probable cause" to hold the accused for prosecution (the decision on probable cause is the main function of a preliminary hearing); 2) testimony of a government witness, particularly on cross-examination, can be the basis for impeaching the witness at the subsequent trial; and favorable testimony of a witness can be preserved for use at trial, if the witness doesn't appear at trial; 3) counsel's ascertainment of the government's case against his client can enable him better to prepare for trial.

[44]*In Re* Groban, 352 U.S. 330, 333, 77 S.Ct. 510, 1 L Ed. 2d 376 (1957).

[45]United States v. Mandujano, 48 L.Ed. 2d 212 (1976).

[46]The plurality opinion recognized another reason for inapplicability of the *Miranda* warnings. "Under *Miranda*, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous..., whereas a grand jury witness ... has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim" (48 L.Ed. 2d at 225). The witness in this case had indeed been warned that he need not answer any incriminating questions.

that the fact that the witness is a potential defendant is immaterial. The witness thus had no valid objection in this case to the limited right which had been offered him, of having his counsel available for consultation outside the jury room.[47]

(e) At *arraignment,* which is the stage when defendant pleads (guilty, not guilty, or nolo contendere) to the charges in the information or indictment, this seems clearly a "critical" stage, if he pleaded guilty, but: (1) There are circumstances when even a defendant who *pleaded not guilty* and then had counsel appointed for the trial, can claim error in the non-appointment of counsel at arraignment. This is illustrated by *Hamilton v. Alabama,*[48] where the Supreme Court found arraignment a "critical stage" in Alabama because arraignment was the time when one had to claim an insanity defense, make pleas in abatement, and motions to quash based on invalid drawing of the grand jury. And in this capital case the Court said it would not "stop to determine whether prejudice resulted" from the non-appointment of counsel. (2) Conversely, there are circumstances when even a defendant who *pleaded guilty* might be regarded as *not* prejudiced by the lack of counsel at arraignment. Thus, if the law allowed him to later withdraw the guilty plea and did not allow the plea to be used in evidence against him, the error in non-appointment of counsel may be viewed as harmless.[49]

(f) *Sentencing* is a "critical" stage requiring that an indigent be assisted by appointed counsel — even when the sentencing had been deferred and then imposed initially at a probation revocation proceeding.[50]

(g) But the *usual probation revocation proceeding* (*i.e.*, one where the sentence had previously been imposed by the Court and suspended in favor of probation) is regarded as *not* part of a "criminal prosecution" under the Sixth Amendment.[51] Still, a probationer has certain minimal "due process" rights at the "informal" revocation hearing, and this includes

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[47]Defendant had been charged by the grand jury in a two-count indictment with a heroin count and a perjury count for false statements to the grand jury. The Courts below had suppressed his grand jury testimony on the ground that *Miranda* warnings hadn't been given him. All eight participating justices agreed in the judgment to reverse, but could not agree on an opinion. Justices Stewart and Blackmun contented themselves with saying that the grand jury testimony was relevant only to the perjury prosecution, not having been used in the heroin prosecution; and the Fifth Amendment provides no protection against perjury. Justice Brennan, joined by Marshall, agreed with that point, but took issue with the plurality opinion on some of its observations on the privilege and on the right to counsel. As to counsel, he expressed his "disagreement with the implication in the plurality opinion that constitutional rights to counsel are not involved in a grand jury proceeding, and... disagreement with the further implication that there is a right to have counsel present to consultation outside the grand jury room but that it is not constitutionally derived and therefore may be enjoyed only by those wealthy enough to hire a lawyer."

[48]368 U.S. 52, 82 S.Ct. 157, 7 L.Ed. 2d 114 (1961).

[49]See Vitoratos v. Maxwell, 351 F. 2d 217 (6 Cir. 1965).

[50]Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1968).

[51]Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973).

said the Supreme Court in *Gagnon v. Scarpelli* in 1973, the indigent's right to appointed counsel *if*, under the particular facts, the effectiveness of those rights can't be attained without appointment of counsel.[52] The nature of the latter determination was somewhat clarified by some general guidelines.[53] The reason for the Court's case-by-case approach was that the probation revocation hearing had a nature and function different from those of a criminal trial. The hearing is more "attuned to the rehabilitation needs of the individual probationer;" in most cases he has already been convicted of committing another crime or has admitted the probation violation, and any alleged mitigating circumstances are often "not susceptible of proof," or are "so simple as not to require either investigation or exposition by counsel." Such reasons would largely apply against the presence of even counsel retained and paid by probationer — and indeed the Court in *Gagnon v. Scarpelli* specifically left open the question whether retained counsel should be allowed in circumstances other than those indicated by the Court as requiring the appointment of counsel for an indigent.[54]

(h) *Parole revocation,* like probation, is not a stage of a criminal prosecution, but revocation of parole does result in loss of liberty and so the hearing rights of parolees were equated by the *Gagnon* Court with those of probationers; and the right to counsel question which had been left open in the 1972 parole revocation case of *Morrissey v. Brewer* was treated in the *Gagnon* probation revocation case in 1973 as having the same answer for both kinds of revocation — namely, the case-by-case approach above described.[55]

(i) On the other hand, in *prison disciplinary proceedings,* the Court

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[52]*Id.*, 790. The minimal due process rights of an "informal" hearing had been previously described in the parole revocation case of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972); and in Gagnon v. Scarpelli (at p. 782) the Court said the same rights applied to probation revocation. The rights described in Morrissey were rights to (1) a preliminary hearing by an impartial hearing officer, involving notice, right to present evidence, confront and examine witnesses, and written statement of reasons by the officer supporting any determination that there is probable cause and hence the parolee should go before the parole board, (2) a final or revocation hearing before the board, which is somewhat more comprehensive, involving rights analogous to those at teh earlier hearing.

[53]"Presumptively," counsel should be appointed, said the Court (pp. 790-1), if after being informed of his right, the indigent probationer asks for counsel, making a "timely and colorable claim" either that he hasn't committed the violation or "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." Also, "whether the probationer appears to be capable of speaking effectively for himself" is relevant "especially in doubhtful cases." And the grounds for refusing a request for counsel must be "stated succinctly in the record."

[54]*Supra*, note 51 at 783, fn. 6. The Court said this as to both probationers and parolees.

[55]Morrissey v. Brewer, *supra*, note 52 at 480, 389; Gagnon v. Scarpelli, *supra*, note 51 at 778, 782.

has ruled that inmates do *not* "have a right to either retained or appointed counsel."[56]

(j) The *appeal* stage in a criminal case has been the subject of some interesting decisions. In 1963 the Supreme Court in *Douglas v. California*[57] recognized an indigent state defendant's constitutional right to appointed counsel at the first level of appeal granted as a matter of right. But whereas *Gideon* and *Argersinger* had been based on Fourteenth Amendment "due process" incorporation of the right to counsel, the *Douglas* ruling was based (with only a minor reference to "due process") on the Fourteenth Amendment "equal protection" clause. The Court ruled that the California system by which the appellate court made "an independent investigation of the record [to] determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed" was discriminatory; "the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is left to shift for himself."[58] In 1974, however, in *Ross v. Moffit*,[59] the Court ruled that where an indigent defendant in a state criminal case had counsel on his unsuccessful first appeal to an intermediate court of appeals, he did not have a further constitutional right to appointed counsel for seeking a discretionary review in the state Supreme Court, or for seeking review in the U.S. Supreme Court.[60]

Explaining first why "due process" did not require appointment of counsel at this stage, Justice Rehnquist for the majority emphasized the difference in the parties' factual and legal relationships at trial and on appeal: "The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior

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[56]Wolf v. McDonnel, 418 U.S. 539 (1975); and this is true though the conduct involved might also be punishable in state criminal proceedings, Baxter v. Palmigiano, 96 S.Ct. 1551 (1976).

[57]372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963).

[58]*Id.*, at 358. Four years later, the scope of the duty of appointed counsel was somewhat clarified. The Court in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967) dealt with a situation where appointed counsel had merely filed a statement with the appellate court that the appeal had no merit, resulting in the court's examining the record and affirming the judgment. The Supreme Court found such procedure impermissible. Counsel may request withdrawal if he finds the case "wholly frivolous," but cannot do so in this manner. He would have to accompany the request for withdrawal with a brief, discussing the points that "might arguably support the appeal." The Court may agree with the Court below if none of the points is found arguable, but otherwise it would have to "afford the indigent the assistance of counsel to argue the appeal."

[59]417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974).

[60]Notice that the case dealt with counsel at the stage of *seeking* review. Once discretionary review is *granted* to an indigent, it has been customary for courts to appoint counsel for handling the case thereafter.

determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston,* 153 U.S. 684 (1894)".[61] Turning to the equal protection clause, Justice Rehnquist found some support even in the *Douglas* opinion for his proposition that the State can draw reasonable lines; that the "question is not one of absolutes, but one of degrees." A defendant in this defendant's position is not denied "meaningful access" to the North Carolina Supreme Court, for at the stage of seeking review in that Court, he will have at the very least, a record of the trial, a brief on his behalf in the Court of Appeals, and often a Court of Appeals opinion disposing of his case. These materials plus whatever submission he files *prose* will give the North Carolina Supreme Court an "adequate basis" for the decision (which is not concerned with the correctness of the judgment below) to grant or deny review.[62] True, a lawyer can be of help, but the "duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Indeed, the U.S. Supreme Court itself "has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or applications or petitions for certiorari. . .," and the Court declined to read the Fourteenth Amendment as requiring an opposite policy for state courts.[63]

(k) The right to appointed counsel in post-conviction *collateral proceedings,* typically habeas corpus, has not yet been squarely considered by the Supreme Court. There is some reason for thinking the Court will not recognize such a right. An habeas corpus proceeding is regarded as civil, and not part of the "criminal prosecution" envisaged by the Sixth Amendment. And if "equal protection" and "due process" were rejected in *Ross v. Moffit* as a basis for requiring appointed counsel to prepare an application for discretionary review, perhaps the same will be done in the respect to habeas corpus applications. Still, habeas corpus has an express constitutional recognition that is lacking for discretionary review and lacking even for the first appeal as of right. Lower courts show some division.[64] The Supreme Court did, on equal protection reasoning,

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[61] *Id.,* at 611.

[62] Instead of reviewing the correctness of the Court of Appeals judgment, the Supreme Court of North Carolina in such discretionary review applications was concerned only with whether the case was significantly related to the public interest or the jurisprudence of the State, or conflicted with one of its own decisions.

[63] *Id.,* at 616, 617-618.

[64] See, *e.g.,* Honore v. Wash. S. Bd., 466 P. 2d 485 (Wash. 1970); People v. Shipman, 397 P. 2d 993 (Cal. 1965); Dillon v. United States, 307 F. 2d 445 (9 Cir. 1962); U.S. *ex rel* Wissenfeld v. Wilkins, 281 F. 2d 707 (2 Cir. 1960).

require that the State furnish *transcripts* to indigents in post-conviction proceedings,[65] but the closest it came to deciding the counsel question were some interesting dicta in *Johnson v. Avery*[66] in 1969.

Before taking leave of the question of right to counsel in criminal cases, I wish to make clear that the right of *federal* criminal defendants is somewhat broader and clearer by virtue of the fact that (1) Federal Criminal Rule 44(a) covers all misdemeanors, without the qualification expressed in *Argersinger*, and might be construed as broader as to the stages at which the right accrues;[67] and (2) under the Criminal Justice Act, the Government will pay (subject to some limits) "investigative, expert, or other services necessary to an adequate defense" if the defendant is financially unable to pay them.[68]

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Finally, consider the opposite side of the question I have been asking: what about the right *not* to have counsel in a criminal case? This was an issue presented squarely to the Supreme Court for the first time in 1975, in *Faretta v. California*.[69] An indigent defendant was charged with grand theft. Though he had only a high school education, he refused the assistance of appointed counsel and insisted on being his own lawyer. The State nevertheless insisted that he be represented by an appointed lawyer. The Supreme Court decided that the Sixth Amendment, as incorporated into the due process clause of the Fourteenth Amendment, gave the defendant an independent constitutional right of self-representation, which he could exercise upon a voluntary, intelligent election to do so. The decision was quite consistent with prevailing practice,[70] but the three dissenters believed the decision to be inconsistent with the court's obligation to see that justice is done in a trial, and with efforts to relieve court delay and congestion.

Having now pursued the right to counsel in criminal cases and in the proceedings supplementary to criminal cases, I shall turn to consider

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[65]Long v. District Court of Iowa, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed. 2d 844 (1966).

[66]393 U.S. 483, 89 S.Ct. 747, 21 L.Ed. 2d 718 (1969). In the course of holding that a state could not violate a prisoner's right of access to habeas corpus by prohibiting prisoners from helping each other prepare habeas corpus petitions, the majority opinion noted the federal court practice of not appointing lawyers to assist prisoners in such petitions. In separate opinions, three justices thought it "neither practical nor necessary to require the help of lawyers" for preparing such petitions.

[67]See text of the Rule in note 16, *supra*.

[68]U.S.C.A. 3006A(e). Concerning status of the constitutional right to Government coverage of these expenses, see note 29, *supra*, and text to which it is appended.

[69]422 U.S. 806 (1975).

[70]A federal statute had explicitly recognized such a right of self-representation for the federal criminal defendant even before the Sixth Amendment was adopted. A great majority of the states, usually by state constitution, also recognized the right for state criminal defendants.

briefly the right to counsel in civil court cases and in administrative proceedings.

II. *Non-Criminal Court Proceedings*

In non-criminal cases, it is in the proceedings *most like* criminal cases (*i.e.*, where loss of personal liberty is possible) that the constitutional right to counsel has been most readily recognized — not of course as a matter of Sixth Amendment right to counsel, but as a matter of due process of law. True, the highest court of New York has held that even a defendant sentenced to 42 days in jail and over $1,000 fine for repeated violations of the auto speeding law was not entitled to appointment of counsel because the New York statute labeled it an "infraction" rather than a crime, and declared that "the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof" — thus making the penalty, said the Court, "something in the nature of a community sanction or civil penalty.... There may be a fine, and in extreme but very rare cases, a jail sentence, but these too are similar to certain civil compulsions which the law exerts."[71] This peculiar statutory labeling plus the Court's concern over insufficient supply of attorneys to take care of traffic cases[72] make this case rather distinguishable from others where loss of liberty is involved. But it is worth noting that since there was an actual imprisonment, such a decision might well be reversed by the present Supreme Court in light of the subsequent *Argersinger* case — and in spite of the statutory labeling.

One clear example of the loss of liberty principle applying in a non-"criminal" case is that of juvenile delinquency proceedings. The Supreme Court recognized the counsel right in 1967 for such proceedings, including notice of the right to retained counsel, and to appointed counsel in case of indigency.[73] So, too, some lower courts have begun to recognize a due process right to retained or appointed counsel in civil commitment proceedings usually commitments for mental illness.[74] Not surprisingly, a similar

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[71]People v. Letterio, 16 N.Y. 2d 307, 213 N.E. 2d 670 (1965), cert. den. 384 U.S. 911 (1966).

[72]The Court said, "The practical result of assigning counsel to defendants in traffic cases would be chaotic. Assigning counsel in but 1% of these millions of cases would require the services of nearly half the attorneys registered in the state."

[73]*In re* Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967).

[74]See *In re* Barnard, 455 F. 2d 1370 (D.C. Cir. 1971); Heryford v. Parker, 396 F. 2d 393 (100 Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078, 1097-1100 (E.D. Wis. 1972) (three judge court), vacated and remanded on procedural grounds, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (1974), judgment vacated and remanded for further consideration on procedural grounds, 421 U.S. 957-8 (1975); Bell v. Wayne County General Hospital, 384 F. Supp. 1085, 1092-94 (E.D. Mich. 1974) (three judge court); and other cases cited in Note. *Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L. J. 1540, 1541 note 7 (1975). *Cf. In re* Ballay, 482 F. 2d 648 (D.C. Cir. 1973) (requiring proof

right has been recognized in the case of a civil arrest or body execution remedy invoked by a judgment creditor;[75] and in a nonsupport contempt proceeding which could lead to imprisonment.[76]

Loss of liberty is not a *sine qua non* for the application of a due process right to counsel in a civil case. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society"[77] — and the fairness of that hearing may depend on the assistance of counsel. Thus in the past decade, several State Supreme Courts have recognized a constitutional right to appointed counsel for indigent parents in proceedings which may result in the State's removing the child from the parents' custody.[78] It may also be possible to argue that in any civil case where the privilege against self-incrimination may properly be invoked, there is a constitutional right to appointed counsel for an indigent, or the ground that a non-lawyer cannot adequately deal with the complexities of the privilege. The argument would probably not at this time be a strong one, there being some uncertain support from language of a recent Supreme Court opinion.[79]

Another, and broader, rationale for civil cases would be a "due process"" argument based on the 1971 Supreme Court case of *Boddie v. Connecticut*.[80] Here the Court ruled that a State statute requiring a fee to be paid by all persons before any civil action could be brought in the

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beyond a reasonable doubt). See also, Comment, *Defective Delinquent Commitment Proceedings and the Constitution: The Privilege Against Self-Incrimination and the Right to Counsel At the Examination Stage*, 22 AM. U. L. REV. 619 (1973); *In re* James, 283 N.Y.S. 2d 126 (Sup. Ct. 1967), *rev'd* 285 N.Y.S. 2d 793 (App. Div. 19), *reinstated* 22 N.Y. 2d 545, 240 N.E. 2d 29 (1968) (civil commitment of narcotics addict).

[75]*In re* Harris, 446 P. 2d 148 (Sup. Ct. Calif. 1968).

[76]Otton v. Zaborac, 525 P. 2d 537 (Alaska, 1974).

[77]Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

[78]Catz and Kuelbs, *The Requirement of Appointment of Counsel For Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAMILY L. 223, 238-41 (1973).

[79]The case is Maness v. Meyers, 419 U.S. 449 (1975) holding that defendant's counsel in an injunction suit was not subject to a contempt penalty for good faith advice to his client, to refuse on the ground of the Fifth Amendment privilege, to comply with a court order to obey a subpuoena for certain allegedly obscene publications. Concurring in the decision favoring the lawyer, Justice Stewart's separate opinion states (pp. 470-471): "The Court today holds that the constitutional privilege against compulsory self incrimination embraces the right of a testifying party to the *unfettered* advice of counsel in a civil proceeding... The premise underlying the conclusion... must be that there is a constitutional right ... to *some* advice of counsel... The Court's rationale thus inexorably implies that counsel must be appointed for any indigent witness, whether or not he is a party, in any proceeding in which his testimony can be compelled." Justice Stewart said he did not go along with the rationale; and the Court opinion itself stated in footnote 15 that the Court didn't think its rationale inexorably led to Justice Stewart's implication. Still, one possible path into a right to counsel in civil cases is opened up by the case.

[80]401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971).

courts violated due process when applied to an indigent seeking a divorce — the Court stressing the fundamental importance of the marriage relation and the fact that a divorce could be obtained only through the courts. Part of the Court's reasoning was that when the Court is the only means of resolving a person's claim of right or duty, he must be given a "meaningful" opportunity to be heard in Court. One can argue that removing the financial barrier to Court access is not enough; that a meaningful opportunity to be heard can not be had (except perhaps in the simplest cases) without the aid of *counsel.* It should be noted, however, that a majority of the highest state court of New York, with two dissents, rejected this reasoning in 1975;[81] and that the Supreme Court has been construing the *Boddie* decision narrowly, being unwilling, for instance, to extend it to fees in certain non-divorce actions.[82]

An alternative rationale is "equal protection" rather than due process. This was the approach taken in the previously discussed *Douglas* case, which recognized the indigent's right to counsel on the first appeal granted as a matter of right. The theory would be that once the Government extends a right of access to the Courts, it has a constitutional duty to make that right equally effective for the poor by providing counsel — a service the non-poor are able to supply themselves. While the Supreme Court has been willing to take this general approach in *Douglas,* and in some other criminal cases involving matters other than counsel,[83] it seems doubtful that the same approach will be taken in civil cases generally. It will be recalled that in *Ross v. Moffitt,* the Court recognized that the equality principle is not absolute; that reasonable lines had to be drawn, and in that case the principle was not recognized beyond the first right of appeal. If the Court was cautious there, it will be even more so in dealing with civil cases.

In short, if the equality principle means that in any Government offering of services (access to Courts; university education; postal service; transportation service; etc.) there is a constitutional duty to overcome

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[81] *In re* Smiley, 36 N.Y. 2d 433, 330 N.E. 2d 53 (1975).

[82] United States v. Kras, 409 U.S. 434 (1973) (bankruptcy filing fees); Ortwein v. Schwab, 410 U.S. 656 (1973) ($25 filing fee applicable to appeals from welfare agency decisions, made after hearing, reducing old-age assistance and welfare payments).

[83] Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 55 A.L.R. 2d 1055, 100 L.Ed. 891 (1956) (indigent criminal defendants entitled to free transcript of record for appeal, where appeal could not be taken without such record); Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed. 2d 1209 (1959) (filing fees for criminal appeal); Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed. 2 39 (1961) (filing fees in post-conviction proceeding); Long v. District Court, *supra,* note 65 (free transcript of habeas corpus hearing, for appeal from denial of habeas corpus); Roberts v. La Vallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed. 2d 41 (1967) (free transcript of preliminary hearing for use at trial); Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L. Ed. 2d 372 (1971) (free transcript for appeal, even in case of ordinance violation punishable by fine only).

poverty's exclusion of a person from those services, this would doubtless have for the Court the forbidding meaning that in large areas of society the Constitution compels socialism. Even if the equality principle was not extended to all the kinds of services just mentioned, but was limited to counsel in civil trials, considerations of sheer volume of cases and Government expenses are likely to stay the Court's full recognition of the right of appointed counsel. It was this kind of consideration that apparently motivated the Court in drawing the line it drew in *Ross v. Moffit*, and in formulating the *Argersinger* ruling in the peculiarly limited way that, we have seen, it did. This also helps explain why, in the 1970 *Goldberg v. Kelly* case recognizing a welfare recipient's right to (an administrative) hearing on the proposed termination of welfare benefits, the Supreme Court ruled there was a right to retained counsel but not to appointed counsel.[84]

It should be remembered that we have been considering the *constitutional* right to counsel; there can be other legal sources sanctioning the appointment of counsel. "Courts regularly appoint counsel to represent indigents in civil matters. Some do so on the basis of an inherent power in the Court; some do so on the basis of statutory provisions; others on the basis of both inherent and statutory power. What they share in common is that the appointment, when made, is entirely discretionary."[85] In addition, free counsel for the indigent may be available from the expanded 'legal aid" facilities now offered through the National Legal Services Corporation, successor to the OEO's legal services program.[86]

III. *Administrative Proceedings*

A case like the *Goldberg v. Kelly* welfare case above mentioned presents still another facet of the problem of the kinds of proceedings in

[84]Goldberg v. Kelly, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). Note that as Chief Justice Burger pointed out in dissenting in the companion case of Wheeler v. Montgomery, 397 U.S. 280, 283 (1970), HEW regulations, which were soon to be effective, would require that welfare recipients be given the right to appointed counsel.

The argument on the practical need to draw lines would of course also apply to the proposition that as distinguished from indigent plaintiffs or defendants, the indigent "potential plaintiff" (who doesn't know that his legal rights have been infringed so as to entitle him to go to court) has a constitutional right to legal counselling services from the state. See discussion in Note, *The Right to Counsel In Civil Litigation*, 66 COLUM. L. REV. 1322, 1334-36 (1966).

[85]Note, *The Indigent's Right to Counsel In Civil Cases*, 43 FORDHAM L. REV. 989, 998-9 (1975).

[86]See Klaus, *Civil Legal Services for the Poor*, in SCHWARTZ (ed.), THE AMERICAN ASSEMBLY, LAW AND THE AMERICAN FUTURE 131-142 (1976). "In 1971, an estimated twenty-five million people have been eligible for legal services... If, as one major survey indicates, 20 percent of those eligible could use legal services per year at an average cost of $100 per client, the estimated costs of meeting the need of the eligible population are at least $500 million per year. With proposed funding at less than $100 million per year, the corporation will be serving one-fifth of the potential need." *Id.*, at 137. See also Buck, *The Legal Services Corporation: Finally Separate But Not Quite Equal*, 27 SYRACUSE L. REV. 611 (1976).

which a constitutional right to counsel should be recognized. For that case involved administrative proceedings rather than court proceedings.

Where an administrative agency is acting in an adjudicative capacity as it was in the welfare case, the right to be represented by one's own retained counsel is usually viewed as an element of a "due process" hearing; and the right to an administrative hearing has in recent years been expanding substantially.[87] But again, considerations of policy and practicality have led to the "drawing of lines." We have noted that even in civil administrative proceedings supplementary to criminal cases (*i.e.*, for revocation of probation or parole) the Supreme Court chose to leave open the question whether the right to retained counsel should extend beyond the special circumstances in which the right of appointed counsel was being recognized;[88] and in prison disciplinary proceedings did not recognize any right to counsel at all.[89] A regulation denying the presence of retained counsel in administrative hearings under the Selective Service Act has not struck the lower federal courts as being unconstitutional.[90] In the case of a public university's student disciplinary hearing, courts have been tending to deny that due process requires allowing a student to be represented by even his own retained counsel.[91] In the case of a "short suspension" of a public school student (up to 10 days, in the particular case) the Supreme Court has said "due process" gives the right to an informal hearing not including the presence of retained counsel;[92] and a federal court has ruled similarly in the case of police disciplinary proceedings which could result in a suspension of up to 30 days.[93]

An indigent's right to *appointed* counsel in an administrative hearing is narrower — as the *Goldberg v. Kelly* welfare case made clear. Thus, while an alien is entitled to a fair administrative hearing on deportation and could retain his own counsel, an indigent alien probably has no constitutional right to mandatory appointment of free counsel.[94] The same is true, according to lower court decisions, as to appointment of free counsel at an administrative hearing looking towards revocation of driver's li-

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[87]See Mermin, *Participation in Governmental Processes: A Sketch of the Expanding Law*, in Pennock and Chapman (eds.), Participation In Politics, esp. at 138-140 (1975).

[88]Gagnon v. Scarpelli, *supra*, note 51 at 778, 783, fn. 6.

[89]See note 56, *supra* and accompanying text.

[90]See, *eg.*, Neckerson v. United States, 391 F. 2d 760 (10 Cir. 1968), cert den.. 394 U.S. 962 (1969).

[91]See cases cited in Note, *Students' Constitutional Rights On Public Campuses*, 58 VA. L. REV. 552, 563, note 61 (1972), and discussion at 563-4.

[92]Goss v. Lopez, 419 U.S. 565, 583, (1975). "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." (p. 584).

[93]Grabinger v. Conlick, 320 F. Supp. 1213, 1218 (D.C. Ill. 1970), *aff'd* 455 F. 2d 490 (7 Cir., 1972).

[94]Aguilera-Enriquez v. I. and N. S., 516 F. 2d 565, 568-9 (6 Cir., 1975); Martin-Mendoza v. I. and N. S., 499 F. 2d 918, 922 (9 Cir., 1974).

cense,[95] or towards eviction of a municipal public housing tenant.[96] A commentator assesses the present and future state of the law by saying: "The cases thus far reject the extension of *Gideon v. Wainwright* to administrative law, refusing to require appointed counsel for indigents in administrative proceedings. Agencies themselves have, however, begun to provide for appointed counsel for parties financially unable to retain their own. Ultimately the court may be expected to extend the right to appointed counsel to agency proceedings — at least to those which are comparable in impact to criminal proceedings, such as deportation, license revocation and disciplinary proceedings, as well as those which have the extreme consequences noted in *Goldberg v. Kelly.*"[97]

A quite separate limit on the constitutional right to counsel in administrative proceedings remains to be discussed. I began discussing the counsel right in agency hearings by referring to the action of agencies in their "adjudicative" capacity. This is important. For when an agency is not adjudicating rights but merely "*investigating,*" then, in general, the Supreme Court believes there is no constitutional right to counsel, whether retained or appointed. You will recall my reference, in discussing grand jury proceedings, to the case involving investigation of the causes of a fire, by an Ohio fire marshall who had power to compel sworn testimony. The Supreme Court there held that the owner of the property, called as a witness, had no constitutional right to counsel. Only an investigation, not an adjudication, was involved; and in any adjudicative penal proceeding that may result from the investigation, counsel would of course be allowed. As to the need for counsel in the investigation, in order to protect the privilege against self-incrimination, it will be recalled that in the 1976 *Mandujano* case involving a grand jury witness, a plurality of four believed that this need for counsel and for advice as to the right to counsel was clear in the *Miranda* situation involving the "coercive" police station setting, but was inapplicable in a setting of "*courts or other official investigations.*" And so, even the grand jury witness who was a potential defendant could not object to being offered only the limited right of having counsel available for consultation outside the jury room.[98]

The nature of the voting alignment in *Mandujano* (4 out of 6) makes it an equivocal authority, but there are other cases looking in the same direction as the plurality opinion. In the 1960 case of *Hannah v. Larche,*[99] voting registrars and others in Louisiana who were suspected of having violated federal election laws were summoned to appear before the Federal

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[95]Ferguson v. Gathright, 485 F. 2d 504 (4 Cir. 1973), cert. den. 415 U.S. 933 (1974).

[96]Tyson v. New York City Housing Authority, 369 F. Supp. 513 (S.D. N.Y. 1974).

[97]SCHWARTZ, ADMINISTRATIVE LAW 287 (1976).

[98]See note 45-47, *supra* and text to which they are appended.

[99]363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed. 2d 1307 (1960).

Civil Rights Commission, in an investigation of possible deprivation of voting rights of blacks. The statute involved happened to give witnesses in such investigations the right to be accompanied by counsel to advise them of their constitutional rights. But a witness wanted his counsel to do more than this; he wanted him, for instance, to have the right of cross-examining other witnesses. But the Court majority held this right, as well as others demanded by the witness, was not part of one's constitutional rights in an *investigative* as distinguished from an adjudicaitve proceeding. And even in an adjudicative proceeding, like a criminal court case, the right of cross-examining other witnesses would apply to the defendant, not a mere witness. Here the witness was only a potential defendant; his rights were not being adjudicated. In the same year, the Court ruled similarly in the case of a state judge's inquiry into improper practices (ambulance chasing, etc.) at the local bar; there was no constitutional right of a witness to have counsel present in the hearing room rather than having him wait outside where he could be consulted from time to time.[100]

In the case of investigation witnesses who are potential defendants, the Court's distinction, in *Mandujano*, between the police station setting and the setting of "courts or other official investigations" is not always easily applied. In a case decided eight years before *Mandujano*, but mindful of its point, the Court extended the *Miranda* rule to a situation where federal tax agents were conducting a civil tax investigation and addressing questions about his tax returns, to a man who was then in jail serving a sentence for an offense under state laws. He was held to be "in custody," even though not on account of suspicion for federal tax illegalities,[101] and so the *Miranda* rule applied. However, in a 1976 case, where the tax agents held the interview in a private residence, and the "entire interview was free of coercion," the Court arrived at the opposite conclusion. It explained the earlier ruling as applying "when the subject is in custody."[102]

Finally, it is worth remembering again that, as pointed out in an earlier connection, one gets a misleading picture of the scope of the right

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[100]Anonymous v. Baker, 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed. 2d 1234 (1960). The Court's attitude can be different however, where there is improper intent on the part of the investigating agency. In a case brought to enjoin a statute creating a commission to investigate crime in the field of labor relations, the complaint made allegations, that were undenied, that the *intent* of the commission was to brand the plaintiff as a guilty criminal in order to injure him and destroy his labor union. The statute didn't allow witness' counsel to call witnesses or cross-examine other witnesses. On these facts, three justices were willing to distinguish Hannah v. Larche, *supra*, on the constitutional issue of right to counsel; and two other justices, who dissented in *Hannah*, concurred in the result (*i.e.*, they didn't want to distinguish Hannah, since they thought that even in that case there should have been a full right of counsel). Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969).

[101]Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed. 2d 381 (1968).

[102]Beckwith v. United States, 96 S.Ct. 1612 (1976).

to counsel if one looks only at the *constitutional* right. In the case of administrtaive proceedings, as in other proceedings, *statutes* may give what the constitution does not require to be given. Thus, under the federal Administrative Procedure Act of 1946,[103] one who is compelled to appear before a federal agency has the right to be "accompanied, represented and advised by counsel." This seems to apply even to an *investigatory* proceeding, and even if the witness is *not* also suspected of illegal conduct. But as far as investigation witnesses are concerned, the statutory right has thus far been given a rather limited scope by lower courts,[104] giving rise to recommendations by the Administrative Conference of the United States for its broadening.[105]

IV. *Summary*

1. In criminal cases it is clear that the constitutional right to counsel has been steadily expanding, so that even a misdemeanant cannot be jailed if he has not been allowed the benefit of retained or appointed counsel and has not waived such benefit. On the practical problem created by the

[103]5 U.S. Code, Sec. 555(b): "Any *person compelled to appear in person before* any agency or representative thereof is entitled to be accompanied, represented and advised by counsel, or, if permitted by the agency, by other qualified representative. Every *party* shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding..." (Emphasis supplied).

[104]Thus in FCC v. Schreiber, 329 F. 2d 517 (9 Cir. 1964), aff'd on other grounds, 381 U.S. 279 (1965), the Court held that the statutory right, in this FCC investigatory proceeding, included the right of counsel to freely initiate advice to his client on the propriety or legality of any questions asked, and to advise the client not to answer any question deemed improper, but did *not* include the right to have counsel object to any questioning deemed improper, or present grounds, on the record, for any such objections.

Another kind of limitation has arisen through attempts by some agencies (*e.g.*, Internal Revenue Service; Securities and Exchange Commission) to prohibit a witness in an investigation from using as an attorney a person who is also representing another person in the investigation. Such a rule against multiple representation is designed to prevent information gleaned by a witness, attorney form being used in behalf of another person. But some cases have regarded the rule as inconsistent with the Administrative Procedure Act's right to counsel, quoted in note 102, *supra*. See S.E.C. v. Higashi, 359 F. 2d 550 (9 Cir. 1966); Backer v. Commissioner, 275 F. 2d 141 (5 Cir. 1960)

[105]In Recommendation #15, the Conference urged that: 1) the right to be "accompanied" should mean the right to have counsel present during any proceeding; 2) the right to be "advised" should mean the right to advice in confidence, before, during, and after the proceeding; 3) the right to be "represented" means at least that counsel be permitted to make objections on the record and argue them briefly in connection with the examination of his client.

The Conference further recommended that: 1) counsel for a client who has been compelled to appear and been questioned should be allowed to examine the client himself; 2) those witnesses who appear by request or permission should have the same right of counsel as those subpoenaed; 3) special attention should be paid to the situation where a person is involved in an investigation that carries implications of wrongdoing. Here a right of counsel is particularly important, and should include, "to the extent appropriate, opportunity for cross-examination, and production of limited rebuttal testimony or documentary evidence." See SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, Senate Document No. 24, 88th Congress, 1st session (1963).

insufficiency of funds and lawyers, U.S. Supreme Court attitude has been that the number of lawyers is steadily expanding; that the type of misdemeanor creating the major practical problem (traffic offenses) rarely results in imprisonment and hence would not bring into play the *Argersinger* rule for appointed counsel in misdemeanor cases; that legislatures could transfer traffic and certain other minor offenses out of the courts altogether, for handling by specialized administrative agencies, and could transfer to treatment centers and social service agencies the handling of certain kinds of conduct not substantially harmful to others (*e.g.*, public drunkeness, narcotics addiction, vagrancy, deviant sexual behavior). Judicial practice in appointment of counsel for misdemeanants is not exactly in conformity with the constitutional minimum laid down by *Argersinger*: some judges have followed it closely, some have gone beyond the minimum, some have failed to observe the minimum. In addition, there have been deficiencies of judicial practice in the manner of advising defendants of their rights, in obtaining waivers, and in determining indigency. There have also been deficiencies in the competence of court-appointed counsel, partly because of lack of funds for supportive services like those of investigators or experts.

The right to counsel does not accrue at every stage of the criminal process. Under the *Miranda* rule, which was created to safeguard the self-incrimination privilege rather than as a requirement of the Sixth Amendment, the right of retained or appointed counsel accrues at police interrogation when the suspect is in custody or his freedom is otherwise curtailed significantly. In applying requirements of the Sixth Amendment (and of Fourteenth Amendment "due process" in a state case), the right is held to accrue at certain "critical" stages, after initiation of "adversary judicial criminal proceedings": line-ups, initial appearances before a magistrate (under some circumstances), preliminary examinations, arraignments (though not always) and sentencing. And under the "equal protection" clause, an indigent defendant in a state case has a right to appointed counsel in the first appeal available as a matter of right, but not for seeking discretionary review in the State Supreme Court or in the U.S. Supreme Court. As for non-criminal proceedings connected with criminal cases: At board hearings on probation revocation and parole revocation, the indigent has a right to appointed counsel only if, under the particular facts, he could not get a fair hearing without it — and whether the right to retained counsel at such hearings is any broader than this remains undecided. In prison disciplinary proceedings, the inmate has no right to either retained or appointed counsel. In collateral proceedings like habeas corpus, the right to appointed counsel is still unclear. Finally, the Supreme Court squarely recognized for the first time in 1975 the right of an indigent criminal defendant to refuse appointed counsel and choose to be his own lawyer.

In civil court cases, the Supreme Court has already recognized the right to appointed counsel in juvenile delinquency proceedings, and lower courts are starting to take the same view for other situations where loss of liberty or other substantial loss is at stake, such as in court proceedings for commitment to mental institutions, or proceedings which may result in removing a child from the custody of indigent parents. Arguments for a broader recognition of the right to appointed counsel in civil cases generally, based on the due process and equal protection clauses, are not soon likely to be successful, because of the practical problem of insufficient supply of funds and lawyers.

The practical "drawing of lines" has been necessary too, in the case of administrative hearings — though generally speaking, one whose rights are being adjudicated in an administrative hearing has a right to be represented by retained counsel. The drawing of lines can be seen in the above references to board hearings on revocation of probation or parole, and to prison disciplinary hearings; in lower courts' denial of even retained counsel in draft hearings under the Selective Service Act, and university and school student disciplinary hearings. The right to appointed counsel is still narrower. Thus, the Supreme Court has been willing to recognize the welfare recipient's right to retained counsel but not appointed counsel, at a hearing on termination of benefits. Appointed counsel has been denied by lower courts in a number of other types of administrative hearings, including proceedings for revocation of a driver's license and for eviction of a municipal public housing tenant. Where the administrative proceeding is not for adjudication of rights but solely for "investigation", the Supreme Court holds there is no constitutional right to counsel, whether retained or appointed, even though the witness is a potential defendant — assuming the absence of the kind of coercive or police station setting present in the *Miranda* case.