Right to Counsel before Arraignment

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INTRODUCTION

A fascinating aspect of the study of legal institutions is the task of identifying legal doctrines or practices that are in the process of rapid change. Normally, a search is most fruitful when one concentrates on those rules or procedures that adversely affect an important and usually vocal group within society, a group that is seeking to express its political power initially through the ballot and eventually through new legislation. The ultimate triumph of workmen's compensation laws and legal recognition of the right of collective bargaining are obvious examples of this type of legal change. Less striking, but in many ways more revealing of the value system of a society, are changes in law not produced by political action expressing group or class interests. Changes in the criminal law, such as the abolition of the death penalty in many jurisdictions, the development of parole and rehabilitation practices, and efforts to increase the fairness of the criminal trial are clearly of this latter nature. So too, is the increasing concern with the responsibility of the state to determine when an accused should have counsel—and, more particularly, whether the assistance of counsel should arise at a stage preceding arraignment for the purpose of pleading to the information or indictment—the particular question to be examined here.¹

I. THE BACKGROUND

To appreciate the nature of the issue, the problem of when an accused should have counsel must be placed in the context of the history of the right to counsel itself. It should be remembered that

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¹. The term "preliminary hearing" is used throughout this article to refer to the proceeding following arrest when a felony defendant is taken before a magistrate who determines whether or not there is sufficient evidence to warrant holding the defendant for further action, sets bail, and advises the defendant concerning his rights. Throughout this paper no reference will be made to the problems of a defendant in misdemeanor cases where denial of appointed counsel is customary in the United States. For an excellent discussion of this problem, see Rahl, The Right to Counsel in Misdemeanor Cases, 48 CALIF. L. REV. 501 (1960).
the English common law was not particularly solicitous of the rights of a criminal defendant; indeed, he was denied the right to have retained counsel represent him fully in felony cases until 1836, although those accused of treason had been granted a right to appointed counsel as early as 1695. In the United States, defendants were allowed to be represented by retained counsel from precolonial times, and the provisions in the Bill of Rights and in state constitutions confirmed that practice. With respect to appointed counsel, state law and practice have varied widely—all states showing a tendency in the present century to appoint counsel for indigents charged with capital offenses, and a large number providing for appointment even in noncapital felonies. In both capital and noncapital cases, however, appointment was often more formal than real. It was not until the 1932 decision of Powell v. Alabama that the Supreme Court ruled that the states have a constitutional duty to see that an effective appointment of counsel is made in certain circumstances to ensure a fair trial. Subsequently, appointment of counsel was made mandatory in state capital cases, but where lesser felonies are charged, appointment is necessary only where failure to appoint alone, or in combination with other circumstances, appears in retrospect to have resulted in a trial lacking fundamental fairness.

The Supreme Court also has held that the denial of counsel at some stage before trial may produce an element of unfairness amounting to a denial of due process. The most obvious challenge that arises is a confession made after an arrested person’s request for counsel is denied. Absence of counsel was one factor which tended to

3. 7 & 8 Will. 3, c. 3, § 1 (1695).
5. The provisions are summarized in Beaney, op. cit. supra note 2, ch. 4 and Fellman, The Right to Counsel Under State Law, 1955 Wis. L. Rev. 281.
9. Crooker v. California, 357 U.S. 433 (1958). The specific comment to this effect occurs at 357 U.S. at 439. No decision has yet gone so far. The “unfairness” does not arise from the absence of counsel alone but must take some other form.
10. See, e.g., Crooker v. California, supra note 9; Cicenia v. Lagay, 357 U.S. 504 (1958); Stroble v. California, 343 U.S. 181 (1952). However, in each case the vital confession was held admissible.
show the involuntary nature of the confession. But the clearest decisions involving specific denial of a request for counsel arose during the 1956 and 1958 terms of the Court. The 1956 decision, *In re Groban,* seemingly is only of peripheral significance to our topic, but further examination reveals that it cuts deeper. In a 5 to 4 decision, the Court upheld the validity of an Ohio administrative proceeding in which a firewarden interviewed Groban in secret and denied his request that counsel be present at the hearing. The majority emphasized that an inquiry into the causes of fires was essentially an administrative proceeding. Justices Harlan and Frankfurter, in a concurring opinion, emphasized that the proceeding was nonprosecutorial, and stated that their concurrence did not imply that “secret inquisitorial powers given to a District Attorney would also have to be sustained.” The dissenters viewed the investigating firewarden as a law-enforcement officer, and argued that compelling a person to appear alone before any law-enforcement officer to give testimony against his will violated the due process guarantee of the right to counsel. Mr. Justice Black stated flatly, “I . . . firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution for a criminal offense.” However, it should be made clear that the question presented in *Groban* concerned only the right to the services of retained counsel.

The problem of when the right to counsel begins was presented more clearly in two cases—*Crooker v. California* and *Cicenia v. Lagay*—decided by the Supreme Court in 1958. In both cases the claim to the right was denied, five to four; Justices Douglas, Black, Brennan and the Chief Justice dissented in *Crooker,* and all but Mr. Justice Brennan, who did not participate, dissented in *Cicenia.* In *Crooker* a 31-year-old college graduate, with one year of law school training, confessed to murder after being interro-

11. In those cases in which lack of counsel has been viewed as one element tending to show the involuntary quality of the confession, so many other elements were present that it is impossible to assign any specific weight to the counsel factor. See, e.g., *Fikes v. Alabama,* 352 U.S. 191 (1957); *Leyra v. Denno,* 347 U.S. 556 (1954); *Watts v. Indiana,* 338 U.S. 49 (1949); *Haley v. Ohio,* 332 U.S. 596 (1948). *Fikes,* supra, involved a confession after the defendant's father and his lawyer were barred from seeing him, but there are other factors that sufficiently explain the ruling of inadmissibility.
13. Id. at 337.
14. Id. at 344.
gated in three periods from 8:30 p.m. to 2 a.m. At the outset he asked at least twice if he could call a named attorney, but was told that he could do so only at the conclusion of the investigation. The rather brief opinion of the Court by Mr. Justice Clark applied the “fair trial” rule and found that the denial of the request for counsel had not prejudiced the defendant so as to “infect his subsequent trial with an absence of ‘that fundamental fairness essential to the very concept of justice.’”

In Cicenia, a similar ruling was expressed. In this case, New Jersey authorities had refused to permit a retained lawyer, who had counseled the defendant on the evening before the latter appeared at police headquarters, to talk to his client until police questioning was finished. A period of seven and one-half hours elapsed between the time of the lawyer's request to see his client and the granting of access. Mr. Justice Harlan, writing for the Court, found no lack of fundamental fairness, and reiterated that lack of counsel is only one pertinent element in determining whether a trial is unfair. An interesting feature of Cicenia is the fact that the lawyer who advised the defendant to report to the police station for questioning either chose not to instruct the defendant to refuse to answer questions or gave instructions that were not heeded. As the Supreme Court itself has suggested, injection of a lawyer into most situations where interrogation is needed by law-enforcement officers supposedly means that the accused will not talk.

The position of the dissenters in Crooker and Cicenia is clear. Mr. Justice Douglas' opinion in Crooker, after pointing out the various functions of counsel at the pre-trial stage, ends on this clear note that “the demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest.” In a footnote, Mr. Justice Douglas quoted a provision (section 825) of the California Penal Code which provides that after an arrest, "any attorney at law... may at the request of the prisoner or any relative of the prisoner... visit the person so arrested." The

18. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or not—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.
20. Id. at 448 n.4.
provision makes refusal to admit an attorney a misdemeanor, with a forfeiture of $500 to the aggrieved person.

There are two aspects of the majority's holding that should be clarified. After citing a line of cases in which the confession made by indigent defendants before appointment of counsel had been held inadmissible, Mr. Justice Clark said, "To be sure, coercion seems more likely to result from the state denial of a specific request for opportunity to engage counsel than it does from state failure to appoint counsel immediately upon arrest" and then concluded that this possibility was negated in the present case "by petitioner's age, intelligence, and education."21 This, of course, means that denying access to counsel to a less intelligent or less experienced defendant may produce a different result. It is the old case-by-case method of review that has existed ever since the "fair trial" rule was adopted. A related aspect is this: the Court refrained from designating the time when the right to retain counsel arises. This is consistent with the rule of Betts v. Brady,22 which permits a trial of a noncapital offense without counsel where the defendant is confronted by a relatively simple charge and the defendant is reasonably intelligent and experienced, and no injustice is done.

In the second place, the Court at least intimates that a different rule might be applied to federal cases. At one point, Mr. Justice Clark refers to the petitioner's claim that the Court should bar any confession made after denial of a request to notify counsel, even if made voluntarily, and even if the denial of counsel did not constitute a violation of the due process right to counsel.23 Mr. Justice Clark terms this "an appeal to the supervisory power of this Court over the administration of justice in the federal case,"24 and simply notes that this was a state conviction. In Cicenia, Mr. Justice Harlan more explicitly expressed his "strong distaste," and stated that "were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice."25 It is true that there is no federal rule specifically requiring access to counsel, and it is not until the appearance before a commissioner that the defendant must be advised of his right to retain counsel and have a reasonable opportunity to consult him.26 But it would be difficult to argue that the failure to take an arrested person before a commissioner "without unnecessary delay" should be given greater

21. Id. at 438.
22. 316 U.S. 455 (1942).
24. Ibid.
significance than refusal to afford the defendant access to counsel, and this is obviously what Mr. Justice Harlan had in mind.

II. WHEN THE RIGHT TO COUNSEL ARISES

A. IN FEDERAL COURTS

It has been generally held in the federal courts that an indigent defendant's right to counsel arises at the arraignment on the plea. The practice in most federal districts is to appoint counsel relatively soon after indictment in serious cases, and somewhat later where lesser offenses are charged. It seems likely, although no cases can be cited, that refusal to allow retained counsel to participate at the commissioner's hearing, or at any subsequent time would render inadmissible any confession made subsequent to such denial. And as suggested previously, the Court might well exercise its supervisory powers to exclude confessions made after denial of access to retained counsel before appearance before the commissioner for the same reasons that the Court excluded confessions in *McNabb v. United States*\(^2^7\) and *Mallory v. United States*.\(^2^8\)

B. STATE PROCEEDINGS

The application of the "fair trial" rule does not require the appointment of counsel even at the trial of an indigent defendant in every noncapital case. Absence of counsel at a stage preceding trial may affect the admissibility of a confession and in general will cause a reversal of a conviction if the totality of circumstances, including the personal characteristics of the defendant, when viewed in retrospect, indicate a fundamental unfairness in the proceeding that resulted in conviction.\(^2^9\) Most state rules or statutory provisions providing for appointment of counsel in capital or noncapital cases make arraignment on the plea the decisive moment. And as previously explained, appointment at that stage with a reasonable opportunity for counsel to prepare for trial satisfies the due process requirement except where exceptional circumstances exist.\(^3^0\)

\(^2^7\) 318 U.S. 332 (1943).
\(^2^8\) 354 U.S. 449 (1957).
\(^2^9\) See cases cited note 11 *supra*.
\(^3^0\) The Michigan Supreme Court has held inadmissible a confession made after a time when a defendant could and should have had his preliminary hearing. *People v. Hamilton*, 359 Mich. 410, 102 N.W.2d 738 (1960). The charge was murder and a lawyer was denied access to the defendant. In addition, the youthful foreign-born defendant knew few English words. The basis of the decision, however, seems to be the court's equating of the relevant Michigan rules and constitutional provisions with the FED. R. CRIM. P. 5(a), which requires a prompt hearing before a com-
With respect to retained counsel, many states make provision for advising the defendant of his right at the preliminary hearing.\(^{31}\) Some police departments or prosecutors have a policy of permitting one or two telephone calls by the defendant after it has been decided to book him,\(^{32}\) and in some instances he will be given specific advice that counsel may be retained and will be permitted to see him.\(^{33}\) But as Crooker and Cicenia show, an accused under arrest has no right to see his counsel while the police are carrying on interrogation or investigation.

If the interrogation of the accused takes place after indictment, however, a different rule becomes effective. In People v. Spano,\(^{34}\) the defendant, suspected of murder, was taken into custody on a bench warrant issued after indictment. The defendant, who had been counseled by his lawyer to say nothing to the authorities, was intensively questioned by an assistant district attorney and others in the period following his surrender. An old friend, presently a member of the New York City police department, helped induce a confession by asserting that the officer would be in trouble with his superior if the defendant failed to confess. The defendant's requests that he be allowed to see his lawyer were denied. The New York Court of Appeals upheld the conviction and the admissibility of confession, four to three. Judge Desmond, writing for the dissenters, emphasized the difference between this and the typical case—the interrogation here took place after indictment. In his view, the defendant could not be compelled to testify against himself, and had the right to the assistance of counsel at every stage of the proceedings.

The United States Supreme Court unanimously reversed, but the Court disagreed as to the grounds for reversal.\(^{35}\) The Chief Justice and four other Justices found the confession inadmissible because of the total circumstances in which it was produced. Justices Douglas, Black, Brennan and Stewart, speaking through Mr. Justice Douglas and Mr. Justice Stewart viewed the refusal to grant access to retained counsel in a capital case after indictment as fatal, wholly apart from the question of whether the confession

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31. See statutes cited in Beainey, op. cit. supra note 2, at 86 n.30.
32. Practices vary widely as revealed by police officials in interviews with the writer. The difficulty of drawing conclusions about these matters arises from the different treatment afforded defendants by the same department depending on the nature of the offense and the reputation and other characteristics of the particular suspect.
was improperly induced. This would seemingly indicate that a majority of the Court would support the proposition that at least after indictment it is a denial of due process in a capital case to refuse a defendant's request to see his lawyer, since Chief Justice Warren had taken an even more extreme position in the earlier Crooker and Cicenia cases—a denial of access even after arrest violated the due process standard.

The concurring opinions in Spano significantly influenced later New York state law respecting the right to counsel. In People v. DiBiasi, the court of appeals, in reversing a murder conviction, held that it is a violation of the right to counsel to question a defendant after conviction in the absence of his retained counsel even though he neither asked for, nor was denied, permission to consult with his lawyer. The facts seemed to show that the defendant made willing responses to all of the questions of police officers and an assistant district attorney. The difference between the facts of this case and Spano was stressed vainly by Justice Dye for the dissenters. A logical extension of this doctrine would be the denial of the right to question an indigent defendant who lacks appointed counsel after indictment. In fact a later decision of the New York Supreme Court, Appellate Division, held precisely this, three to two, where a defendant charged with murder confessed after indictment without being offered the assistance of appointed counsel. This decision may represent a position far in advance of that which a majority of the United States Supreme Court is prepared to take, but the decision in Spano suggests the present weakness of Betts v. Brady. It seems impossible to justify the right of access to retained counsel at every stage after indictment in a capital case, while permitting an indigent defendant to be tried without counsel in many noncapital cases. The capital, noncapital distinction is wholly lacking in substance in view of the incapacity of laymen to grasp even simple points of law, and the relative simplicity of the legal issues in many capital crimes as compared with the often difficult issues of noncapital offenses.

III. PRACTICE AND POLICY

The counsel problem is a fascinating chapter in the changing law of society for several obvious reasons. In few other situations

38. This is suggested in Note, Post-Indictment Questioning in Absence of Counsel Violates Due Process Requirements, 61 Colum. L. Rev. 744, 748 (1961).
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The judges so directly aware of the conflicting interests involved. Moreover, this is an area where the judges must assume responsibility if substantial changes are to occur, since it is unlikely that legislatures will show much interest in this subject. In addition, there is dogged resistance from a relatively vocal group of professional law-enforcement organizations to any change that favors the accused. Yet there are signs of a gradual, if erratic, trend toward a more generous treatment of defendants before trial, in spite of the fact that defendants may still be denied appointment of counsel in a noncapital state trial. Such improvement is not likely to result from a balancing of interests, with a finding that the social and individual interests in full protection outweighs the social interest in convicting more defendants. Rather, it will result from an awareness that the present "fair trial" rule as applied is illogical, and the illogic of its application becomes more obvious with each case. In addition, the present system of generally denying counsel until arraignment on the plea is patently unfair to the defense.

The illogic of the "fair trial" rule as applied is that it provides a "right" that is incapable of reasonably precise definition, so that neither law-enforcement officers nor the defendant know what each owes to the other, and second, it is almost wholly retrospective in application. It is true that many of the law's commands must be couched in the loose formula of the reasonable man or the test of reason, but a guarantee that a man shall not be deprived of life, liberty or property without due process of law seems capable of stricter definition.

Mr. Justice Clark suggests the fragile nature of the "fair trial" rule in Crooker when he admits that "the least change of circumstances may provide or eliminate fundamental fairness." In Crooker, the man was a 31-year-old college graduate who had completed one year of law school. It seems clear that he knew he was not required to answer questions, and appears to have been a rather sophisticated defendant. These personal characteristics of the defendant seem to have been an important ingredient in Mr. Justice Clark's opinion in Crooker, yet in Cicenia we learn nothing of the defendant's characteristics. His age, education and knowledge or ignorance of his rights while undergoing interrogation are not discussed in Mr. Justice Harlan's opinion, and we have no report of any of the opinions in the New Jersey courts. The rule that emerges from these two cases seems to be one permitting denial of access to counsel for an unlimited time, so long as a confession is sought and obtained without excessive pressure. Or is the more than seven hours denial in Cicenia near the permissible

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40. 357 U.S. at 441 n.6.
limit? It is difficult to see that anyone can have an adequate conception of the duties of law-enforcement officials and the rights of defendants from these two decisions and the previous rulings of the Supreme Court.

The unfairness of the present state of the law to a defendant is obvious. He needs a safeguard against overzealous prosecution and an opportunity to prepare adequately for his defense. The public would be outraged by a disclosure that a prosecutor or a police officer had allowed two weeks to elapse before undertaking a thorough investigation of the facts of a case, including the interrogation of the suspect and all available witnesses and such scientific tests as the nature of the case permits. In New Jersey, which uses a system of appointment from an alphabetical list of practicing attorneys, a 1955 study illustrated that the courts in 16 of 21 counties appointed counsel at or after arraignment. In 13 of these counties (those where data was available) the minimum interval between arrest and appointment in jail cases varied from one day to 25 days, and the maximum varied between seven and 180 days, with the average being about 70 days. A rule added in 1953 does provide that “whenever practicable counsel shall be assigned before arraignment,” but its wording suggests its shortcomings. A study of a New York county showed a delay of three months before assignment in some cases. Under the “fair trial” rule as presently applied, extended delay in making appointment will not be viewed as a violation of due process, unless there is some special circumstance showing unfairness. But what is argued here is that the delay in itself is a serious element of unfairness, a proposition that can be tested by asking what would be the reaction of any defendant with means to retain counsel and what would be his counsel’s attitude if he were forced to forego the privilege of representation until a week or more had elapsed? This basic unfairness may permeate many trials but without resulting in the kind of tangible evidence of impropriety needed under the “fair trial” rule. The possible defense witness who is never found, the prosecution witness’ story that might have been different if the defense had obtained an early interview, suggest the range of various “might have been” factors aiding the defense which are eliminated by the tardy appointment of counsel. And when an appellate court determines that a trial is not lacking in fundamental fairness it

42. N.J. RULES 1:12-9(a) (Supp. 1960).
43. SPECIAL COMM. OF THE NEW YORK CITY BAR ASS’N, EQUAL JUSTICE FOR THE ACCUSED 67 (1959). This splendid report should be read in its entirety. It effectively documents the shortcomings of the present system of providing counsel for indigent defendants.
must of necessity overlook the possible unseen harm of this nature suffered by the defendant. Only if the defense has an opportunity to prepare for trial substantially equal to that enjoyed by the prosecution can a criminal proceeding be considered fair in any realistic sense. This in turn means that counsel, whether retained or appointed, must have access to the accused soon after arrest.

**CONCLUSION**

What is needed in federal courts through a new federal rule, and in state proceedings under the existing “fair trial” rule, or a less ambiguous standard, is a requirement that defines specifically the time when both retained and appointed counsel may see a defendant. If, as the Special Committee of the Association of the Bar of the City of New York concluded, that “representation must be provided early if it is to be effective,” the problem is to determine when is “early” enough. It is suggested that the obtaining of counsel at the preliminary hearing, assuming it is held without unnecessary delay, is the minimum protection needed by the defendant. As a corollary, waiver of counsel by an undefended accused at a preliminary hearing should not be permitted. For indigent defendants there is great difficulty in envisaging an earlier time of appointment without relying on the police in a way that hardly seems feasible at present. In fact, a system of appointment at the time of preliminary hearing is meaningful only if there is some institutionalized method of furnishing counsel, such as the Voluntary Defender or Public Defender systems, both of which at present provide representation at a far earlier stage of proceedings than does the more prevalent system of *ad hoc* assigned counsel.

The New York City Bar Report found that the Criminal Courts Branch of the Legal Aid Society generally began representation within two to three days after arrest and that the Public Defender of Almeda County, California interviews an indigent defendant within two days after arrest.

With respect to access by retained counsel, a rule requiring that defendant may obtain counsel, and making it a misdemeanor to bar counsel, although ignored by the California enforcement officials in *Crooker*, seems eminently satisfactory—if a more effective sanction can be found. Clearly, an effort by the states to provide an

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44. *Id.* at 60.
45. *Id.* at 71, 74. It would appear that the only feasible method by which assigned counsel could be injected into the proceeding at the time of the preliminary hearing would require that the police promptly notify the appointing official after the “booking.” There is little disposition on the part of the police to undertake such a function.
46. *Id.* at 71.
47. *Id.* at 74.
effective system of appointed counsel and one that would come into operation at an earlier time would be a more satisfactory solution than a rule devised by the United States Supreme Court. But the failure of the states to take this step should hardly be a reason for Supreme Court acceptance of the present situation. The only effective sanction that exists is that of holding inadmissible a confession made after a denial of access to counsel, and it is suggested, a similar view should be taken of confessions obtained after failure to appoint counsel within a 48 to 72 hour period after arrest.

This would hardly affect the power of the police and prosecution to interrogate suspects following arrest to determine if they are to be charged, nor would it exclude confessions obtained as the result of such questioning. What the new rule would accomplish is the banning of protracted detention incommunicado and the suction method of interrogation. The positive value is the assurance of a reasonable opportunity for an adequate defense in criminal cases. It may be seriously doubted whether competent police officers and vigorous prosecutors would be seriously handicapped by this rule. And if it has the side effect of raising the standards of law-enforcement officials, it will have achieved an additional important purpose.

This proposed change in the law will hardly eliminate all shortcomings from federal and state trials, but it will advance us one important step to the ideal of equal justice under law.