

The Advocate and the Expert—Counsel in the Peno-Correctional Process

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INTRODUCTION

The pattern of protective law governing the process of guilt determination constitutes as complex and elaborate a structure of limitations upon the exercise of governmental power as will be found in our system of law. The definition of the prohibited conduct may act only prospectively and must meet rigid standards of specificity; law enforcement officials are subject to an elaborate network of restraints in detecting crime, identifying the criminal, and apprehending and detaining suspects; forms of accusation are required to meet minimum standards in advising the accused of the crime charged; strict rules of evidence protect the accused against relevant but possibly prejudicial material; guilt must be established beyond reasonable doubt in an open hearing; the right of the accused to retain counsel, if not always to have one provided, is universally recognized. Indeed, law enforcement people, restive under the heavy apparatus of restraints, often protest that the law has gone too far in weighing the scales in favor of the accused. But the mood abruptly changes once guilt is finally adjudicated and the pertinent questions turn on dispositions of the convicted defendant within the framework of the relatively modern, beneficent systems designed to allow for tailoring of punishment to the circumstances of the individual offender. The dominant theme then becomes the freedom of the official to exercise his discretion rather than the freedom of the individual from the exercise of unconfined power. As stated by the Illinois Supreme Court:

[A]ny person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him. . . . After a plea of guilty

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. . . instead of being clothed with a presumption of innocence they are naked criminals, hoping for mercy but entitled only to justice.¹

That this is not merely another Americanism is reflected in the observation of Mr. R. M. Jackson:

An English criminal trial, properly conducted, is one of the best products of our law, provided you walk out of court before the sentence is given: if you stay to the end, you may find that it takes far less time and inquiry to settle a man's prospects in life than it has taken to find out whether he took a suitcase out of a parked motor car.²

It may be added that the sense of contrast may grow if you stay on after sentence, through the determination by the court whether or not to revoke probation, the determination by the parole board whether, when, and under what conditions to release on parole and later whether to revoke. Substantive legislative standards governing the decision to grant offenders conditional liberty on probation or parole commonly make no pretense at being other than adjurations to act in the public interest. The final decision is commonly a calculated guess founded upon the judge's or board's penological theories or social preferences. On the procedural level, there is a comparable relaxation, for it was the United States Supreme Court which called attention to the necessary and inherent differences between trial procedures and post-conviction procedures.³ Hearings on sentence and release determinations are commonly attenuated interviews when they are given at all. Even in revocation proceedings when the issue turns on the releasee's breach of the imposed conditions, hearings are provided for only in some jurisdictions; and where they are, many of the common traditional marks of "fair" process, such as advance notification of the allegations made, opportunity to be present, to present evidence and to cross examine, personally or through counsel, are absent.

An analysis of the development of ideas leading to the evolution of this relaxation of substantive and procedural standards and its defensibility in principle and in terms of practicalities is, of course, beyond the range of this limited paper. It is necessary, however, to make the point at the outset that the problem of the right and role of legal representation in these post-conviction disposition proceedings—the immediate concern of this paper—is only a single aspect of that larger problem.

The problems of the right to counsel in post-conviction proceedings have been faced by courts, legislatures and parole boards.

1. *People v. Riley*, 376 Ill. 364, 368, 33 N.E.2d 872, 875, *cert. denied*, 313 U.S. 586 (1941).

2. *THE MACHINERY OF JUSTICE IN ENGLAND* 211 (3d ed. 1960).

3. *Williams v. New York*, 337 U.S. 241, 246-47 (1949).

Courts have been obliged to determine how long after conviction and appeal the constitutional assurance of the right to counsel in criminal proceedings extends; whether and to what extent due process affords protection against denial of the right to counsel; whether statutory grants of a hearing should be taken to imply the right to be heard by counsel; and what content should be given to the right where it is determined to exist. Legislatures have faced the problem of determining whether representation by counsel in probation and parole proceedings should be recognized, expressly denied, or left to be determined by the court or agency empowered to determine the issue of disposition. And parole agencies have had to determine whether the right should be extended and how it should be administered. Underlying all of these decisions are problems central to the administration of justice in a system of individualized treatment determined by the discretionary judgment of experts. What, if any, are the crucial differences between proceedings entailing the determination of guilt or innocence and legal regularity, on the one hand, and, on the other, proceedings entailing the appropriate peno-correctional disposition of an offender whose guilt has already been determined? What significance does it have that the legislature has determined the maximum punishment for particular crimes, leaving it to courts or agencies to determine, without substantial legal guide-lines, how much less should be imposed on particular offenders and on what conditions? Does the essentially discretionary clinical judgment involved in disposition determinations render the traditional attribute of fair hearing, the right to be heard by counsel, particularly inappropriate? To what extent do traditional conceptions of fairness in procedure have any relevance in disposition determinations? Has the lawyer any place in these matters? To what extent does recognition of right to counsel corrupt and distort the professional clinical judgment of the charged agencies and tend to subvert the aims of the whole system of individualized disposition? Finally, even if there is some place for legal representation, do counterbalancing considerations of practicality require that he be excluded?

In Part I of this paper I will attempt to describe the ways in which legislatures, courts and agencies have responded to the issues posed for decision in each of the stages of the disposition process from sentencing to final release, and show something of the rationale upon which these decisions have been based. In Part II, I will venture to deal generally with the considerations in virtue of which it seems to me the role of counsel in these areas may profitably be examined.

I. STATE OF THE LAW

A. JUDICIAL SENTENCING

The exercise of the judicial sentencing function, encompassing such determinations as whether to impose sentence or extend probation, the term and conditions of the probation order, or the term, minimum or maximum, or both, of a prison sentence, has not been made subject to the procedural requirements of a criminal trial. Without doubt, the prevailing practice is to accord an opportunity to the offender to present factors in mitigation of sentence. But some statutes expressly make it discretionary with the judge whether to hold even a modified hearing on mitigating circumstances alleged by the offender.⁴ And the use of ex parte presentence investigation reports, whose contents are only sometimes made available to the offender, has largely muted the adversary character of sentencing processes.⁵ Nonetheless, the role of counsel at the sentencing stage has largely, though not consistently, been recognized in the federal and state courts.⁶

In *Townsend v. Burke*,⁷ the Supreme Court can fairly be said to have held that due process exacts the same requirements with regard to the right to counsel at the sentencing stage as it does at the trial itself. There, petitioner, convicted on a plea of guilty to

4. See, e.g., IDAHO CODE ANN. § 19-2515 (1947); MONT. REV. CODES ANN. § 94-7813 (1947); N.D. REV. CODE § 29-26-17 (1960); ORE. REV. STAT. § 137.080 (Supp. 1959). But see UTAH CODE ANN. §§ 77-35-12, -13 (1953). See *Thomas v. Teets*, 220 F.2d 232 (9th Cir. 1955), where an allegation in a habeas corpus petition was held not to state a due process violation which alleged that the state court judge, empowered to determine whether capital punishment would be imposed, prevented the offender from presenting further evidence in mitigation on the ground that his mind was already made up.

5. The seminal case is, of course, *Williams v. New York*, 337 U.S. 241 (1949). See generally Note, *Employment of Social Investigation Reports in Criminal and Juvenile Proceedings*, 58 COLUM. L. REV. 702 (1958). However, some states have maintained greater adherence to the adversary process in sentencing. CAL. PEN. CODE § 1204, for example, requires evidence in mitigation or aggravation of an offense to be given by witnesses in court or by their dispositions. CAL. PEN. CODE § 1203, which provides for the preparation of a presentence report by a probation officer, requires that the report be made available to counsel for the offender at least two days prior to the sentencing hearing. The California courts have held that these provisions require that no further evidence on sentencing be presented to the court other than through testimony in open court, since otherwise the offender would be denied the right given to him by these provisions to meet the evidence against him and present evidence in his own behalf. See, *People v. Valdivia*, 182 Cal. App. 2d 145, 5 Cal. Reprtr. 832 (Dist. Ct. App. 1960); *People v. Neal*, 97 Cal. App. 2d 668, 218 P.2d 556 (Dist. Ct. App. 1950); *People v. Giles*, 70 Cal. App. 2d 872, 161 P.2d 623 (Super. Ct., L.A. 1945).

6. See Note, *Right to Counsel at the Time of Sentence: New York's Forgotten Guarantee*, 27 BROOKLYN L. REV. 110 (1960).

7. 334 U.S. 736 (1948).

non-capital offenses, asserted a violation of due process in the acceptance of his plea and imposition of sentence upon him without being advised of his right to counsel and without being offered assignment of counsel. The Court asserted, as a starting point, the established principle with regard to assignment of counsel in non-capital cases in state courts that "the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process."⁸ Thereupon, in reviewing the proceedings following the guilty plea the Court found elements of prejudice and overreaching in the facetiousness with which the sentencing judge conducted the proceeding and in the arrant misreading by the judge of the petitioner's record by which prior verdicts of acquittal were regarded as convictions. Concluding that these were elements of substantial prejudice which presence of counsel could have prevented, a due process violation was found, the Court concluding:

[I]t is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process. . . . In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.⁹

While the Supreme Court has not passed on whether the right to counsel in the federal courts under the sixth amendment extends to the sentencing stage, thereby obliging the court to appoint counsel in sentencing apart from a showing of prejudice, it has on several occasions recognized the "invaluable aid" a lawyer can render at this stage in calling the court's attention to mitigating circumstances which might result in a lighter penalty.¹⁰ The lower federal courts have viewed the matter similarly.

There is then a real need for counsel. . . . Then is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and in short, to appeal to the equity of the Court. . . .¹¹

8. *Id.* at 739.

9. *Id.* at 741. While Mr. Justice Jackson's reasoning supports the view of the holding expressed in the text, it may be plausibly argued that the heart of the error was the misbehavior of the sentencing judge rather than the absence of counsel. Would the Court have held differently if assigned counsel had been present but had failed to correct the judge?

10. See *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *Carter v. Illinois*, 329 U.S. 173, 178-79 (1946).

11. *Martin v. United States*, 182 F.2d 225, 227 (5th Cir. 1950).

Indeed, the very latitude of the power possessed by the sentencing court has been suggested as augmenting, rather than reducing, the need for representation at this stage.¹² In consequence, the federal courts have held that the guarantee of the sixth amendment, expressed in *Powell v. Alabama*¹³ as the right to "the guiding hand of counsel at every step in the proceedings," extends to the sentencing stage of the criminal process.¹⁴

The federal courts' interpretation of this right has not been consistent. Though only one court appears to have had occasion to deal squarely with the refusal of a court to appoint counsel at sentencing for an indigent who makes the demand,¹⁵ the language of the federal decisions renders it likely that a constitutional violation would be found. The situation giving rise to most of the decisions is that in which counsel (appointed, for the most part) who represented the offender at the plea or at the trial, fails to appear with him at the sentencing. The courts have generally remanded for resentencing in this circumstance on the ground that sentencing without the presence of the offender's counsel violates the sixth amendment.¹⁶ On the issue of prejudice to the offender, some courts have held that it is presumed,¹⁷ while others have suggested that at least the possibility of prejudice must be demonstrated by the offender.¹⁸ Mere physical presence of substituted counsel who

12. See *Kent v. Sanford*, 121 F.2d 216, 218 (5th Cir. 1941) (Hutcheson, J., dissenting). The dissenting view later prevailed in *Martin v. United States*, 182 F.2d 225 (5th Cir. 1950). For a trial judge's exposition of the kind of assistance that counsel can render his client in sentencing determinations, see Pharr, *On Sentencing: What a Judge Expects from Defense Counsel*, 1 PRAC. LAW. 76 (Oct. 1955).

13. 287 U.S. 45, 69 (1932).

14. See, e.g., *Nunley v. United States*, 283 F.2d 651 (10th Cir. 1960); *Gadsden v. United States*, 223 F.2d 627 (D.C. Cir. 1955); *Davis v. United States*, 226 F.2d 834 (8th Cir. 1955); *McKinney v. United States*, 208 F.2d 844 (D.C. Cir. 1953); *Martin v. United States*, 182 F.2d 225 (5th Cir. 1950); *Thomas v. Hunter*, 153 F.2d 834 (10th Cir. 1946).

15. *Stidham v. Swope*, 82 F. Supp. 931 (N.D. Cal. 1949). Here petitioner alleged that he was induced to waive counsel and plead guilty in return for the federal prosecutor's representation of a lenient sentence. When the judge imposed a four year sentence, he moved for appointment of counsel prior to entry of judgment. Thereupon the court set aside the four year sentence and imposed one for five years. Chief Judge Denman of the Ninth Circuit found the allegations sufficient to state a violation of the right to counsel.

16. See *Gadsden v. United States*, 223 F.2d 627 (D.C. Cir. 1955); *Martin v. United States*, 182 F.2d 225 (5th Cir. 1950); *Willis v. Hunter*, 166 F.2d 721 (10th Cir. 1948); *Wilfong v. Johnston*, 156 F.2d 507 (9th Cir. 1946); *Thomas v. Hunter*, 153 F.2d 834 (10th Cir. 1946).

17. See *Martin v. United States*, *supra* note 16, at 227: "[T]he nature and possibilities of this important stage of the proceedings are such as make the absence of counsel at this time presumably prejudicial."

18. See *Walton v. United States*, 202 F.2d 18 (D.C. Cir. 1953). Here the absence of counsel was held to be "inconsequential error" since the offender had been represented during the sentencing by counsel who was

did not have opportunity to prepare has been held a denial of the constitutional right to effective representation,¹⁹ although postponement of sentencing by counsel to permit him to collect data and submit it by memorandum, even though he was absent at sentencing, was held to fulfill the "spirit and purpose of the constitutional mandate."²⁰ The issue of waiver has been variously treated, some courts appearing to require the same affirmative showing necessary at earlier stages,²¹ others finding a failure to raise the issue of the absence of trial counsel on the allocution sufficient to waive the right.²²

Recognition of the right to counsel at sentencing in the *state* courts has been less even. So far as concerns the limitations of the due process clause of the fourteenth amendment, the federal courts have dealt with collateral attacks based on absence of counsel at sentencing on the same level as lack of counsel during trial.²³ The fifth circuit has held death sentences in violation of due process where trial counsel was not present because of a failure of the offender's message to reach his counsel,²⁴ and where counsel was not present for lack of notification that sentencing was to take place.²⁵ The same court held a habeas corpus petition to state a meritorious claim which asserted, without more, that petitioner's counsel was absent at the time the death sentence was imposed.²⁶ In non-capital cases, where due process imposes less exacting requirements, the issue of the absence of counsel at sentencing appears to turn on whether petitioner's right to the assistance of his own counsel was denied, as by the court proceeding to

absent only when the court recalled the matter fifteen minutes later to correct an inadvertent error in names.

19. *Gadsden v. United States*, 223 F.2d 627 (D.C. Cir. 1955). *Cf.* *Wilfong v. Johnston*, 156 F.2d 507 (9th Cir. 1946).

20. *Walton v. United States*, 202 F.2d 18 (D.C. Cir. 1953).

21. *Martin v. United States*, 182 F.2d 225 (5th Cir. 1950); *Wilfong v. Johnston*, 156 F.2d 507 (9th Cir. 1946).

22. *Batson v. United States*, 137 F.2d 288 (10th Cir. 1943); *Errington v. Hudspeth*, 110 F.2d 384 (10th Cir. 1940), *cert. denied*, 310 U.S. 638 (1941). See *Moore v. Aderhold*, 108 F.2d 729 (10th Cir. 1939) where it was held that a mere allegation in a habeas corpus petition that trial counsel was not present at sentencing without an assertion of denial of the right to the assistance of counsel was inadequate. "The burden rested upon petitioner to establish that he did not competently and intelligently waive his constitutional right to counsel." 108 F.2d at 732. Where the offender waives counsel and enters a plea of guilty, the waiver presumptively carries over to sentencing. *Davis v. United States*, 226 F.2d 834 (8th Cir. 1955); *Creel v. Hudspeth*, 110 F.2d 762 (10th Cir. 1940). *But see* *Zeff v. Sanford*, 31 F. Supp. 736 (N.D. Ga.), *aff'd*, 114 F.2d 1018 (5th Cir. 1940).

23. See *Townsend v. Burke*, 334 U.S. 736 (1948).

24. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga.), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759 (1943).

25. *Ellis v. Ellis*, 239 F.2d 175 (5th Cir. 1956).

26. *Houston v. Ellis*, 252 F.2d 186 (5th Cir. 1958).

sentence without awaiting counsel's return,²⁷ or whether the absence of counsel was simply the result of a failure to appoint at sentencing.²⁸

State decisions have varied on the extent to which the right to the assistance of counsel at trial, as that right is defined by state law, is applicable as well to the sentencing stage. One can identify, however roughly, four principal views:

(1) California has interpreted its constitutional provision guaranteeing the right to appear and defend with counsel in "criminal prosecutions"²⁹ as extending unqualifiedly to the pronouncement of judgment and sentence. Therefore, where the defendant appears for sentencing without counsel, the court may not proceed without advising the defendant of his right to the assistance of counsel and satisfying itself that the defendant has understandingly waived that right. Failure to do so is error, apparently without regard to a showing of prejudice, whether the judgment and sentence are imposed directly after verdict,³⁰ or after a revocation of a suspension of imposition of sentence.³¹ Unlike the rationale adduced by the federal courts, which turns on the value of counsel in appealing to the "equity" of the court on behalf of a more lenient sentence, the California Supreme Court has focused rather upon the need for counsel to establish legal cause why judgment should not be pronounced and to protect against an unwitting running of the time allowed for an appeal.³²

(2) In New Jersey, the state constitutional provision for counsel appears to have been interpreted similarly to the sixth amendment. A person charged with a crime in any court is entitled to be advised of his right to counsel and of his privilege to have counsel assigned;³³ moreover, the duties of assigned counsel extend through, and terminate after, sentencing.³⁴ In a recent opinion, the appellate division held that failure to notify defendant of his right to the assistance of counsel at the time sentence was imposed and to appoint counsel for him in the absence of waiver constituted

27. *Green v. Robbins*, 120 F. Supp. 61 (D. Me.), *aff'd*, 218 F.2d 192 (1st Cir. 1954). On appeal the state did not contest the substance of the trial court's due process findings.

28. *Billman v. Burke*, 74 F. Supp. 846 (E.D. Pa. 1947), *aff'd*, 170 F.2d 413 (3d Cir. 1948). *But see Townsend v. Burke*, 334 U.S. 736 (1948).

29. CALIF. CONST. art. 1, § 13.

30. *In re Boyce*, 51 Cal. 2d 699, 336 P.2d 164 (1959); *People v. Havel*, 134 Cal. App. 2d 213, 285 P.2d 317 (Dist. Ct. App. 1955).

31. *In re Roberts*, 40 Cal. 2d 745, 255 P.2d 782 (1953); *Ex parte Levi*, 39 Cal. 2d 41, 244 P.2d 403 (1952); *People v. Fields*, 88 Cal. App. 2d 30, 198 P.2d 104 (Dist. Ct. App. 1948).

32. See *Ex parte Levi*, 39 Cal. 2d 41, 46, 244 P.2d 403, 405-06 (1952).

33. N.J. RULES 1:12-9(a) (Supp. 1960).

34. N.J. RULES 1:12-9(b) (Supp. 1960).

jurisdictional error correctible by collateral attack.³⁵ The grant of habeas corpus was reversed and the matter remanded by the supreme court,³⁶ not on the ground that the right to the assistance of counsel does not extend to sentencing,³⁷ but because petitioner neither alleged nor proved (a) that he did not understandingly waive counsel at sentence (he *had* waived counsel prior to pleading) and (b) that his rights could not have been fairly protected without the aid of counsel. On the latter point, the court distinguished between the role of counsel at trial and upon sentencing, pointing out that while in the former case "prejudice may quite readily appear" from the absence of counsel, the same can not be said of the sentence stage.

We do not belittle the role of counsel at that stage. Rather we stress that our practice is designed to assure an impartial presentation of pertinent material and frequently is far more productive for a defendant than are the efforts of counsel. . . . Although the probation report does not supersede the role of counsel, surely the justice of a sentence no longer rests so heavily upon his contribution.³⁸

(3) In New York, it is now clear that the state constitutional guaranty of the right "to appear and defend in person and with counsel" in "any trial in any court"³⁹ precludes deprivation of defendant's right to counsel of his choice at the time of sentence.⁴⁰ However, there is no duty to appoint counsel at the sentencing as there is at trial. The right to appointment of counsel is not constitutional, and the statute extends the duty only at the trial.⁴¹ Furthermore, the mere absence of defendant's counsel of choice at sentencing does not constitute a violation of any New York right.⁴² This New York view is fairly representative of the holding of many state courts in the typical case where defendant's counsel of choice fails to appear at sentencing: the right to counsel of choice extends to sentencing, though perhaps not to appointment except in grave cases; but the absence of counsel is not error unless it

35. *Jenkins v. State*, 57 N.J. Super. 93, 154 A.2d 29 (App. Div. 1959).

36. *State v. Jenkins*, 32 N.J. 109, 160 A.2d 25 (1960).

37. The Supreme Court expressly asserted that it did. 32 N.J. at 112, 160 A.2d at 27.

38. 32 N.J. at 114-15, 160 A.2d at 28.

39. N.Y. CONST. art. 1, § 6.

40. *People v. Hannigan*, 7 N.Y.2d 317, 165 N.E.2d 172, 197 N.Y.S.2d 152 (1960).

41. *People v. Hasenstab*, 283 App. Div. 433, 128 N.Y.S.2d 388 (1954); *La Mere v. Jackson*, 9 App. Div. 2d 843, 192 N.Y.S.2d 958 (1959). Section 188 of the Code of Criminal Procedure requires appointment of counsel on arraignment.

42. *People v. DeMaio*, 303 N.Y. 939, 105 N.E.2d 629 (1952), *affirming* 279 App. Div. 596, 107 N.Y.S.2d 561 (1951).

appears that there is no waiver⁴³ and active prejudice is shown.⁴⁴

(4) Finally, there are several decisions which assert that the pronouncement of sentence is no part of the trial within the intentment of state constitutions⁴⁵ or statutes⁴⁶ guaranteeing the right to counsel in criminal trials. Whether these decisions mean, however, that as a consequence an offender may be deprived of the privilege of representation by his counsel of choice is doubtful; certainly the holdings *require* no such proposition.

B. ADMINISTRATIVE SENTENCING—PAROLE ELIGIBILITY

Determinations by Boards of Parole whether and when to release the offender on parole are in some measure equivalent to the sentencing determinations of the judge. Determining when during the offender's term he shall be released approximates the judicial setting of a term of imprisonment. The only difference is the time of the determination: the judicial sentence determines the range of imprisonment at the outset; the parole decision determines the length of sentence after it is served. Moreover, the administrative decision to release on supervised and conditional parole

43. *E.g.*, *Drolet v. Commonwealth*, 335 Mass. 382, 140 N.E.2d 165 (1957) (fair to assume that counsel's unexplained absence, in the circumstances, due to prearrangement with defendant); *Schwartz v. State*, 103 Miss. 711, 60 So. 732 (1913) (defendant failed to protest counsel's unexplained absence). Sometimes the waiver concept is applied when there is no basis for a finding of prearrangement, as where the court proceeds to sentence only after an unsuccessful search for defendant's counsel (*Wilson v. State*, 32 Ga. App. 77, 122 S.E. 640 (1924)) or where the counsel's absence arises from the prosecutor having overlooked counsel's request to notify him of the time of sentencing (*Welch v. State*, 63 Ga. App. 277, 11 S.E.2d 42 (1940)).

44. *Whitehurst v. State*, 3 Ala. App. 88, 57 So. 1026 (1912) (sentence in absence of defendant's counsel may cause grave injustice, but none present since court himself polled jury and reduced sentence from six to five years when he became aware of counsel's absence); see *McCall v. State*, 262 Ala. 414, 79 So. 2d 51 (1955).

Screven v. State, 169 Ga. 384, 150 S.E. 558 (1929) (unexplained absence of defendant's counsel at sentencing no grounds for reversal when rights and interests of accused not affected).

Commonwealth v. Polens, 327 Pa. 554, 556-57, 194 A. 652, 653 (1937) (counsel absent at sentence for capital offense, but since he was present at hearing for determination of degree of guilt and appropriate penalty, there was no harm to defendant). However, "the practice of sentencing a defendant in the absence of his counsel is most unusual and is hereby condemned . . ." See also *Commonwealth ex rel. De Simone v. Cavell*, 185 Pa. Super. 131, 138 A.2d 688 (1958); *Commonwealth ex rel. Berry v. Tees*, 177 Pa. Super. 126, 110 A.2d 794 (1955).

State v. Neal, 1 Utah 2d 122, 262 P.2d 756 (1953) (absence of counsel at sentencing not prejudicial since form of jury verdict made imposition of death sentence mandatory).

45. *Powers v. Langlois*, 153 A.2d 535 (R.I. 1959) (constitutional provision substantially similar to that of California, see note 29 *supra*).

46. *State v. Hughes*, 170 La. 1063, 129 So. 637 (1930); *Ex parte Oliver*, 156 Tex. Crim. 235, 240 S.W.2d 316 (1951).

is basically the same as the judicial decision to stay imprisonment during supervised and conditional probation. Furthermore, decisions on both levels turn on a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.⁴⁷ Nonetheless, there is no observable disposition to extend constitutional or statutory guarantees to the right of counsel in criminal proceedings to the administrative determination of whether to release on parole.⁴⁸ Apart from the occasional statutory sport, like the Montana statute which assures the privilege of representation by counsel at parole release hearings,⁴⁹ statutes rarely address themselves to the role of counsel, except occasionally, as in Minnesota, to allow the Parole Commission to decline to hear oral presentations by attorneys.⁵⁰ The argument often made in revocation cases that the grant of a right to a hearing⁵¹ encompasses the right to be heard by counsel⁵² does not appear to have been made. As a matter of law, the privilege of counsel is at the free option of the parole board. What boards actually do is indicated by replies to a questionnaire circulated by the Reporter for the Model Penal

47. Compare ARIZ. REV. STAT. ANN. § 31-412 (1956): The Board may release on parole when it appears "that there is reasonable probability that the applicant will live and remain at liberty without violating the law," with ARIZ. REV. STAT. ANN. § 13-1657 (1956): The court may place the defendant upon probation, "if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be subserved thereby." Compare FLA. STAT. ANN. § 947.18 (1944): The Parole Commission shall not grant parole unless there is a reasonable probability that on parole the defendant "will live and conduct himself as a respectable and law abiding person, and that his release will be compatible with his own welfare and the welfare of society," with FLA. STAT. ANN. § 948.01(3) (Supp. 1960): The court may grant probation "If it appears . . . that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law"

48. I have found no cases in point, although it would seem to follow from the sense of the holdings that revocation procedures are no part of a criminal prosecution. See discussion *infra*.

49. MONT. REV. CODES ANN. § 94-9835 (Supp. 1959).

50. MINN. STAT. ANN. § 637.06 (Supp. 1960). But see MINN. STAT. §§ 611.12(3), 611.13(3) (1957) authorizing the committing judge to order the public defender (of Hennepin and Ramsey counties) to appear before the Parole or Pardon Board on behalf of any applicant for pardon or parole.

51. Statutes usually afford some kind of hearing on parole determinations. See, e.g., ARIZ. REV. STAT. ANN. § 31-411 (1956). The prisoner whose minimum term has expired "shall be given an opportunity to appear and apply for release upon parole" IDAHO CODE ANN. § 20-223 (Supp. 1959). "The board shall have the prisoner appear before it and shall interview him." ARK. STAT. ANN. § 43-2802 (1947). The board "shall conduct open hearings"

52. See discussion *infra*.

Code—legal counsel is permitted either in preparation for the hearing or at the hearing itself in some 18 states.⁵³

C. COMMITMENT REDETERMINATIONS—REVOCATIONS

It was suggested that release determinations of parole boards share much in common with judicial sentencing determinations. Similarly, determinations to revoke a conditional release and commit, whether made by the court in revoking probation or by a board in revoking parole, have important elements in common with the criminal trial itself. In each case the primary focus is upon the past behavior of the person: in the former case, whether he in fact violated the standards of conduct (the conditions) of the release order; in the latter, whether he violated the standards of the criminal law. There are, of course, differences, since discretion to revoke is sometimes thought to be as wide as discretion to grant probation and is therefore not necessarily confined to proven breaches of conditions, as conviction is confined to proven breaches of the law.⁵⁴ But on any view the primary focus, whether exclusive or not, is on past behavior. The right to counsel has often been dealt with differently in probation and parole revocations. It is convenient, therefore, in describing what the courts have done to treat these separately.

53. MODEL PENAL CODE § 305.10, comment (Tent. Draft No. 5, 1956).

54. See, *e.g.*, opinion of Mr. Chief Justice Hughes in *Burns v. United States*, 287 U.S. 216, 220–21 (1932):

Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. . . .

There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. . . . The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant.

However, a competing and perhaps more widespread view is that probation may be properly revoked only for breach of the conditions of its original grant. See, *e.g.*, *Hollandsworth v. United States*, 34 F.2d 423, 428 (4th Cir. 1929):

The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him. It is not conceivable that Congress intended to confer upon the court the power to call back the defendant at any time within five years after conviction and imprison him, no matter how blameless his conduct may have been during the interim, or how strictly he may have observed the terms of his probation.

See also *United States v. You*, 159 F.2d 688 (2d Cir. 1947); *Manning v. United States*, 161 F.2d 827 (5th Cir. 1947); *Mankowski v. United States*, 148 F.2d 143 (5th Cir. 1945); *In the Matter of Maguth*, 103 Cal. App. 572, 284 Pac. 940 (Dist. Ct. App. 1930); *State v. Bonza*, 106 Utah 553, 150 P.2d 970 (1944). Occasionally an order of revocation has been reversed where it plainly appeared that there was no violation of the conditions imposed. See, *e.g.*, *United States v. Van Riper*, 99 F.2d 816 (2d Cir.

1. Probation Revocation

Justice Cardozo, in *Escoe v. Zerbst*,⁵⁵ was the author of highly influential dicta to the effect that neither due process nor the specific constitutional guarantees protecting the accused in a criminal trial extend to probation revocation: since probation comes as an act of grace to one duly convicted of crime, Congress is free to impose such conditions as it deems wise, including dispensing with notice and hearing on revocation of the favor.⁵⁶ But what Justice Cardozo was unable to evoke from the Constitution, he felt justified in extracting from the provision of the probation statute that after arrest the probationer "shall forthwith be taken before the court."⁵⁷ That language was interpreted as requiring such notice and hearing as will "enable an accused probationer to explain away the accusation." While this does not require "a trial in any strict or formal sense," it does require "an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."⁵⁸

Adjudicating within this framework, the federal courts have declined to invalidate revocation orders where the probationer was dealt with without counsel. These courts take the view that "the statute does not require that a probationer be represented by counsel at an inquiry relative to the proposed revocation of probation."⁵⁹ The test is whether the court has abused its discretion in

1938). Mr. Chief Justice Hughes' view, it may be added, is less plausible under the terms of the amended federal probation statute which specifies the grounds of an arrest warrant, as the former act did not, as the "violation of probation occurring during the probation period." 18 U.S.C. § 3653 (1958). *But see* *United States v. Squillante*, 144 F. Supp. 494 (S.D.N.Y. 1956) (refusal to terminate probation though sole condition of payment of fine and tax complied with); *United States v. Qualls*, 182 F. Supp. 213, 216 (N.D. Ill. 1960):

A revocation, of course, need not be based upon the violation of specific terms of the probation. . . .

The determinative question is whether the probationer's conduct has been inconsistent with a bona fide effort to accomplish his own rehabilitation.

Kaplan v. United States, 234 F.2d 345, 348 (8th Cir. 1956):

The appellant's argument that he violated none of the specific terms of his probation and that the terms were never modified would not, even if true, be persuasive. The determinative question is whether the conduct of the probationer was inconsistent with his duties as such. One on probation is not at liberty; he is in law and in fact in the custody and under the control of the court granting probation.

55. 295 U.S. 490 (1935).

56. *Id.* at 492-93.

57. 43 Stat. 1260 (1925). It has now been amended to read: "As speedily as possible after arrest the probationer shall be taken before the court. . . ." 18 U.S.C. § 3653 (1958).

58. 295 U.S. at 493.

59. *Bennett v. United States*, 158 F.2d 412, 415 (8th Cir. 1946). See

conducting the proceeding—failure to appoint counsel is itself no such abuse.⁶⁰ Failure to permit probationer to be represented by his own counsel probably would be such an abuse;⁶¹ whether failure to appoint counsel upon request may be an abuse of discretion, at least in circumstances of an inexperienced and ignorant probationer, apparently no court has determined. One factor of relevance suggested by courts is whether counsel could have been helpful to the probationer; where he admits the violation and there are no disputed issues, a finding of abuse of discretion is not likely.⁶²

Most state courts have, as might be expected, followed the lead of the Supreme Court in *Escove v. Zerbst* in regarding revocation proceedings as not subject to the constitutional procedural guarantees applicable in criminal prosecutions, even as regards the right to a hearing and confrontation.⁶³ Absent any contrary statutory provision,⁶⁴ therefore, there is no right to hearing or counsel in revocation proceedings. In those few states, however, which have held these constitutional guarantees applicable to probation revocation, the right to counsel, or at least the right to be represented by retained counsel, has a constitutional base.⁶⁵

also *Kelley v. United States*, 235 F.2d 44 (4th Cir. 1956); *United States v. Huggins*, 184 F.2d 866 (7th Cir. 1950); *Gillespie v. Hunter*, 159 F.2d 410 (10th Cir. 1947); *Cupp v. Byington*, 179 F. Supp. 669 (S.D. Ind. 1960); *United States v. George*, 48 F. Supp. 200 (W.D. La. 1942).

60. *Kelley v. United States*, *supra* note 59, at 45; *Gillespie v. Hunter*, *supra* note 59, at 411.

61. See *United States v. George*, *supra* note 59, at 213.

62. See *Bennett v. United States*, 158 F.2d 412, 415 (8th Cir. 1946).

63. *In re Davis*, 37 Cal. 2d 872, 236 P.2d 579 (1951). California, however, does regard the sentencing stage as part of the criminal trial. See text accompanying notes 29–32 *supra*. Thus, where probation is accompanied by suspension of imposition of sentence (as opposed to suspension of execution of an imposed sentence), although probation may be revoked without hearing and counsel, sentence may not then be imposed in their absence. See *Varela v. Merrill*, 51 Ariz. 64, 74 P.2d 569 (1937) (no point made of California distinction between suspension of imposition and execution of sentence); *In re Levi*, 39 Cal. 2d 41, 244 P.2d 403 (1952); *People v. Dudley*, 173 Mich. 389, 138 N.W. 1044 (1912). A saturation of cases appears in Annot., *Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation*, 29 A.L.R. 2d 1074 (1953). See also Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 322–34 (1959).

64. Indeed, some statutes expressly dispense with notice and hearing at revocation. See IOWA CODE ANN. § 247.26 (1949) ("without notice"); MINN. STAT. § 610.39 (1957) ("without notice"); MO. REV. STAT. § 549.090 (1949) ("without notice"); DEL. CODE ANN. tit. 11, § 4321 (1953) ("without any further proceedings").

65. *Ex parte Lucero*, 23 N.M. 433, 168 Pac. 713 (1917); *Christiansen v. Harris*, 109 Utah 1, 163 P.2d 314 (1945); *State v. Zolantakis*, 70 Utah 296, 259 Pac. 1044 (1927); *State v. O'Neal*, 147 Wash. 169, 265 Pac. 175 (1928). See *Brill v. State*, 159 Fla. 682, 685, 32 So. 2d 607, 609 (1947); *Mason v. Cochran*, 209 Miss. 163, 46 So. 2d 106 (1950); *People v. Valle*, 7 Misc. 2d 125, 164 N.Y.S.2d 67 (Ct. Spec. Sess. 1957).

A very few statutes expressly grant probationer a right to be represented by his counsel at revocation proceedings.⁶⁶ For the rest, the decisions turn on whether the more or less explicit provisions for hearing (found in most statutes)⁶⁷ encompass the right to the assistance of counsel. In New York, for example, the court of appeals has construed a statute requiring "an opportunity to be heard" at probation revocation⁶⁸ to contemplate notice of the violation charged and opportunity to attack or deny the charge.⁶⁹ Accordingly, it has been held "elementary" that the probationer be given an opportunity to obtain counsel, if requested.⁷⁰ Consistent with the federal view, this has not been held to impose an obligation on the court to inform probationer of his right to counsel⁷¹ or to appoint counsel in his behalf.⁷² Likewise in Illinois, the provision requiring the probationer to be "brought before the court" (as well as the court's sense of "justice") merited reversal of a probation revocation where the court took evidence and issued its order despite knowledge that the attorney who probationer thought was representing him declined to serve. The court said:

We think that justice required that he be given some opportunity to determine whether he had an attorney and if he did not have one, to obtain one. On the other hand if, for some reason, the court did not see fit to continue the hearing, the defendant should have been offered the services of the Public Defender.⁷³

2. Parole Revocation

The predominant view of the federal courts in probation revocation proceedings—that neither the specific constitutional guar-

66. GA. CODE ANN. § 27-2713 (Supp. 1958); FLA. STAT. ANN. § 948.06 (Supp. 1960) ("opportunity to be fully heard on his behalf in person and by counsel"); TENN. CODE ANN. § 80-2907 (1955); ALASKA COMP. LAWS ANN. § 66-16-32 (1949).

67. For citations of statutes see Note, 59 COLUM. L. REV. 311, 323-24, nn.89-93 (1959).

68. N.Y. CODE CRIM. PROC. § 935 (1958).

69. *People v. Oskroba*, 305 N.Y. 113, 111 N.E.2d 235 (1953).

70. See to the same effect *State v. Burnette*, 173 N.C. 734, 737, 91 S.E. 364, 366 (1917); *State v. Nowak*, 91 Ohio App. 401, 406, 108 N.E.2d 377, 380, *appeal dismissed*, 157 Ohio St. 525, 106 N.E.2d 82 (1952).

71. *People v. St. Louis*, 3 App. Div. 2d 883, 161 N.Y.S.2d 170 (1957).

72. *People v. Valle*, 7 Misc. 2d 125, 164 N.Y.S.2d 67 (Ct. Spec. Sess. 1957). *Nunz v. Monroe County Court*, 5 Misc. 2d 592, 150 N.Y.S. 2d 698 (Monroe County Ct. 1956). Neither, of course, is a court precluded from appointing counsel. A recent questionnaire revealed that 23 of the New York judges responding always assign counsel before or during revocation proceedings, 4 usually assign counsel, 7 usually do not and 1 never does. See Note, 59 COLUM. L. REV. 311, 329 n.138 (1959).

73. *People v. Burrell*, 334 Ill. App. 253, 258, 79 N.E.2d 88, 90 (1948). The court was admittedly influenced by the contribution an attorney could have made in resolving the "doubts and ambiguities" in the testimony concerning the allegation of purse snatching which was the ground of revocation.

antees appropriate to criminal trials nor the command of procedural justice of the due process clause are applicable—has, consistently enough, been extended to parole revocation matters as well. As with probation revocation, the moving considerations have been that the parolee has a status of a privileged inmate, enjoying no right to a continuation of that status and that, in any event, he received his constitutional protection at the trial.⁷⁴ It follows, of course, that there is no constitutional right to counsel.⁷⁵

As with probation revocation, the bulk of federal litigation has turned upon the extent to which a right to counsel can be implied from the statutory requirement of a parole revocation hearing. That some courts have drawn wider implications in parole than in probation revocation proceedings is no doubt attributable to the fact that the hostility to counsel exhibited by some boards has furnished the occasion to do so. In *Fleming v. Tate*,⁷⁶ for example, parolee sought habeas corpus from a commitment under a parole revocation at which the federal parole board denied the requests of parolee's attorney to appear, and of his employer to testify, in his behalf. In the face of settled board practice of over 35 years of not allowing counsel to appear or testimony to be offered, the court found that the statutory grant of "an opportunity to appear"⁷⁷ before the board carried with it the right to appear through counsel and to present evidence; even though no obligation to appoint counsel could be properly implied, these two features constituted "the basic characteristics of our whole system of administration of justice."⁷⁸ A year after the decision, Congress adopted the holding by amending the District Code to provide that the parolee "may be represented by counsel" at the revocation hearing.⁷⁹ In a subsequent decision, *Moore v. Reid*,⁸⁰ the Court of Appeals for the District of Columbia carried the *Tate* holding one step further by holding that in the absence of express advice to the parolee of his right to the assistance of counsel of his choice, no waiver could be implied from his participation at the hearing without counsel.

74. E.g., *Anderson v. Corall*, 263 U.S. 193, 196 (1923); *Hiatt v. Campagna*, 178 F.2d 42 (5th Cir. 1949), *aff'd without opinion by equally divided court*, 340 U.S. 880 (1950); *United States ex rel. Harris v. Ragen*, 177 F.2d 303 (7th Cir. 1948); *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946); *United States ex rel. Nicholson v. Dillard*, 102 F.2d 94 (4th Cir. 1939). But see *Flandrick, Revocation of Conditional Liberty—California and the Federal System*, 28 So. CAL. L. REV. 158, 170 (1955).

75. See, e.g., *Hiatt v. Campagna*, *supra* note 74; *Fleming v. Tate*, *supra* note 74.

76. 156 F.2d 848 (D.C. Cir. 1946).

77. D.C. CODE § 24-206 (1940).

78. *Fleming v. Tate*, *supra* note 74, at 850.

79. Act of July 17, 1947, 61 Stat. 378, 379, D.C. CODE, § 24-206 (1951).

80. 246 F.2d 654 (D.C. Cir. 1957).

The federal parole statute reads in all substantial respects the way the District of Columbia provision read at the time *Fleming v. State* was decided, providing that the retaken prisoner "shall be given an opportunity to appear before the Board."⁸¹ In a recent case, the Court of Appeals for the District of Columbia, therefore, interpreted that statute in the same way it interpreted the District Statute.⁸² Other federal courts, however, have rejected the District of Columbia interpretation, declining to upset the settled federal parole board practice since 1910 of denying parolee the right to appear through counsel. The fifth circuit found support for its view in the 1948 revision of the criminal code which added to the parole provision that the appearance should be before the Board, "a member thereof or an examiner designated by the Board." "This change," the court concluded, "cuts deeply into the idea that the appearance is to be a trial. An examiner may conduct it now, and it would seem that the taking of the testimony of the prisoner, and perhaps his witnesses, is alone contemplated."⁸³ The court apparently did not deem it significant to advert to the fact that the District of Columbia provision expressly authorizing counsel, has the same language. More recently, other courts have reasoned that the failure of Congress to include a provision for counsel in the 1948 revision of the criminal code, after its action the previous year in amending the District of Columbia law expressly so to provide, and its failure to do so again in 1951 when it enacted the District of Columbia Code of 1951, including the 1947 amendment, is evidence of its intention to establish a different requirement under the federal statute.⁸⁴ Why Congress should have intended an arbitrary classification which would allow District parolees the right to counsel but deny that right to other federal parolees before the same Board challenges the imagination; one would have thought that the statutory interpretation argument cuts

81. 18 U.S.C. § 4207 (1958).

82. *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959).

83. *Hiatt v. Campagna*, 178 F.2d 42, 46 (5th Cir. 1949), *aff'd without opinion by equally divided court*, 340 U.S. 880 (1950).

84. *Washington v. Hagan*, 183 F. Supp. 414 (M.D. Pa.), *aff'd*, 287 F.2d 332 (3d Cir. 1960); *Hock v. Hagan*, 190 F. Supp. 749 (M.D. Pa. 1960); *United States ex rel. McCreary v. Kenton*, 190 F. Supp. 689 (D. Conn. 1960); *Poole v. Stevens*, 190 F. Supp. 938 (E.D. Mich. 1960); *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). In the last cited case the court applied the same rule to a prisoner conditionally released as of right pursuant to 18 U.S.C. § 4161 (1958) after serving his sentence less deduction for good behavior, in view of 18 U.S.C. § 4164 (1958) providing that prisoners so released should be treated as released on parole. See 108 U. PA. L. REV. 423 (1960). Thus far, apparently, only one court has found the District of Columbia view persuasive. *Cannon v. Stucker*, Civil No. 19822 (E.D. Mich. June 1960).

the other way.⁸⁵ In a recent opinion Judge Goodrich also disagreed with the District of Columbia view of the federal statute, but declined to rest his conclusion on the legislative history argument.⁸⁶ He rather rested it on the fifty year old practice of denying representation by counsel which, in his judgment was

right because this matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question. . . . The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole.

Judge Goodrich made clear that the statute does require a "fair hearing"; the point was that blanket refusal in all cases to permit representation by counsel does not render the hearings unfair.⁸⁷

Another argument presented on several occasions in support of the right to counsel in federal parole revocation proceedings rests on the language of section 6(a) of the Administrative Procedure Act⁸⁸ which accords the right to be represented by counsel to anyone compelled personally to appear before any agency or representative and to any party in any agency proceeding.⁸⁹ The ar-

85. The fact that the erratic working of legislative processes has produced some disparities in parole matters between federal and district law, such for example as in computing good time available after revocation of parole (see *Gilstrap v. Clemmer*, 284 F.2d 804 (4th Cir. 1960)), or in other matters (see *Lopez v. Madigan*, 174 F. Supp. 919, 922 (N.D. Cal. 1959)) would hardly seem to justify a court in implying a further disparity, especially, (a) when the language of the law does not require it, and (b) there is no imaginable rhyme or reason for the difference.

86. *Washington v. Hagan*, 287 F.2d 332, 334 (3d Cir. 1960). The court observed that "the change in the District of Columbia Code was considered and reported to the Congress by the District of Columbia Committees of the respective Houses while the revision of Title 18 of U.S.C. came out of the Judiciary Committees." *Id.* at 334 n.4.

87. The Court cited with approval the decision in *United States ex rel. McCreary v. Kenton*, 190 F. Supp. 689 (D. Conn. 1960) which, while denying it was error to refuse to hear parolee's counsel and witnesses, reversed a parole revocation order as being based on an unfair hearing.

88. 60 Stat. 237, 240 (1946), 5 U.S.C. § 1005(a) (1958).

89. § 2(a), 60 Stat. 237 (1946), 5 U.S.C. § 1001(a) (1958) defines "agency" in terms which appear to embrace the Federal Parole Board. It is defined as an authority of the Government of the United States other than Congress, the courts or territorial governments. Certain agencies are excluded from the act, except for the requirements of § 3, Public Information. But though the list of those excluded appears to be inclusive and the exceptions defined both in general terms (e.g., courts martial, wartime mili-

gument has been rejected on all occasions.⁹⁰ One basis has been that the laws governing parole "bristle with discretion" and the "full dress procedure it requires would render it practically impossible for the Board to handle its business."⁹¹ The issue, however, is whether the single provision of section 6(a) respecting counsel is applicable. The hearing procedures and judicial review provisions in sections 7 and 10, respectively, could readily be distinguished from the requirements of section 6(a). Indeed, while these latter sections contain exceptions in virtue of which parole board proceedings could plausibly be excluded,⁹² section 6 does not. Judge Goodrich took perhaps a more candid view in asserting: "Nor can we believe that the Administrative Procedure Act, 5 U.S.C.A. § 1005, was ever intended to cover this kind of a case."⁹³ If "intent" is what the legislators were actually thinking about there is no doubt much to the judge's point—correctional agencies have traditionally been regarded as outside the administrative law, and there is not the slightest indication that anyone was thinking about the Parole Board when the Act was enacted. But if "intent" is taken to mean the generalized purpose and fundamental conceptions underlying the statutory scheme it is less

tary authority) and by naming specific agencies (e.g., functions conferred under Selective Service Act, Contract Settlement Act) there is no language which would exclude the Parole Board. Further, where Congress has meant to exclude an agency, it has often done so in the law creating the agency. "Since the enactment of the Administrative Procedure Act in 1946, at least 10 statutes have contained exceptions from all but the public information or the judicial review requirement of the Administrative Procedure Act." COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REP. ON LEGAL SERVICES AND PRAC. 142-43 (1955).

90. *Washington v. Hagan*, 287 F.2d 332 (3d Cir. 1960); *Bozell v. United States*, 199 F.2d 449 (4th Cir. 1952); *Hiatt v. Campagna*, 178 F.2d 42 (5th Cir. 1949), *aff'd without opinion by equally divided court*, 340 U.S. 880 (1950); *United States ex rel. De Lucia v. O'Donovan*, 82 F. Supp. 435 (N.D. Ill. 1948), *aff'd*, 178 F.2d 876 (7th Cir. 1949).

91. See *Hiatt v. Campagna*, *supra* note 90, at 45.

92. § 7, 60 Stat. 241 (1946) 5 U.S.C. § 1006 (1958): "In hearings which section 1003 [Rule making] or 1004 [Adjudication] . . . requires to be conducted pursuant to this section—(a) [Presiding Officers.—] There shall preside at the taking of evidence [certain officials]; *but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.*" Assuming the emphasized language refers to proceedings before persons of peculiar competence beyond that of trial examiners provided for by the act, parole boards would seem properly excluded. See Note, 65 HARV. L. REV. 309, 318 (1951). But it is not clear (though it is plainly arguable) that this exception applies to the counsel provisions of § 6 as well as to the presiding officer provisions of § 7 and, perhaps, the provisions of §§ 4 & 5.

§ 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958): "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.—[provisions for judicial review]."

93. *Washington v. Hagan*, 287 F.2d 332, 337 (3d Cir. 1960).

clear that the provision for counsel has no application to parole boards.

A recent development will probably postpone indefinitely any Supreme Court determination of the foregoing legal issues involved in the denial of the right to counsel at federal parole revocation hearings. On April 24, 1961, the United States Board of Parole adopted a new rule permitting representation by counsel of choice at parole revocation hearings. That rule reads as follows:

All federal prisoners who have been returned to custody as parole or mandatory release violators under a Board warrant shall be advised that they may be represented by counsel at the revocation hearing provided that they arrange for such counsel in accordance with Board procedure.

All prisoners in custody as violators previously given revocation "hearings" without being afforded the opportunity for representation by counsel shall be given an opportunity for a hearing with counsel.⁹⁴

What prompted this departure from a 50 year old practice, upheld by most courts which passed upon it, can only be guessed. In view, however, of the fact that the new rule was promulgated shortly after of writ of certiorari was filed from the decision of the third circuit in *Washington v. Hagan* upholding the past practice of the Board, and in view of the Solicitor General's memorandum in response to that petition,⁹⁵ it would seem a fair inference that the Board heeded the advice of government attorneys.⁹⁶

The federal courts' view that neither fifth amendment due process nor the sixth amendment create a right to be represented at

94. Quoted in Memorandum for the Respondent, p. 4, *Washington v. Hagan*, Supreme Court Docket No. 973 Misc., Oct. Term, 1960. See also the remarks of Chairman Chappell of the U.S. Board of Parole at the Conference on Improving Career Opportunities for Lawyers in the Administration of Criminal Justice, Harvard Law School, Summer, 1961.

95. The government argued against the grant of the writ on the issue of the statutory right to counsel at parole revocation hearings on the ground that despite a conflict between the District of Columbia and the third circuit on this issue the changed rules of the Board deprived the issue of any substantial importance.

96. *Cf. Glenn v. Reed*, 289 F.2d 462, 463 (D.C. Cir. 1961) in which Judge Edgerton stated: "The government rightly concedes the hearing and revocation were invalid because appellant neither had nor was offered counsel." It must be stated, however, that the issue argued by the government in this case was simply that a prisoner who was not represented by counsel at his original parole revocation hearing but was subsequently offered the opportunity to be represented by counsel at a new hearing is not entitled to be released from detention. While the argument impliedly accepts the right to representation by counsel at revocation hearings, the government was not really in a position to contend otherwise in the District of Columbia Circuit. As for the reported government concession of the right to have counsel offered, it can only be said that this surprising concession (even the District of Columbia Circuit has never so held) does not appear to have been made in the government's brief. Brief for Appellees, *Glenn v. Reed*, 289 F.2d 462 (D.C. Cir. 1961).

parole revocation, even by counsel of choice, obviously precludes collateral attack on fourteenth amendment due process grounds of denials of right to counsel by state boards. But one decision to the contrary, although not dealing with counsel explicitly, is noteworthy for its uniqueness. In *Fleenor v. Hammond*,⁹⁷ the sixth circuit held that a Kentucky Governor's revocation of a conditional pardon with neither notice nor opportunity to be heard, pursuant to state statute, was violative of the fourteenth amendment. The court recognized that the Governor's granting of the release was an act of grace and his decision to revoke final and conclusive upon the courts. However,

upon the granting of a pardon, albeit conditionally, the convict was entitled to his liberty and possessed of a right which could be forfeited only by reason of a breach of the conditions of his grant. . . . To hold that such forfeiture may be imposed without giving the grantee an opportunity to be heard, does violence to what are said to be "immutable principles of justice, which inhere in the very idea of free government, which no member of the Union can disregard."⁹⁸

The court does not deal with the counsel question, but its moral is plain enough.

The state law governing the right to counsel in parole revocation proceedings parallels that applicable to probation revocation, although in some instances distinctions have been implied or drawn between the considerations applicable to parole, as distinguished from probation revocations.⁹⁹ Occasionally there is an echo of the extreme *Fleenor v. Hammond* view;¹⁰⁰ equally occasionally a stat-

97. 116 F.2d 892 (6th Cir. 1941).

98. *Id.* at 896. See the approving comment by Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L. & CRIMINOLOGY 531 (1942).

99. Compare MICH. STAT. ANN. § 28.2310 (1954) which allows representation by counsel in parole revocation, except where the violation is breach of the Michigan law, with MICH. STAT. ANN. § 28.1134, which makes no provision for counsel in probation revocation, and *People v. Dudley*, 173 Mich. 389, 138 N.W. 1044 (1912) rejecting constitutional challenge against the statute for failure to provide for confrontation, counsel, etc. Also compare *Johnson v. Walls*, 185 Ga. 177, 194 S.E. 380 (1937) (upholding parole revocation without notice and hearing) with *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951) (invalidating probation revocation without notice and hearing and overruling prior probation cases but not mentioning the prior handling of the parole revocation issue). See also *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721 (1945) which distinguished between the hearing requirements for parole and probation revocation on the ground that the latter, being a judicial act, requires judicial processes, and *Ex Parte Anderson*, 191 Ore. 409, 439, 229 P.2d 633, 646, 29 A.L.R.2d 1051, 1067 (1951). The Utah Supreme Court has more recently abandoned the distinction. *Blaine v. Beckstead*, 10 Utah 2d 4, 347 P.2d 554 (1959), noted in 7 UTAH L. REV. 125 (1960). For differences in procedure for parole and probation revocation proposed by the Model Penal Code, see note 127 *infra*.

100. *People ex rel. Joyce v. Strassheim*, 242 Ill. 359, 90 N.E. 118 (1909);

ute will provide the privilege of representation by counsel at the hearing;¹⁰¹ more often statutes make provision for some sort of hearing¹⁰² which some courts construe as bestowing a privilege of being represented by one's own counsel;¹⁰³ in a large number of jurisdictions the applicable statute imposes no requirement of a hearing in revocation proceedings.¹⁰⁴ Some evidence of the actual practice of parole boards is furnished by the answers to a questionnaire circulated by the Reporter for the Model Penal Code which revealed that some twelve parole boards conducted hearings without specific statutory authorization, though often at the same time denying the parolee has any right to a hearing.¹⁰⁵ Further, it appears to be the practice in about 18 states whose statutes do not provide for counsel, to permit a parolee to advise with counsel in preparation for his hearing;¹⁰⁶ in eight of these counsel is permitted at the hearing as well.¹⁰⁷ Appointment of counsel

State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1950). Statutory interpretation was an adequate alternate ground in both cases since a statute in each state provided for a hearing. ILL. STAT. ANN. ch. 38, § 808 (Smith-Hurd 1935); MD. ANN. CODE art. 41, § 115 (1957). See also *People v. Moore*, 62 Mich. 496, 29 N.W. 80 (1886).

101. ALA. CODE tit. 42, § 12 (1959); FLA. STAT. ANN. § 947.23 (Supp. 1960); MICH. STAT. ANN. § 28.2310 (1954); W. VA. CODE ANN. § 6291 (26) (Supp. 1960). See also N.J. STAT. ANN. § 30:4-123.25 (Supp. 1960) which provides that a parolee may consult counsel of his own selection, presumably in advance of the revocation hearing. This approximates the MODEL PENAL CODE § 305.21 (Tent. Draft No. 5, 1956). [Now renumbered as § 305.16.]

102. See, e.g., ARIZ. REV. STAT. ANN. § 31-417 (1956); GA. CODE ANN. § 77-519 (Supp. 1958); LA. REV. STAT. ANN. § 15:574.9 (Supp. 1960); N.H. REV. STAT. ANN. § 607:46 (1955); N.Y. CORREC. LAW § 218 (Supp. 1960); TEX. CODE CRIM. PROC. ANN. art. 781d (Supp. 1960); UTAH CODE ANN. § 77-62-16 (1953). Several states have recently amended their law to provide for a hearing where none was theretofore required. KY. REV. STAT. § 439.440 (1960); MISS. CODE ANN. § 4004-13 (1956); MO. ANN. STAT. § 549.265 (Supp. 1960); MONT. REV. CODES ANN. § 94-9838 (Supp. 1959).

103. *Warden v. Palumbo*, 214 Md. 407, 135 A.2d 439 (1957); *Stewart v. Warden*, 212 Md. 657, 659, 129 A.2d 89, 90 (1957) ("We assume without deciding that the right to counsel at a hearing on violation of the condition of suspension is the same as at a trial."); *State v. Boggs*, 49 Del. 277, 114 A.2d 663 (1955); cases cited *supra* note 100.

104. ARK. STAT. ANN. § 43-2802 (1947); IDAHO CODE ANN. § 20-228 (1947); IND. ANN. STAT. § 13-1532 (1953); IOWA CODE ANN. § 247.9 (1946); MASS. LAWS ANN. ch. 127, § 148 (1957); NEV. REV. STAT. § 213.150 (1959); N.C. GEN. STAT. § 148-61.1 (1958); ORE. REV. STAT. § 144.370 (1959); R.I. GEN. LAWS ANN. § 13-8-18 (1956); S.D. CODE § 13.5307 (Supp. 1960); VT. STAT. ANN. tit. 28, § 904 (1958); WIS. STAT. ANN. § 57.06 (Supp. 1961); WYO. STAT. ANN. § 7-326 (1957).

105. MODEL PENAL CODE § 305.21, comment (Tent. Draft No. 5, 1956).

106. *Ibid.* (I have excluded from the comment's list of 23, those 5 jurisdictions whose statutes authorize legal representation.)

107. *Ibid.* For a survey of an earlier day see 4 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 245-48 (1939).

for indigent parolees is, needless to say, required nowhere, but it appears to be the practice to make such appointments in several states.¹⁰⁸

II. AN EVALUATION

The marginal legal recognition given to representation by attorneys in the crucial stages of the criminal process in which decisions of the greatest impact upon the life of the offender are made is a matter of grave concern to those who value the contribution which lawyers can make to the better administration of the criminal law. What is of equal concern is that the lack of legal recognition is itself a reflection of a profound conviction in many quarters that neither the lawyer nor the system of values he represents have any useful role in the peno-correctional processes. As we have seen, the responsibility for dispositions of the offender after guilt are distributed between judicial and administrative agencies. Not surprisingly, it is in the latter areas, by and large representing the institution of parole administration, that the greatest opposition centers. In most areas of the criminal process where the problems of counsel arise, the controversy centers around the challenge of accommodating the adversary process within a regime of equal protection; in short, the problem of appointment of counsel. In the parole area, the controversy centers around an issue largely a matter of history in most areas—the very privilege of being represented by one's own lawyer. The blanket refusal to hear a person by counsel is in most aspects of our system felt to be antithetical to basic notions of justice, whether the proceedings be civil, criminal¹⁰⁹ or administrative.¹¹⁰ While the practice is occasionally tolerated, as in administrative investigations,¹¹¹ there is there absent what is always present in correctional dispositions—the issuance of an order granting or denying liberty to the subject of the inquiry. Yet, as we have seen, the bare privilege of legal representation is widely denied. Although the United States Board of Parole

108. This would seem to be so in Maryland and West Virginia according to PROCEEDINGS OF THE 89TH ANNUAL CONGRESS OF CORRECTION OF THE AM. CORRECTIONAL ASS'N WORKSHOP V, COMM. ON PAROLE BD. PROBLEMS 83-84 (1959).

109. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932): "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubtful that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense." The dictum was applied in *Chandler v. Freytag*, 348 U.S. 3 (1954) and, most recently, in *Reynolds v. Cochran*, 365 U.S. 525 (1961).

110. See Administrative Procedure Act, § 6(a), 60 Stat. 237 (1946), 5 U.S.C. § 1005(a) (1958).

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

is apparently abandoning its 50 year old practice of refusing to hear counsel in parole revocation matters, the same is not true of many state parole boards. Indeed, to judge from the reported remarks at a recent American Correctional Association meeting, some parole boards have made something of a mission out of keeping lawyers out of parole, going so far as to meet with state bar representatives to discourage lawyers from accepting retainers for parolees.¹¹²

Moreover, this attitude toward law and lawyers in these processes is not confined to parole administrators and correctional people. Note has already been made of Judge Goodrich's refusal to construe the requirement of a hearing to include the privilege of being heard through counsel, on the ground that "there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."¹¹³

In examining the basis of these positions, it is useful at the outset to consider matters of principle apart from matters of practicality. There is, of course, a risk of being unreal and visionary. But there is also a danger that preoccupation with the expedient and the practical may make a necessary, or partly avoidable, evil seem itself desirable.

One common justification for the ostracism of the law and the lawyer is that matters of dealing with offenders within the maximum limits established by the legislative penalty is altogether a matter of grace and favor. No offender is entitled to anything except the maximum imprisonment appropriate to the crime for which he was duly convicted. Parole and probation, then, are fundamentally like the traditional prerogative of mercy—acts of charity from a forgiving sovereign. While the argument is repeatedly made, generally in supporting a denial of legal processes against constitutional attack, it is hard to believe that anyone really believes it. First of all, even if it is solely the quality of mercy which is being dispensed, it is apparent that it is not a personal act of grace by a reigning monarch, but a highly institutionalized system administered to tens of thousands of offenders each year by hundreds of governmental officials. So administered in a democratic community, even grace itself, it may be thought, must be dispensed and withdrawn according to some sense of principle and order and with some respect for the forms of procedural regularity associated with concepts of basic fairness. But more significantly,

112. PROCEEDINGS OF THE 89TH ANNUAL CONGRESS OF CORRECTION OF THE AM. CORRECTIONAL ASS'N, WORKSHOP V, COMM. ON PAROLE BD. PROBLEMS 83-84 (1959).

113. *Washington v. Hagan*, 287 F.2d 332 (3d Cir. 1960). See also the similar remarks of Judge Breitel in 33 ALI PROCEEDINGS 264-65 (1956).

the institution of individualized treatment represented by the indeterminate sentence laws and the systems of probation and parole are not remotely charity, but an integral part of our system of criminal law. What Justice Holmes said of pardon is a fortiori true of probation and parole:

A pardon [probation or parole] in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional [statutory] scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment [statutory maximum] fixed.¹¹⁴

On this view, these laws are as much a part of the system of general law for dealing with offenders as the statutory maximum term—they have their purposes, their principles and their limitations. Indeed it may be said as well that an offender is entitled *prima facie* to probation or to the statutory minimum rather than to incarceration for the maximum term permitted;¹¹⁵ and also, *prima facie*, that he is entitled to remain at liberty on parole or probation until a violation of its provisions has been clearly shown. In a word, these laws are part of a system of justice rather than acts of aberrational mercy which we indulge ourselves, and as such can hardly be viewed as being properly administered outside the framework of the legal order appropriate to other laws.

This suggests the more substantial basis for the nonlegal approach to correctional dispositions. This is that the processes of individualization of punishment, by withholding imprisonment, or releasing from prison, or withdrawing a suspension or release once granted, require judgments of a kind which are more appropriately made by officials who are expert in these matters, unfettered either by the legal proscription of generalized standards, or of procedures for the determination of facts respecting particular offenders.

The view is exemplified in the following observation made in connection with revocation proceedings, but a fortiori applicable in release determinations:

[T]he board undoubtedly takes into consideration impressions of the suspected parolee that it gained in the manner just indicated. It analyzes symptoms and character rather than weighs evidence. It is required to determine a non-legal problem; that is, whether the parolee is about to become a recusant. A prudent performance of a board member's duty may call for intuition rather than for a knowledge of the

114. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

115. See Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 470, 486-87 (1961).

rules of procedure, and for training in the social sciences rather than a course of study in a law school.¹¹⁶

The problem of legal standards to govern the exercise of individualized correction is, of course, beyond the scope of this paper. However, the implications for procedural regularity, particularly as that involves a role for the lawyer, of the argument resting on the needs of expert clinical judgment raise issues which are central.

Before proceeding to deal with these issues one preliminary observation is in order. Although the primary focus of this discussion is the role of counsel, it is apparent that the issue is inextricably involved with the role of the hearing. Without a hearing, even of an informal kind, in which antagonistic facts can be rebutted and favorable ones presented, the role of counsel is inevitably marginal. And without counsel, the benefit of a hearing to the subject of the inquiry is substantially reduced. The considerations which follow concerning the role and use of counsel, therefore, are predicated upon the availability of a meaningful hearing. And what is said of the desirability of counsel necessarily attaches to the grant of a hearing.

The obvious suggestion was made in the first part of this paper that correctional dispositions fall into two categories distinguished by the degree of significance of particular factors of decision. The sentencing determination, whether it be performed by the judge after conviction or by a parole board in deciding when and whether to release, entails a primary focus on the intangibles of the rehabilitative potential of the offender coupled with the needs of society for protection and for vindication. Here, one would suppose, the range of the relevant reaches its apogee and the grounds of judgment rest maximally on the expertise of the professional clinical judgment. By contrast, however, commitment redeterminations, whether by a court to revoke probation or by an agency to revoke parole, involve an inquiry of narrower ambit, whatever the overlay of discretion, of whether the releasee has complied with standards of behavior which the judge or board expressly made the condition of continued liberty. It is useful to consider separately the role of counsel in these two types of proceedings.

A. SENTENCING—TYPE DETERMINATIONS

It would seem plain enough that the rigidity and formality of the full blown processes of the adversary proceeding are not adequate to bring into focused consideration the imponderables involved in sentencing-type determinations. In these proceedings, there is clearly need for discrete inquiries by investigators into the

116. Rossman, J. concurring in *Ex parte Anderson*, 191 Ore. 409, 450, 229 P.2d 633, 650, Annot., 29 A.L.R. 2d 1024 (1951).

offender's history, judging and speculating by experts concerning the significance of the offender's personality and a more active role by the deciding tribunal than is contemplated in the ordinary adversary proceeding. But to say so much is not at all to say that there is no room for participation by the offender in the processes of judgment with whatever help his lawyer can provide. To argue as has Commissioner Bates that sentencing determinations do not raise a "forensic question" and that "it is not a question of law"¹¹⁷ misses the point, since the lawyer's contribution is not limited to his knowledge of the law but extends to his professional skill in the complicated processes of fact determinations. If matters of fact were irrelevant to the inquiry, the argument against counsel would have greater force. Indeed, this seems to have been Judge Breitel's thought in joining Commissioner Bates' opposition to providing for the right to assistance of counsel at parole release hearings in the American Law Institute. He observed:

A Parole Board does not determine facts and principles and rules in any way at all, as we do either before an administrative agency or a court. The hearings that they actually conduct are not for the purpose of ascertaining the truth as an issue. It is to make a discretionary, inside-the-system determination whether a man should be retained or released.¹¹⁸

But surely factual truth is not irrelevant to such an inquiry. Whatever validity the correctional judgment has rests at bottom upon the assumption of a pattern of facts concerning the offender's personality and history. What were in fact all the relevant circumstances surrounding personal difficulties the offender has had? What are the facts relevant to his past brushes with the law? How significant factually is his record of prior arrests? What elements in his history suggest a favorable prognosis? These are matters of fact; to say that the decider has other means than the hearing to discover these facts is not to say that the offender has no legitimate interest in seeing to it that the decider makes determinations upon a factual record which does justice to the offender, as he sees it, and which is free of outright error. The usefulness of counsel in assisting the offender in insuring fullness and accuracy of the factual record, in presenting aspects and implications of the facts favorable to him, and in guarding against unfavorable implications, let alone rumor and overhasty conclusions, seems hardly debatable. His help, it may be added, is particularly needed in view of the obvious fact that the average offender is commonly ill-equipped, in terms of

117. 33 ALI PROCEEDINGS 261 (1956).

118. *Id.* at 264. See also Rossman J., concurring in *Ex parte Anderson*, 191 Ore. 409, 448, 229 P.2d 633, 649 (1951).

education, articulateness and situation, to carry the burden himself.¹¹⁹

Moreover, the uses of counsel are not limited to the fact resolving function which underlies the proper exercise of the expert clinical judgment of the court or agency in evaluating the reformatory potential of the offender. In virtually all cases, to some degree, and in certain cases, like the sex offender, to a significantly large degree, the judgment turns upon the weightiness of considerations of retribution, moral reprobation, community reassurance or deterrence as to which in no realistic sense is there called into play the expert professional judgment of the decider.¹²⁰ The very subjectivism of this type of judgment would appear to make altogether useful the kind of search into basic values and into their application in the circumstances of the offender toward which able counsel might readily contribute.

Of course, even granting the help a lawyer may render in behalf of the offender there is still the question whether it is desirable that he be permitted to have it. But it is a question to which basic considerations of fairness and justice appear to require an affirmative answer. There is no apparent reason why there should be abandoned in the area of sentencing or paroling offenders the traditional value, associated closely with the root idea of a democratic community, that a person should be given an opportunity to participate effectively in determinations which affect his liberty. Indeed, the cultivation of a sense of fair dealing in the offender would appear to be helpful, if not essential, in attaining one of the principal goals of these correctional processes, the rehabilitation of the offender. All this would be so even if judges and parole boards were, unlike all other individuals in authority, paragons of virtue and infallibility. In fact, of course, the often inexpert character of correctional agencies, the oft-cited biases of occasional parole board members, the pressure of work under which case investigators and boards work¹²¹ would seem to make particularly welcome to the conscientious court or agency whatever added assurance of accuracy and fairness is contributed by the participation of the offender and his lawyer in the processes of decision.

There is another, though subtler, contribution which a lawyer can make to the integrity of the sentencing or parole decision. This is the influence he can exert toward more rational decision mak-

119. See the observations of Mr. James V. Bennett, Director of the Federal Bureau of Prisons, 33 ALI PROCEEDINGS 262 (1956). See generally Tappan, *The Role of Counsel in Parole Matters*, 3 PRAC. LAW 21 (Feb. 1957).

120. It is well known, for example, that sex offenders as a class are marked by both a very low recidivism rate and a very low parole rate.

121. See Tappan, *supra* note 119, at 25.

ing. It is, of course, true that what judgment the decider finally makes on the basis of the factual record is altogether a matter of discretion. There is, in this area, nothing resembling legal rules which require a given disposition on a showing of a given set of facts. Yet, unless the judgments are to be regarded as totally whimsical, they must be made with more or less consistency in response to some conceptions or principles which transcend the subjective feelings generated by the circumstances of the particular case. It has traditionally been the role of the lawyer in the common law system to participate actively in evolving legal principles out of a pattern of case by case adjudication in which the governing structure or principle is at first only dimly, partially or not at all perceived. Lawyers can be nettling and tiresome in demanding reasoned and supportable conclusions, responsive to the assumptions of principle implicit in past decisions. But that surely is a small price to pay for the impetus to careful, sound and consistent consideration of the elements of decision. It would seem to me fundamentally fallacious to argue, as has Judge Breitel, that only after several decades of experience when governing standards have become determined will there be an important function for lawyers to provide.¹²² This ignores two significant considerations. In the first place, the very absence or anarchy of standards presents the maximum need for whatever protection a lawyer can provide against arrant subjectivism and arbitrariness, given the absence of substantive legal control created by the lack of standards.¹²³ In the second place, the argument ignores the fundamental contribution which lawyers can make toward the evolvement of generalized grounds of decision.

Some, perhaps, may feel it visionary to contemplate the lawyer's role as the inculcation of principle and coherence into the anarchy of sentencing and parole decisions. Even so, a significance of counsel, particularly before parole boards, is that his very presence tends to demand answerability. Under the pressures of an intoler-

122. 33 ALI PROCEEDINGS 265 (1956).

123. Compare the observations of Mr. Justice Frankfurter, dissenting in *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950), where the Court sustained the constitutionality of a state statute vesting in the Governor the authority to determine whether intervening insanity warranted reprieve of a death sentence, without affording the prisoner an opportunity to be heard. Speaking of "the tentative and dubious knowledge as to mental diseases and the great strife of schools in regard to them" and "the treacherous uncertainties in the present state of psychiatric knowledge", Mr. Justice Frankfurter implied that these factors added to the unfairness of the ex parte determination. *Id.* at 24-25. He suggested that the evil of "a hurried, one-sided, untested determination of the question of insanity" was augmented by the fact that the answers "are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship." *Id.* at 25.

able work load and an almost impossible task, it is the human response for boards to fall into habits and routines which make their daily task more readily manageable—cursory interviews, hasty reviews of reports, half-considered dispositions, handy but crude rules of thumb to govern dispositions. Counsel, an outsider with no involvement in the agency's problems, can be a healthy influence in the stimulus and challenge his very presence tends to provide to continuing self-appraisal by the board of accepted routines and assumptions. What Professor Allen observed with respect to counsel at juvenile proceedings is equally applicable to parole proceedings: "[I]t is good for an institution to have on the premises persons sufficiently independent and sufficiently brash to challenge, on occasion, the assumptions and methods of the institution. I know of no better therapy for the messianic complex."¹²⁴

Finally, it should be pointed out that the recognition of the lawyer's role in parole determinations is rather the projection of existing processes than the innovation of new ones. As was stated earlier, full recognition is given to the lawyer's place in the judicial sentencing procedures, ever since the advent of the wide-ranging pre-sentence reports. Since parole determinations are in all relevant respects of principle of a similar order to sentencing determinations, recognition of a like place for counsel before parole boards has the added virtue of consistency.

B. REVOCATION DETERMINATIONS

In so far as the decision to revoke a conditional release, whether probation or parole, turns upon considerations of clinical and professional judgment, all that was said concerning the role of counsel in sentencing and parole release determinations is applicable here

124. *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 SOC. SERV. REV. 107, 119 (1959). Consider in this connection the remarks of Mr. Lee B. Mailler, Chairman of the New York Board of Parole in the American Law Institute, Meeting of the American Law Institute Group in Connection with the Model Penal Code, p. 11 (Dec. 21, 1956, Mimeographed Transcript):

There is no necessity for him [parole violator] to have counsel to come back again if he has clearly violated his provisions of release. There is no reason for him to come again before a Board of Parole with an attorney to try and slip out of the violations which he has committed. In the State of New York it has worked very well. The Board of Parole at the present time has been conducting on an average of 1000 parole hearings a month—in other words over 12,000 a year. These people are dedicated men. They are not politically influenced in any way, shape or form. If parolees or inmates of institutions could feel they could have outside legal advice, either in the preparation for their appearance before parole, or after they have transgressed and are about to be brought back, it would weaken the whole system of the operation of parole.

as well. However, as was stated earlier, the determination to revoke and recommit because of conduct in violation of the conditions on which release was granted, involves, if not exclusively, then at least centrally, the fairly narrowly focused issue of what the conduct of the releasee actually was and whether it constituted a violation of a stated condition, entitling the court or agency to consider whether revocation is thereby indicated. Given the character of the issue to be determined and the fact that the continued liberty of a person depends on the outcome, it is difficult to understand the view sometimes expressed that a lawyer has no proper business in these matters. The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the "immutable principles of justice." Indeed, in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act. No doubt it is simpler and faster for a court or a board to make the determination by whatever means seem to it sufficient to persuade—whether it be an informal talk with the parole officer or a brief interview with the prisoner or a written report by an investigator. But it would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel. The force of the argument that the releasee owes his liberty to a beneficent act of grace and enjoys no right to his liberty, even where the conditions of its grant have been complied with, has, unfortunately, precluded the application of the constitutional command of due process.¹²⁵ There is all the more reason, therefore, for courts and legislatures to recognize voluntarily the obligations of common justice implicit in the claim for legal representation. Supporting a provision in the Model Penal Code requiring, in probation revocation, that the probationer be given notice and a hearing at which he may introduce and controvert evidence and be represented by counsel, the Reporter's comment observes: "This is an area where dangers of abuse are real and the normal procedural protection proper. That a defendant has no right to the suspension or probation does not justify the alteration of his status by methods that must seem and sometimes be unfair."¹²⁶ The point is well taken, though it is not easy to see why, in principle, the argument did not carry the Model Penal Code to recognize the

125. See *Escue v. Zerbst*, 295 U.S. 490, 492-93 (1935); *Burns v. United States*, 287 U.S. 216 (1932).

126. MODEL PENAL CODE § 301.4, comment (Tent. Draft No. 2, 1954).

appropriateness of similar guarantees in parole revocations before lay agencies, where, it would seem, the dangers of abuse and unfairness are even greater.¹²⁷ It would be unimaginable, for example, that any court would follow, in probation revocation proceedings, a practice which was carried on for years by the United States Parole Board—not only declining to advise the releasee of his privilege to hire counsel, but refusing to permit retained counsel to appear.

If concreteness is needed to establish the singular appropriateness of counsel both in probation and parole revocations, the records in many decided cases supply it forcefully. In *Fleming v. Tate*,¹²⁸ parolee was sent back to prison to serve out the remaining 24 years of his original 40 year sentence because, while on parole, he left the District of Columbia to attend his sister's funeral in Virginia in violation of a condition that he should not leave the District without the written permission of the board. His claim that he obtained permission from his parole sponsor was rebuffed with the suggestion that he should have gotten permission from an employee of the board. The board revoked for failure to get permission from the proper party, rather than failure to get it in writing from the board as the condition required, after refusing to hear the testimony of his parole sponsor or to allow his counsel to appear. Not surprisingly the court took this occasion to hold that the board's practice of not permitting counsel or witnesses at parole revocation hearings was in violation of the statutory grant of a hearing.

In *Moore v. Reid*,¹²⁹ a person conditionally released after earning good time credit was summarily arrested and delivered to jail for "associating" with persons having a criminal background in violation of a condition of his parole. As the court read the record, parolee manifested a complete misapprehension of his conditional status as a releasee, and failed to appreciate the significance of the hearing before the Examiner or the extent of the latter's authority. Further, the criminal "association" took the form

127. The Model Penal Code, although providing for notice, hearing and opportunity to rebut and present evidence in parole as well as probation revocation proceedings, provides in the former only that the parolee may "advise with his own legal counsel." MODEL PENAL CODE § 305.21 (Tent. Draft No. 5, 1956). [Now renumbered as § 305.16.] Another notable difference in the Model Penal Code's treatment of probation and parole revocation is that while in the former an actual conviction of a crime is required for revocation, in the latter it is sufficient that the parole board itself determine that the parolee committed a crime. Compare MODEL PENAL CODE § 301.3 (Tent. Draft No. 2, 1954) (probation revocation) with MODEL PENAL CODE § 305.21 (Tent. Draft No. 5, 1956) [renumbered § 305.16] (parole revocation).

128. 156 F.2d 848 (D.C. Cir. 1946).

129. 246 F.2d 654 (D.C. Cir. 1957).

of parolee writing innocent letters and post cards, though under alias, to a former cellmate, apparently not fully aware until after the event that he was authoritatively forbidden to do so. The court itself took the view that the condition was not susceptible to interpretation that sending the communications constituted an association with improper persons. Indeed, the parole officer's misinterpretation appeared itself to be something of a ruse since he later testified that he suspected the appellant might be laying the foundation for a prison break. The court observed that, "If ever a lawyer were needed, it would seem that this appellant needed one."¹³⁰

In *United States ex rel. McCreary v. Kenton*,¹³¹ the court declined to follow the District of Columbia view that right to counsel was implicit in the grant of a hearing, but reversed a parole revocation with observations that shake the court's premise:

The transcript discloses that the Board member, after identifying the prisoner, asked one question—the one which the Member herself was supposed to answer—"How did you violate your release?" When the prisoner said he wanted a chance to prove that he had been living a decent life, he was not asked a single question about sources of information or proof which he could point out which would exonerate him or contradict the claimed violations. The prisoner's representations were not discussed with him at all. The statute contemplates something more than the sterile, pro-forma proceeding adopted in this case.¹³²

As a final example, the proceedings in *Hiatt v. Compagna*¹³³ bear mention, not as representative of common practice but as exemplative of the kind of abuse which can occur. In that case,

130. *Id.* at 657.

131. 190 F. Supp. 689 (D. Conn. 1960).

132. *Id.* at 691-92. Courts in probation revocation sometimes fall into the same impatient and hurried inquiries. Compare the following verbatim report of such a proceeding, *In re Levi*, 39 Cal. 2d 41, 43 n.1, 244 P.2d 403, 404 n.1 (1942):

"The Court: People v. Eddie D. Levi.

"Mr. Levi, they tell me you have had some more trouble since you were out.

"The Defendant: I went to Pedro to my brother's—

"The Court: You got into some sort of a drunken brawl?

"The Defendant: No. They say I was drunk.

"The Court: Yes. Your wife has never come out here and your children are still back in Chicago, is that correct?

"The Defendant: Sure.

"The Court: Well, because of the serious nature of your offense and because the Court specifically admonished you that you were not under any circumstances to use intoxicating liquor and because you rewarded the consideration that was given you by going out and getting drunk within five days after your release, your probation is revoked."

133. 178 F.2d 42 (5th Cir. 1949), *aff'd without opinion by equally divided court*, 340 U.S. 880 (1950).

according to testimony of some board members before a congressional committee, no grounds for revocation of parole existed; yet, the board agreed to act on congressional recommendations for revocation, a widescale campaign of publicity having been launched against the parolees. The incident led a dissenting judge in the Court of Appeals to observe:

Neither adverse newspaper criticism of the granting of parole or a demand or request by a subcommittee of the Committee on Expenditures in the Executive Department of Congress can lawfully supplant the requirement of the statute for "reliable information of violation of parole". . . . Neither newspapers, sub-committees, political repercussions, whims, or capriciousness, singly or collectively, without more, justifies the incarceration or re-incarceration of an individual longer than it is reasonably necessary to afford him a full and fair hearing on charges adduced against him.¹³⁴

There is one last point relevant to the use of counsel in revocation proceeding, which transcends the values of justice and fairness as ends in themselves and as safeguards against abuse. It has not escaped those who have been concerned with the institution of procedural regularity that one of its prime contributions is as a psychological stabilizer; acceptance of law is substantially furthered to the extent that those subject to its rule observe its workings with consistent, scrupulous fairness. The inculcation of a similar sense on the part of those subject to the correctional laws tends to further, therefore, the very readaptation to the norms of society which it is the ultimate purpose of these laws to achieve. As stated by Justice Prettyman:

The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective, and thorough processes of the machinery of the law. And hardly any circumstance could with greater effect impede progress toward the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy, or impervious to facts. The crisis in the rehabilitation of these men may very well be the treatment which they receive when accused of an act violative of the terms of what must be to them a precious privilege.¹³⁵

134. 178 F.2d at 47-48. On remand the district court discharged petitioners from custody on the ground that the revocation orders were arbitrary, unsupported by evidence and total nullities, stating: "The parole system, which marks a great and wise advance in penology, will lose public confidence and effectiveness unless it is administered with independence, courage, fairness and justice. The courts as well as the Board should be alert to safeguard against arbitrary action." *Campagna v. Hiatt*, 100 F. Supp. 74, 81 (N.D. Ga. 1951).

135. *Fleming v. Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946). See also *State v. Zolantakis*, 70 Utah 296, 303, 259 Pac. 1044, 1046 (1927).

C. CONSIDERATIONS OF PRACTICABILITY

The final and inevitable inquiry is whether it is practical and feasible to authorize representation by counsel in parole and revocation proceedings, given the actual circumstances surrounding the working of these institutions, however desirable it appears in principle to do so. Here it is necessary to consider separately the making of these determinations by courts and administrative agencies. So far as judicial determinations are concerned—sentencing, probation grants and probation revocations—there appear to be no considerations of practicality not applicable to the criminal trial itself. Indeed, the argument of convenience is rarely made. It is where determinations are made by parole agencies—granting or revoking parole—that the practical consequences of recognizing the right to counsel are principally adduced.¹³⁶

A common objection derives from the apprehension that parole agencies, already burdened with caseloads that place a maximum strain upon their institutional capabilities, might ultimately falter under the added delays and prolongations which representation by counsel would entail. Some of this objection is quite real. The presence of counsel would, no doubt, serve as a formidable obstacle to such saving short-cuts as the two-minute interview and the out of hand revocation to which some boards have been led by institutional and personal pressures. And no doubt as well, average time devoted to the ordinary parole or revocation hearing at which counsel is present might be appreciably more than that at which only the offender is present. This, however, is to be counted as an advantage rather than a disadvantage, for the reasons earlier suggested. The problems of overburdened parole

136. Considerations of practicality probably led the Model Penal Code to the disparity stated *supra* note 127 of granting the right to representation by counsel at the hearing in probation revocation, though not in parole revocation. According to the Reporter it was indeed such considerations which led him not to propose the right to representation by counsel in parole release hearings. See remarks of Professor Wechsler in 33 ALI PROCEEDINGS 259 (1956). As originally proposed, MODEL PENAL CODE § 305.11(2) (Tent. Draft No. 5, 1956) provided: "A prisoner shall be permitted to advise with his own legal counsel in preparing for a hearing before the Board of Parole." After a spirited exchange of views at the 33d Annual Meeting of the American Law Institute (PROCEEDINGS, *supra* at 258-67), an amendment was voted (by a 21-19 vote) to provide: "The prisoner shall be entitled to advise with his own legal counsel in preparing for a hearing before the Board of Parole, and shall be entitled to have assistance of counsel at such a hearing, subject to control by the Board as to any abuse of that privilege." (Emphasis added.) The council reconsidered the question at its March 1957 meeting and resolved to recommend that the Institute reconsider its action and approve the following formulation, as § 305:7(2): "A prisoner shall be permitted to advise with any persons whose assistance he reasonably desires, including his own legal counsel, in preparing for a hearing before the Board of Parole."

boards would appear remediable by measures directed to the problem rather than by the pursuit of measures which render the work of the boards less just and less adequate.

On the other hand, some of the apprehension that lawyers would bog down the system is less than real, stemming from the layman's traditional distrust of lawyers as masters of the art of frustration, sworn to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion.¹³⁷ For the reasons suggested earlier, this view is a somewhat primitive distortion of the significance of counsel in the adversary proceeding. But to the extent that there is some basis for this concern, it would hardly appear necessary to bar entry to lawyers to allay it. The issue is not whether the lawyer's paraphernalia of technicalities appropriate to other areas are proper in parole matters; no one has seriously suggested that rules of pleading and evidence should be imported into parole hearings. The issue is whether the attorney may speak for his client, given the areas of relevance of parole and revocation proceedings and always subject to the authority of the agency to draw the ground rules. A sensible and pragmatic adaptation of the nature of legal advocacy to the needs and purposes of the inquiry is as plausible in parole as it has proven to be in such "non-legal" areas as labor arbitration and the regulatory and adjudicative work of administrative agencies.

Furthermore, these arguments—based on the delay and confusion which lawyers would introduce—are apparently founded on the assumption that to recognize the right of offenders to retain counsel at parole or revocation hearings will inevitably lead great numbers of offenders to take advantage of the right. No evidence has been adduced to indicate that this has happened in the jurisdictions which recognize such a right in revocation proceedings; given the dedicated animus to lawyers of many articulate parole administrators the omission of proof is itself telling. Indeed it has been indicated by the Chairman of the Michigan Parole Board that although the right to counsel in revocation proceedings, other than those based on conviction of crime, was created by statute in 1937, in only a handful of the thousand or so revocations each year has the offender elected to appear at a hearing with counsel.¹³⁸ Maryland has apparently had a similar experi-

137. See generally Swisher, *The Supreme Court and the "Moment of Truth"*, 54 THE AMER. POL. SCI. REV. 879 (1960).

138. Remarks of Mr. Ross Pascoe to Summer Research Training Institute on the Administration of Criminal Justice, Madison, Wisconsin, Summer 1960.

ence. A synopsis of a recent American Correctional Association workshop on parole board problems reveals:

In Maryland, their Court of Appeals has ruled that all persons returned as violators are entitled to an attorney. Maryland provides a form for each inmate to determine if he desires this service and it was indicated that very few have taken advantage of this right.¹³⁹

Since only a rare statute or two affords the right to be represented by counsel at parole release proceedings there is no way of estimating what impetus to obtaining counsel such a statutory recognition would create in the prison community. But for whatever it is worth there is no evidence of a mass retention of counsel in those jurisdictions where boards permit counsel as a matter of practice.

Of course, there is inevitably a strong moral and practical pressure, once the right to counsel is recognized, to extend the benefit of that right to all who claim it, whether or not they can afford it, through provisions for the appointment of counsel. And given the multitude of parole and revocation proceedings it may prove inordinately expensive and otherwise impractical for the state to provide counsel. It may be that one answer lies in expanding the duties of public defenders to include parole board representation.¹⁴⁰ In all events, this is a problem which inheres in the dilemma of adhering to an adversary process without offending principles of equal protection for the great majority who lack the resources to obtain its benefits. It is precisely the problem which exists with regard to counsel at the trial itself; indeed, it is the overriding problem. It is hardly a proper solution to the institutional inadequacies which create the problem to deprive those who can obtain counsel of their right to do so. Financial inability to hire counsel when the need is legally recognized may well create a sense of unfairness and perhaps a degree of hopelessness in inmates and parolees and this may operate adversely to the rehabilitative end. But it is a matter of balancing gains and losses and one may reasonably find a greater injustice and obstacle to reform in the blanket refusal to permit representation by counsel, especially in view of the contributions to the integrity of the parole process itself which the presence of retained counsel tends to make.

The final practical objection to counsel at parole matters may be stated as follows: What kind of attorney, it is asked, will be attracted to practice before parole boards? Judging from the character of many attorneys who specialize in minor matters in the

139. PROCEEDINGS OF THE 89TH ANNUAL CONGRESS OF CORRECTION OF THE AM. CORRECTIONAL ASS'N, WORKSHOP V, COMMITTEE ON PAROLE Bd. PROBLEMS 83 (1959).

140. See the Minnesota Public Defender statute, *supra* note 50.

criminal courts it is not unreasonable to suppose that the same "jail-house lawyer" type will be the ones typically called upon to represent prisoners and parolees. Persons of this calibre have done little to impart integrity into the processes of the criminal trial and it is not likely they would do so in parole proceedings. The average offender generally possesses a jaundiced view of the workings of the institutions of criminal justice, tending to regard the fix, or at least influence, as of inestimably more significance than the merits of the case. The fear is that the type of lawyer who will specialize in these matters will feed upon and encourage this attitude, thus converting legal representation into a commercial relationship in which, in the offender's mind, if not sometimes in actuality, liberty is bought by paying a fee.¹⁴¹

There is no doubt much to the argument. It is particularly in the administration of criminal justice in this country that the bar as a group has failed to discharge its responsibilities. The highest minded and the most competent are not, as a group, the lawyers most attracted to criminal work. The jail-house lawyer is a reality and not a bogeyman of parole administrators. But the presence of many bad lawyers is not a dispositive argument, any more in parole proceedings than in criminal trials, for excluding all lawyers. The unhappy inadequacies of some lawyers, whether manifested by influence peddling, venality and incompetency, or narrow contentiousness and obstreperousness are amenable to measures short of the totally self-destroying remedy of closing the door to all legal representation. The challenge is to the bar as well as to the agencies involved, a challenge eloquently put in general terms in the Report on Professional Responsibility of the Joint Conference of the American Bar Association and the American Association of Law Schools:

The lawyer's highest loyalty is . . . the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

All institutions, however sound in purpose, present temptations to interested exploitation, to abusive short cuts, to corroding misinterpretations. The forms of democracy may be observed while means are found to circumvent inconvenient consequences resulting from a compliance with those forms. A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foun-

141. For examples of the argument I have tried to describe see comments to National Probation and Parole Association, Standard Probation and Parole Act, as quoted in Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 LAW & CONTEMP. PROB. 544, 551-52 (1958), and the statements of Commissioner Sanford Bates in 33 ALI PROCEEDINGS 259-67 (1956).

dations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable cooperation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness. This is a duty that attaches not only to his private practice, but to his relations with the public. In this matter he is not entitled to take public opinion as a datum by which to orient and justify his actions. He has an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process.

Without this essential leadership, there is an inevitable tendency for practice to drift downward to the level of those who have the least understanding of the issues at stake, whose experience of life has not taught them the vital importance of preserving just and proper forms of procedure. It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" is not a matter of abstract philosophic conviction, but of direct professional experience. If the lawyer fails to do his part in educating the public to these dangers, he fails in one of his highest duties.¹⁴²

142. Reprinted at 44 A.B.A.J. 1159, 1162, 1216 (1958).

