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IV

RIGHT TO COUNSEL AFTER THE FIRST APPEAL IN CAPITAL CASES

Another fundamental challenge to the death penalty and the procedures surrounding its exercise arises from California's failure, after the first appeal, to provide effective assistance of counsel to indigent prisoners convicted of capital crimes.

The indigent prisoner's right to appointed counsel in post-conviction processes is only the logical extension of the line of United States Supreme Court and California supreme court decisions which have found a right to counsel in virtually all other stages of state criminal proceedings. The United States Supreme Court has required the courts to appoint counsel when the investigation focuses on the individual suspect, when the suspect is taken into custody, at lineup, for arraignment proceedings, at the preliminary hearing, in preparation for trial, during trial, at sentencing proceedings, on the first appeal of right, and arguably at parole revocation proceedings. The Supreme Court of California has also found the right to counsel in collateral proceedings when the petition filed pro se states a prima facie claim for relief. Thus, California guarantees the invaluable assistance of counsel at almost every stage at which the defendant might lose his rights if he were to fend for himself.

The postconviction period in a capital case begins after the trial court finds the defendant guilty and sentences him to death and after the

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California supreme court denies his automatic appeal.1 After rejecting the appeal, the California supreme court remits the case to the trial court which issues a death warrant and sets a date of execution.1 Within ninety days the defendant may file a petition for a writ of certiorari in the United States Supreme Court,1 which normally grants a stay of execution to allow itself time to consider the petition.1 If the Supreme Court denies the petition or affirms conviction after hearing, the trial court sets a second date of execution.1 The defendant may then petition the California supreme court for a writ of coram nobis1 provided that he can allege the existence of some fact which through no fault of his own was unknown at the time of trial, but which, if known, would have prevented his conviction.1

The defendant may also petition for a writ of habeas corpus alleging some jurisdictional or constitutional defect in the prior proceedings.1 Having failed to obtain collateral relief and having exhausted state remedies,1 the prisoner may petition for habeas corpus in the federal court of the district in which he is held, in the circuit court, or in the


1469. CAL. PEN. CODE §§ 1239(b) (direct appeal), 1243 (stay of execution during appeal) (West 1956).
1470. CAL. PEN. CODE § 1193(1) (West 1956).
1473. CAL. PEN. CODE § 1227 (West 1956).
1474. CAL. PEN. CODE § 1265 (West 1956).
1476. CAL. PEN. CODE § 1473 (West 1956). The writ of habeas corpus may be issued by the superior courts, district courts of appeal, the Supreme Court of California, or by any judge of these courts. “In death penalty cases petitions for habeas corpus are normally filed in the superior court in Marin County (the location of San Quentin Prison), in the Supreme Court of California, or simultaneously in both courts.” Comment, Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94, 117 (1958) (footnotes omitted).

The scope of the writ of habeas corpus is discussed in R. Sokol, A HANDBOOK OF FEDERAL HABEAS CORPUS (1965).
United States Supreme Court. The prisoner may apply for clemency from the Governor of California. If the Governor does not commute the sentence, the warden of the prison in which the prisoner is held may determine that there is good reason to believe that the condemned man is insane. If the prisoner is considered sane, he is executed.

While California leads many states in providing appointed counsel for indigent prisoners who qualify for a hearing on their claims for collateral relief and in providing for the assistance of counsel in the preparation of petitions to the United States Supreme Court, the state does not provide counsel to indigents as a matter of right at the following stages between the first direct appeal of right and the execution: (1) The preparation of a petition for habeas corpus to the California supreme court or to the superior court in the county in which the prisoner is incarcerated; (2) the preparation of an application for coram nobis to the California supreme court; (3) the preparation of a petition for habeas corpus to the federal court of the district where the prisoner is held; (4) representation at habeas corpus proceedings in the federal district court; (5) representation at executive clemency proceedings; and (6) petition and hearing to determine if the prisoner is sane after appeal and prior to the date set for execution.

This portion of the Comment argues that several constitutional provisions require the appointment of counsel at each of these post-conviction proceedings and, indeed, during the entire postappellate

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1478. 28 U.S.C. §§ 2241, 2242 (1964). Normally, applications are filed with the appropriate district court. If the prisoner applies directly to a higher court, he must state his reasons for not directing the petition to the district court. E.g., Stidham v. Swope, 83 F. Supp. 370 (9th Cir. 1949) (Denman, C.J.).

1479. CAL. PEN. CODE §§ 4800-52 (West 1956).

1480. Id. §§ 3700-03.

1481. Id. §§ 3704 (procedure if found sane), 3600-07 (execution) (West 1956).

1482. On August 15, 1968, the Governor of California approved S.B. 1028, an act to amend section 1239 of the Penal Code, which provides any indigent prisoner whose death sentence has been affirmed by the California supreme court with an appointed counsel to prepare a petition to the United States Supreme Court. It is hoped that other states will follow California's lead. See note 1681 infra and accompanying text.

period. The constitutional arguments are first developed with regard to petitioning for collateral relief and then are applied to the other available procedures. Not only is the sixth amendment guarantee of the right to counsel applicable to these postappellate stages, but the requirement of a fair hearing implicit in both the due process clause and the equal protection clause of the fourteenth amendment also demand the appointment of counsel for indigent prisoners. Finally, the right to petition the government for a redress of grievances might also be used to reach this result. The right to the assistance of counsel for all indigent prisoners in the postconviction period is desirable. But if extending this right to all those charged with felonies is presently impractical, the state should afford appointed counsel to at least those prisoners convicted of capital crimes.

A. The Sixth Amendment Requirement

The sixth amendment, which is enforceable against the states through the due process clause of the fourteenth amendment, provides that, "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." The logical corollary of this right to counsel is the right of indigents to have counsel appointed by the court at state expense. The Supreme Court's most recent formulations guarantee the right to counsel at every "critical stage" in the "criminal proceedings." In order for the sixth amendment to apply, postconviction procedures must be both "critical" and "criminal."

1. The Right to Counsel at Every Critical Stage

A "critical stage" in the pretrial proceedings is one in which the
The presence of a lawyer is necessary to preserve the suspect's possible defenses and rights so that they may be asserted at trial. The lawyer's presence at the critical stages of investigatory procedures prevents the accused from losing his privilege against self-incrimination through failure to understand or assert it. At the lineup the lawyer can insure against improper handling of pretrial identifications of the suspect by witnesses. The accused requires the "guiding hand of counsel" at arraignment and preliminary hearing to advise him of his rights. The assistance of counsel in preparation for trial and at trial helps to assure a fair hearing and complete assertion of the accused's rights and defenses. The assistance of counsel on direct appeal guarantees that the accused can raise errors committed by the trial court, which deprived him of his rights and defenses.

The California supreme court has held that if an indigent prisoner can make a prima facie showing of a claim for collateral relief in his petition filed pro se, the court will provide the petitioner with appointed counsel for the postconviction hearing on his claim. While the Ninth

more expansive language which seems to provide a right to counsel at every stage in the criminal proceedings, particularly in capital cases. Powell v. Alabama, 287 U.S. 45, 69 (1932).


1499. Although the majority of the Court in Douglas v. California, 372 U.S. 353, 357-58 (1963), relied solely on the equal protection clause to find a right to counsel on the first appeal of right from a criminal conviction, the developed "critical stage" rationale would seem to be just as applicable to the first appeal. Apparently there is some fear that if the Court finds the sixth amendment applicable to direct appeal, the Court must also find that due process demands that the states afford appeal procedures. Comment, In Re Gault: Children Are People, 55 CALIF. L. REV. 1204, 1216-17 (1967). It is settled that there is no due process right to an appeal from a criminal conviction. Griffin v. Illinois, 351 U.S. 12, 18 (1956); McKane v. Durston, 153 U.S. 684, 687-88 (1894). It is difficult to imagine that there is a due process right to lineup or other investigatory procedures for which there is a sixth amendment right to counsel. There would seem to be no reason why the sixth amendment could not apply to direct appeal or post-conviction procedures. Cf. note 1564 infra.

Circuit Court of Appeals does not require the appointment of counsel in all habeas corpus proceedings, the district courts apparently follow a practice of providing counsel to all petitioners who qualify for hearings. The appointment of counsel as a matter of right is thus lacking both for federal postconviction proceedings and for purposes of preparing petitions for collateral relief in state and federal courts.

Collateral procedures for challenging the sentence afford the accused an occasion for asserting rights and claims which may remain after direct appeal. Some of the rights which he may assert collaterally are the same rights which were protected by the presence of counsel at other stages. The petitioner might contend that the test for the voluntariness of his confession which led to its admission in the trial was constitutionally insufficient. He might raise as error the trial court's

1501. The Ninth Circuit Court of Appeals has held that due process may demand the appointment of counsel in some postconviction proceedings. Eskridge v. Rhay, 345 F.2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996 (1966); Dillon v. United States, 307 F.2d 445, 446-47 (9th Cir. 1962); Hatfield v. Baileeaux, 290 F.2d 632, 635-36 (9th Cir.), cert. denied, 368 U.S. 862 (1961). But see Greber v. Schneckloth, 241 F.2d 710 (9th Cir. 1957) (no due process right to counsel because habeas corpus is civil in nature). Even without finding a right to counsel the court may appoint a lawyer to represent an indigent prisoner, e.g., Dillon v. United States, supra at 448.

It is the practice of at least four districts of the Ninth Circuit to appoint counsel for indigent prisoners in all habeas corpus or motion to vacate sentence cases in which an evidentiary hearing is required. Letter from Paul Dezurick, Habeas Corpus Clerk, U.S. District Court, Northern District of California, to authors, March 14, 1968 (on file with the California Law Review); letter from M.D. Crocker, Judge, U.S. District Court, Eastern District of California, to authors. March 18, 1968, (on file with the California Law Review); letter from Gus J. Solomon, Chief Judge, U.S. District Court, District of Oregon, to authors, March 19, 1968 (on file with the California Law Review); letter from James M. Carter, Judge, U.S. Court of Appeals for the Ninth Circuit, answering for the Southern District of California, to authors, March 19, 1968 (on file with the California Law Review).

Two district courts have apparently declared the right to counsel in all postconviction proceedings. La Faver v. Turner, 231 F. Supp. 895, 898-99 (D. Utah 1964), aff'd, 345 F.2d 519 (10th Cir. 1965) (right to counsel on appeal from state court denial of postconviction relief); Henderson v. United States, 231 F. Supp. 177, 178 (N.D. Cal. 1964) (right to counsel on motion to vacate sentence).

Some federal court decisions have considered only the motion to vacate sentence under 28 U.S.C. § 2255 (1964) which is unavailable to state prisoners. Habeas corpus and a motion to vacate sentence are practically equivalent. Dillon v. United States, supra at 448; Note, Civil-Discovery In Habeas Corpus, 67 Colum. L. Rev. 1296 & n.1 (1967). They will be treated as the same for right to counsel purposes in this Comment, unless noted otherwise.


Postconviction procedures may be the only occasion to raise certain issues. See Comment, Right to Counsel in Criminal Post-Conviction Review Proceedings, 51 Calif. L. Rev. 970, 978 (1963).

failure to provide him with counsel at preliminary hearings, during trial or on appeal. The petition for postconviction relief might allege that pretrial publicity denied the prisoner a fair trial. The petitioner might assert by collateral petition that some state procedural rule deprived him of the ability adequately to enforce his right to be free from an unreasonable search and seizure. Other rights which the accused can assert collaterally may have been unavailable to him at earlier stages. Under recent enlargements of the requisites of procedural due process, in fact, many of the rights upon the denial of which collateral relief might be based are unlikely to be apparent at earlier criminal proceedings and therefore are not waived for failure to raise them at that time. The prisoner might discover new material evidence which the prosecution had suppressed in violation of due process. He might also find that representatives of the state had knowingly used perjured testimony on a material issue in his trial; or he might raise by coram nobis his legal insanity at the time of the trial.

1504. E.g., In re James, 38 Cal. 2d 302, 240 P.2d 596 (1952).
1509. Postconviction procedures may afford an individual his only remedy for a deprivation of his fundamental rights. For example, in Giles v. Maryland, 386 U.S. 66 (1967), evidence was suppressed by the prosecution at trial. The evidence came to light after trial and postconviction procedures afforded the defendants their only remedy.
1510. E.g., Parker v. Gladden, 385 U.S. 363 (1966) (per curiam) (right to trial by impartial jury); Hollingshead v. Wainwright, 384 U.S. 31 (1966) (per curiam) (right to counsel on appeal); Jackson v. Denno, 378 U.S. 368 (1964) (involuntary confession); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) (systematic exclusion of Negroes from jury); In re Varnum, 63 Cal. 2d 629, 633, 408 P.2d 97, 99, 47 Cal. Rptr. 769, 771 (1965) (failure to advise of rights to counsel and to remain silent); In re Spencer, 63 Cal. 2d 400, 413-14, 406 P.2d 33, 42, 46 Cal. Rptr. 753, 762 (1965) (improper arguments influencing the penalty trial).

There may even be some rights which were apparent at earlier stages in the proceedings, but which, because of their nature, were most appropriately raised on habeas corpus. See Fay v. Noia, 372 U.S. 391, 440 (1963) (failure to appeal because of fear of increased sentence on retrial).
crime. By habeas corpus he might question his competency to stand trial. A petition for coram nobis relief might allege that the plea of guilty was improperly obtained. As these examples illustrate, the state provides postconviction relief to any prisoner who can prove that his conviction was the result of fundamentally unfair means which deprived him of his constitutional rights.

Although fundamental and constitutional errors which justify collateral relief might be infrequent, both the state and the individual have strong interests in the justice which only the availability of post-conviction processes makes possible. Only by appointing counsel for the preparation of petitions can it be known for certain whether a deprivation of constitutional rights has in fact occurred in a particular prisoner's case. Postconviction procedures thus demand the appointment of counsel to assert and protect the accused's rights, just as urgently as do pretrial, trial, and appeal processes. At all these stages the accused may well lose his rights or defenses without the assistance of counsel. Petitions and proceedings for collateral relief are critical stages within the established rationale for appointment of counsel as required by the sixth amendment.

The established definition of a critical stage at which the sixth amendment requires counsel is a proceeding in which the defendant might preserve or lose his rights and defenses. Because of the irrevocability of the death penalty, every proceeding at which a life or death decision is made in the postappellate period is critical. Par-
particularly in capital cases petitions and proceedings for postconviction relief are critical stages at which the sixth amendment requires the appointment of counsel.

2. Postconviction Procedures: Civil or Criminal?

One of the greatest barriers to the appointment of counsel for indigents in postconviction proceedings is the characterization of these procedures as "civil" in nature. Since the sixth amendment guarantees the assistance of counsel only in criminal proceedings and since habeas corpus and coram nobis are considered civil, courts reason that they need not appoint counsel to represent prisoners in the preparation of petitions to the courts or in habeas corpus and coram nobis proceedings. 1520

The traditional characterization of habeas corpus and coram nobis as "civil" arises from their historical use and their present procedural attributes. 1521 The writ of habeas corpus, for example, was originally unavailable to those convicted by criminal processes. 1522 More recently, however, the writ has become an accepted method of testing the sentencing court's jurisdiction, the constitutionality of its procedures, and the validity of the statute under which the conviction was obtained. 1523 While coram nobis and habeas corpus are most often used to obtain relief from criminal judgments, they are classified as civil remedies in that they assert the civil right of personal liberty. This characterization is consistent with the civil procedural aspects of the writs. The petitioner has the burden of proof in showing that his conviction is invalid. 1524 There is a presumption of regularity of the

1520. Douglas v. Maxwell, 357 F.2d 320, 321 (6th Cir. 1966); Flowers v. Oklahoma, 356 F.2d 916, 917 (10th Cir. 1966); Baker v. United States, 334 F.2d 444, 447 (8th Cir. 1964); Ellis v. United States, 313 F.2d 848, 850 (7th Cir. 1963); In re Dinerstein, 258 F.2d 609, 611 (9th Cir. 1958); Leonard v. Eyman, 1 Ariz. App. 593, 405 P.2d 903 (1963); State v. Weeks, 166 So. 2d 892, 895-96 (Fla. 1964); Freeman v. State, 87 Idaho 170, 180-81, 392 P.2d 542, 548 (1964); State v. Washington, 399 S.W.2d 109, 112 (Mo. 1966); State v. Ramirez, 78 N.M. 418, 419, 432 P.2d 262, 263 (1967); State ex rel. Wood v. Johnson, 216 Tenn. 531, 536, 393 S.W.2d 135, 137 (1965); Summers v. Rhay, 67 Wash. 2d 898, 902, 410 P.2d 608, 611 (1966).


judgment which is collaterally attacked; and the court need not provide a jury to hear the petitioner's claims.

The right to counsel, however, should be considered as a function of the consequences, subject matter, and character of the proceedings in question. If one ignores the traditional labels and looks to the substance of the writs, it is obvious that they have the same consequences as trial or appeal. The individual will either be subject to penal sanctions or not, depending upon the outcome of the proceedings. Furthermore, collateral relief procedures are similar to criminal proceedings not only in their consequences but also in their subject matter. Habeas corpus and coram nobis are means of testing the validity of criminal penalties, and are no less a part of criminal procedure than are direct appeals. Several courts, in fact, have treated postconviction proceedings as civil for some purposes, but as criminal with regard to the requirement of counsel.

Considering whether the equal protection clause forbids the charging of docketing fees for habeas corpus appeals, the United States Supreme Court admitted in Smith v. Bennett that postconviction proceedings might be considered "civil" for some purposes. The Court held, however, that to require indigent prisoners to pay filing fees in habeas cases impinges on such fundamental rights that the availability of the remedy cannot be dependent upon mere labels. If the imposition

1527. This approach is used in Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 n.3 (1966) and In re Gault, 387 U.S. 1, 27-29 (1967).
1528. Post-conviction procedures are independent of the earlier determination of guilt. United States v. Hayman, 342 U.S. 205, 222-23 (1952). But the issues raised in postconviction petitions are usually identical to those ordinarily raised at trial and on appeal. See notes 1503-15 supra and accompanying text.
1531. Id. at 712; see, e.g., Hiflin v. United States, 358 U.S. 415, 418 n.7 (1959); Ex parte Tom Tong, 108 U.S. 556, 559 (1883). See generally Comment, Right To Counsel In Federal Collateral Attack Proceedings: Section 2255, 30 U. Chi. L. Rev. 583, 589 (1963).
1532. "We shall not quibble as to whether in this context it be called a civil or criminal action for . . . it is 'the highest remedy in law, for anyone that is imprisoned.' . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." Smith v. Bennett, 365 U.S. 708, 712 (1961) (citations omitted).

The same approach is evident in Burns v. Alabama, 377 F.2d 233, 235 (5th Cir. 1967), where the court construed a statute governing the time allowed for filing appeals and for requesting free transcripts; it applied the more liberal criminal procedures to formally civil postconviction processes. Postconviction petitions also receive special consideration on the court calendar. E.g., Ruby v. United States, 341 F.2d 585, 587 (9th Cir.), cert. denied, 384 U.S. 979 (1965).
of docketing fees upon indigent petitioners unconstitutionally conditions their fundamental right to collateral relief, the failure to provide them with the assistance of counsel can hardly escape similar condemnation.

One of the most important differences between postconviction and other criminal procedures is that with regard to collateral relief the prisoner is the moving party and has the opportunity to select the forum and time for challenging his conviction, while at trial the state enjoys these perogatives. The relevance of this difference lies in the fact that the sixth amendment guarantees the accused the right of assistance of counsel only for his defense. The distinction is a purely formal one, however, since the accused's conviction does not substantially alter the parties' relationship. Just as the accused remains the defendant on direct appeal—despite his having become the moving party—the petitioner in postconviction proceedings continues to be in the position of a defendant vis-a-vis the state and its manifold resources. The difference between appeal and postconviction proceedings are not so substantial as to justify granting counsel in one and not in the other.1533

B. The Due Process Requirement

If the issues raised by a petition for collateral relief are difficult and the petitioner is unlearned in the law, courts have recognized, independent of the requirements of the sixth amendment, the right of indigents to appointed counsel in order to insure a fair hearing.1534 In view of the procedural difficulties associated with collateral remedies, the complexity of the issues which most such petitions raise, and the inability of the average prisoner to draft an intelligible legal document, the courts should extend this rationale for the appointment of counsel.

1533. See generally Comment, Right To Counsel In Federal Collateral Attack Proceedings: Section 2255, 30 U. Cil. L. Rev. 583, 584-91 (1963), which adequately refutes the argument, of Cobas v. Clapp, 79 Idaho 419, 426, 319 F.2d 475, 478, cert. denied, 356 U.S. 941 (1958), that post-conviction proceedings are not "criminal prosecutions" within the meaning of the sixth amendment, for substantially the same reasons as are outlined in the text above with respect to the distinction between civil and criminal proceedings.

The distinction between the right of access and the effective use of the courts is, indeed, hollow. Comment, The Indigent's Right to Counsel in Civil Cases, 76 YALE L.J. 545, 558-59 (1967).

under special circumstances to require the provision of counsel in all collateral proceedings.

Even practitioners of the law, well versed in the intricacies of criminal procedure, confess to some confusion over the choice of post-conviction remedies. The distinction, for example, between the writs of habeas corpus and coram nobis is particularly unclear, and some doubt exists as to what issues a petition for either of the two remedies may properly raise. The ordinary prisoner can hardly be charged with knowledge of technicalities which even some lawyers do not understand.

In order to frame a successful petition, furthermore, the prisoner must be quite knowledgeable in substantive criminal and constitutional law. Most prisoners lack both the resources and ability to research adequately the law applicable to their cases in order to know what issues to raise. Matters of law are seldom so simple and settled that the assistance of counsel would not be of critical value. The prevalence of the "jailhouse" lawyer dramatizes the dilemma of the prisoner who is unlearned in the law and often functionally illiterate.

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1536. For example, as to whether a prisoner's failure to exhaust state remedies is a jurisdictional defect, barring federal court consideration of his habeas corpus claims, compare Blair v. California, 340 F.2d 741, 745 (9th Cir. 1965) and Duffy v. Wells, 201 F.2d 503, 504 (9th Cir. 1952) (no jurisdictional defect), with Reese v. Teets, 248 F.2d 147, 148 (9th Cir. 1957) and Rupp v. Teets, 214 F.2d 312, 312 (9th Cir. 1954) (jurisdictional defect).

In addition, the definitions of the postconviction remedies have not been unchanging, Granucci, Review of Criminal Convictions by Habeas Corpus in California, 15 HASTINGS L.J. 189, 192-93 (1963); Note, State Post-Conviction Remedies, 61 COLUM. L. REV. 681, 689 (1961); Comment, Post-Conviction Remedies in California Death Penalty Cases, 11 STAN. L. REV. 94, 114-15, 121 (1958); see In re Jackson, 61 Cal. 2d 500, 503, 393 P.2d 420, 421-22, 39 Cal. Rptr. 220, 221-22 (1964). See generally Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 CALIF. L. REV. 335 (1952).

1537. See note 1544 infra.


There is apparently a limited right to the use of law books. See, e.g., United States ex rel. Mayberry v. Prasse, 225 F. Supp. 752, 753 (E.D. Pa. 1963); In re Allison, 66 Cal. 2d 282, 288, 425 P.2d 193, 195-96, 57 Cal. Rptr. 593, 595-96 (1967). It is remarkable that legal materials are withheld from prisoners in view of right-to-counsel rulings which require the prisoner to prepare a
The questions of law that a prisoner may potentially raise in collateral relief proceedings have recently been in the most rapid flux of any field of law. The courts cannot ordinarily expect a prisoner to understand the changing concepts of procedural due process as they might apply to his case. It is the lawyer's task to understand the full extent and subtlety of these important changes and to predict potential developments in the law.

Many of the issues which a collateral petition may raise are the same questions which require a lawyer at trial and on appeal. Applying the law, if it can be ascertained, to the facts of the individual case is as difficult in postconviction procedures as in the prior criminal proceedings. In fact, the requirements that the petitioner show a prima facie case for relief in order to get a hearing on his claims\(^{1539}\) and that he discharge the burden of proof to establish his allegations at the hearing indicate a greater need for a lawyer in postconviction procedures than at trial.

The lawyer's primary function is to select from the facts of the petitioner's case those facts which would justify a claim for relief.\(^{1540}\) The

\(^{1539}\) See notes 1584-86 infra and accompanying text.

draftsman of the petition need not argue the law in his request for a post-conviction hearing. But it is the attorney's knowledge of the law which makes him capable of selecting the facts relevant to a potentially successful claim for relief.

Despite the maxim that petitions from prisoners unlearned in the law will be construed liberally, the ordinary prisoner is usually unable to meet the quite strict requirements of particularity which the courts often impose. Prisoners who have been convicted of capital crimes, furthermore, are generally poorly educated, if not functionally illiterate. They often feel the need to fill their petitions with legal-


1543. E.g., In re Swain, 34 Cal. 2d 300, 209 P.2d 793 (1949), cert. denied, 338 U.S. 944 (1950) (the leading California case). At times the technicalities of pleading are unfortunately applied. E.g., Conway v. Wilson, 368 F.2d 485 (9th Cir. 1966), cert. denied, 386 U.S. 925 (1967); Gordon v. United States, 216 F.2d 495 (5th Cir. 1954); In re Montenegro, 246 Cal. App. 2d 515, 54 Cal. Rptr. 865 (1966). Informal letters to the courts do not always receive attention. E.g., Magee v. Peyton, 343 F.2d 433 (4th Cir. 1965). Courts do not always resolve procedural confusion in the petitioner's favor. E.g., Thomas v. Teets, 205 F.2d 236, 239-40 (9th Cir. 1953) (confusion between coram nobis and habeas corpus in California courts).

The United States Supreme Court has indicated its dissatisfaction with the very rigorous requirements of specificity which lower courts often apply to postconviction petitions. E.g., Tomkins v. Missouri, 323 U.S. 485, 487 (1945): "The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the laws. . . . But where the substance of the claim is clear, we should not insist upon more refined allegations than paupers, ignorant of their right of counsel and incapable of making their defense, could be expected to supply."

1544. The plight of the uneducated in the courts has long been recognized. E.g., Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); In re James, 38 Cal. 2d 302, 309, 311-12, 240 P.2d 596, 600, 601-02 (1952); L. Lawes, Twenty Thousand Years in Sing Sing 302 (1932). Warden Duffy explained:

"This is my experience at San Quentin in handling death penalty cases. I have yet to find that there has ever been anyone executed who is wealthy, who has a lot of money. You might say very few of those people ever commit a homicide, but they do occasionally, and they are not sentenced to death. If they have competent attorneys, in my way of looking at it, and they are wealthy, they do not get the death penalty. It is the ones who are friendless and seem somewhat hopeless that are sentenced to death. . . . It's rarely the old, hardened criminal who comes to condemned row. It's the inexperienced, mentally inadequate members of minority races who are not properly represented
sounding jargon which obscures the merits of their cases. They write petitions which incoherently ramble through factual assertions and legal conclusions taken from their own cases and from the appellate decisions which have become matters of common misunderstanding in the prison. What appears frivolous may in fact be quite substantial, and vice versa. A court cannot give fair hearing to the merits of a post-conviction petition solely on the basis of papers which the ordinary prisoner submits.

In addition, neither the prisoner nor his "jailhouse" lawyer can do research beyond their knowledge of the facts and the record provided. Even if discovery were available in postconviction processes, many of the material facts would be unavailable to the incarcerated prisoner. In the absence of financial resources or friends willing to unearth vital facts which are beyond the reach of the prisoner, appointed counsel may be the only person to whom the prisoner can turn to ascertain the facts which might justify a claim for collateral relief.

Some federal courts have said that appointed counsel is necessary only when the petitioner raises difficult issues of fact and not when he argues issues of law. This distinction between issues of law and fact is founded upon improper analogies to considerations of the necessity of by adequate counsel, in my belief at least. There's no money to represent them. They can't carry on investigations of their cases. They can't put them through the courts the way that people with money can. They're not mentally adequate to do it either . . . . Well it's just not equal justice. It's not right. Hundreds and hundreds of cases as I repeat, are just as bad, if not worse, than those who are executed or to be executed." Hearing Report and Testimony on S.B. 1 before the California Senate Committee on Judiciary, 14, 19, 22 (1960) (Testimony of Clinton Duffy, former Warden of San Quentin).


1547. See Wilson v. Harris, 378 F.2d 141 (9th Cir. 1967) (motion to take depositions denied); Note, Civil Discovery in Habeas Corpus, 67 Colum. L. Rev. 1296 (1967) (discovery is presently unavailable to the habeas corpus petitioner, but there are sound arguments for allowing discovery).

1548. There is arguably a right to investigators and expert witnesses, as well as a right to counsel. Note, Discrimination Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 448-49 (1967); Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054 (1963); see A.B.A., Standards Relating to Post-Conviction Remedies § 4.5, at 67-71 (1967).


holding an evidentiary hearing and the propriety of requiring the
prisoner to be present. While the petitioned court need not hold a plenary
hearing if the prisoner raises no material issues of fact, the assistance
of counsel in setting forth the material facts, stating the history of the
case, and marshalling the arguments on questions of law would be of
substantial assistance to the court's decision. Only after thorough
argument and exploration of the present law and possible suggestions for
change in the law, with the aid and guidance of counsel, can a court
make an adequate determination of the legal issues raised by the
substantive claims of the prisoner's petition.

The expense and required security precautions necessary to produce
the prisoner at a hearing usually result in his absence unless he is needed
to resolve factual issues which do not appear in the record. However,
the necessity of appointing counsel should not be determined by
considerations pertaining to the prisoner's right to be present at his
hearing. Even when the prisoner's presence is not required at a post-
appellate proceeding, the lawyer might assist in the proceedings by cross-
examining witnesses, arguing the petitioner's case, and protecting the
prisoner's rights, just as in other criminal proceedings.

The requirement of special circumstances before a prisoner can
qualify for the appointment of counsel in postconviction proceedings is
precisely the same test courts used prior to Gideon v. Wainwright to
determine whether a defendant required an appointed counsel at trial.

1551. Townsend v. Sain, 372 U.S. 293, 313 (1963); Ford v. Boeger, 362 F.2d 999, 1003 (8th Cir. 1966); Wright v. Dickson, 336 F.2d 878, 881 (9th Cir. 1964).
1552. Where it has been determined by the court that the appointment of counsel in a post-
conviction proceeding would be appropriate, the requisites of the effective assistance of counsel
outlined in Anders v. California, 386 U.S. 738 (1967), should apply. Harders v. California, 373 F.2d
839, 843 (9th Cir. 1967); McCartney v. United States, 343 F.2d 471 (9th Cir. 1965).
1553. Sanders v. United States, 373 U.S. 1, 20-21 (1963) (prisoner's presence required when
testifying on substantial issues); Macibroda v. United States, 368 U.S. 487, 495-96 (1962)
(prisoner's presence required when facts outside record cannot be fully investigated otherwise);
United States v. Hayman, 342 U.S. 205, 222-23 (1952) (substantial issues of fact as to events in
which the prisoner participated require production at hearing).
1554. Cf. In re Gault, 387 U.S. 1, 57 (1967); Pointer v. United States, 380 U.S. 400, 404
1555. A "trial type proceeding" is envisioned. Pate v. Page, 325 F.2d 567, 569 (10th Cir.
1963), cert. denied, 376 U.S. 957 (1964); see Holiday v. Johnston, 313 U.S. 342, 352 (1941); Walker
v. Johnston, 312 U.S. 275, 285, 286-87 (1941); People v. Shipman, 62 Cal. 2d 226, 231, 397 P.2d
1557. Id. at 350-51 (concurring opinion of Harlan, J.); see Betts v. Brady, 316 U.S. 455
(1942); Powell v. Alabama, 287 U.S. 45, 71 (1932).
Gideon abolished the requirement of special circumstances for indigent felony defendants to qualify for the provision of a lawyer at trial.\textsuperscript{1558} All defendants need the assistance of counsel at trial. Similarly, all petitioners in postconviction procedures require a lawyer to assist in the preparation of petitions and at hearings. In other words, every petitioner's case has the special circumstances of raising difficult issues with which the prisoner is unable to cope.\textsuperscript{1559} A court does not suddenly become omniscient when the petitioner is poor. In order to guarantee a fair consideration of the issues raised by a collateral relief petition and pressed at hearing, due process requires the state and federal courts to appoint counsel to prepare petitions in every case in which an indigent prisoner requests assistance and to represent petitioners who are granted a hearing in federal court on their claims.

\textit{C. The Equal Protection Requirement}

In addition to the sixth amendment and the due process requirement of a fair hearing, the equal protection clause of the fourteenth amendment should be a basis for the right to appointed counsel for indigent prisoners.\textsuperscript{1560} It is "invidious discrimination," forbidden by the equal protection clause of the fourteenth amendment, for the sort of justice an individual receives to depend upon whether he is rich or poor.\textsuperscript{1561}

\begin{itemize}
\item \textsuperscript{1558} Mempa v. Rhay, 389 U.S. 128, 134 (1967).
\item \textsuperscript{1559} The fact that Gideon did a reasonably competent job of defending his case did not deter the Court from finding a right to counsel. \textit{See} Gideon v. Wainwright, 372 U.S. 335, 337 (1963); A. Lewis, \textit{Gideon's Trumpet} 9-10 (1964). Some habeas corpus petitioners may be quite competent. \textit{E.g.}, Smith v. United States, 267 F.2d 210, 211-12 (9th Cir. 1959). But courts must survey the lack of legal ability of most prisoners and generalize that condition to find a right to counsel for all indigents. \textit{Cf.} Miranda v. Arizona, 384 U.S. 436, 445-47 (1966).
\item \textsuperscript{1560} While the equal protection clause is directly enforceable only against the states, the due process clause of the fifth amendment probably applies the concept of equal protection to the federal government. \textit{See} Bolling v. Sharpe, 347 U.S. 497 (1954); Antieau, \textit{Equal Protection Outside the Clause}, 40 Calif. L. Rev. 362 (1952). Even if "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" \textit{Cf.} Schneider v. Rusk, 377 U.S. 163, 168 (1964). \textit{See Comment, The Constitutionality Of The NLRA Farm Labor Exemption}, 19 Hastings L. J. 384, 387-89 (1968). Thus, equal protection arguments for the right to appointed counsel are equally available to habeas corpus petitioners in state and federal courts. \textit{E.g.}, Henderson v. United States, 231 F. Supp. 177, 178 (1964).
\end{itemize}
1. The Concept of Invidious Discrimination

In *Douglas v. California*\(^{1562}\) the United States Supreme Court found invidious discrimination in the state's failure to appoint counsel to prosecute indigents' first appeals of right in state criminal cases.\(^{1563}\) This discrimination was no less invidious than the failure to provide a free transcript on appeal, which the Court held to violate the fourteenth amendment in *Griffin v. Illinois*.\(^{1564}\) The Court in *Burns v. Ohio*\(^{1565}\) similarly decided that the practice of charging a docketing fee to indigent appellants violated the equal protection clause.

This concept that the sort of review an individual receives should not depend on his wealth clearly extends beyond the first appeal to procedures for postconviction relief.\(^{1566}\) In *Lane v. Brown*,\(^{1567}\) the United

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1563. *Id.* at 355. The Supreme Court refused to consider whether there might be a right to counsel after direct appeal. *Id.* at 356. But the Court has observed that the appointment of counsel might be useful in post-conviction procedures. Sanders v. United States, 373 U.S. 1, 21 (1963).
1564. 351 U.S. 12 (1956). The Constitution does not require states "... to provide appellate review at all. *See, e.g., McKane v. Durston*, 153 U.S. 684, 687-88. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." *Id.* at 18.
1566. "[T]hese principles were not to be limited to direct appeals from criminal convictions, but extended alike to postconviction proceedings." *Lane v. Brown*, 372 U.S. 477, 484 (1963). A number of courts reject the application of the equal protection rationale to postconviction procedures by simply distinguishing *Douglas* on the ground that it applies only to first appeals of right. *E.g., Queor v. Lee*, 382 F.2d 1017, 1018 (5th Cir. 1967); Noble v. Sigler, 351 F.2d 673, 678 (8th Cir. 1965); United States *ex rel. Combs v. Denno*, 231 F. Supp. 942, 945 (S.D.N.Y. 1964), *aff'd*, 357 F.2d 809 (2d Cir. 1966); State v. Burnside, 181 Neb. 20, 22, 146 N.W.2d 754, 755 (1966). Justice Harlan prophetically observed in his dissent in *Douglas v. California* that the rationale of equal protection might extend to the postappellate period: "Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review." *Douglas v. California*, 372 U.S. 353, 366 (1963).

There is some justifiable concern that the equal protection argument is so strong that if fully extended it would require the appointment of counsel for indigents in all civil and criminal proceedings. *See Note, The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). It was a similar discomfort with the equal protection rationale that apparently motivated the Court of Appeals for the Second Circuit in United States *ex rel. Coleman v. Denno*, 313 F.2d 457, 460 (2d Cir. 1963), to reject the petitioner's request that counsel be appointed for all those convicted of capital offenses. That court refused prior to *Douglas v. California*, to find a distinction between capital and noncapital cases, and indicated that at least all felons would have to receive the right to counsel if the petitioner's request were granted.

Under the equal protection rationale, however, a meaningful distinction might be drawn between capital and noncapital cases. In capital cases the discrimination against the indigent prisoner is much greater than in noncapital cases. In capital cases the loss of a letter in the mails,
States Supreme Court found invidious discrimination in the state's failure to provide free transcripts to an indigent prisoner on appeal from a denial of his coram nobis petition. The Court in *Smith v. Bennett* 1568 struck down a four-dollar docketing fee which made the remedy of habeas corpus unavailable to an indigent petitioner. In doing so the Court observed that "When a right is granted by a State, financial hurdles must not be permitted to condition its exercise." 1569 The California supreme court in *People v. Shipman* 1570 found that the trend of United States Supreme Court decisions defining invidious discrimination required the appointment of counsel in coram nobis proceedings upon a showing of merit in a petition filed pro se.

Development of the concept of invidious discrimination under the equal protection clause seems to indicate that along with the right to a free transcript and the forgiveness of docketing fees, appointed counsel should be available to indigents in postconviction processes. A possible distinction exists between the right to appointed counsel, on the one hand, and the right to a free transcript and the waiver of docketing fees, on the other. Failure to provide a transcript and to forgive filing fees would completely foreclose indigent prisoners from utilizing postconviction procedures. The failure to appoint counsel, however, would not absolutely deny a petitioner the possibility of collateral relief. The cost to the petitioner of retaining counsel is certainly greater than the filing fee at issue in *Smith v. Bennett*. 1571 One realizes, however, that the values at stake are life and freedom, and that without the funds to file for relief the petitioner would be foreclosed from presenting his claim to the courts. Without a lawyer most indigent petitioners are quite unable to present their claim so as to have more than a remote chance of success. The supposed distinction between the appointment of counsel and the forgiveness of docketing fees is seen to be unequal to the task envisioned for it.

Although the due process clause does not require a state to provide appellate review of criminal proceedings, once it chooses to allow an
appeal of right in criminal cases it must avoid conditioning the availability of such review on the accused's ability to pay. The same reasoning dictates that if the state provides postconviction procedures for reviewing the fundamental fairness of earlier criminal proceedings, it must appoint counsel to prepare petitions and attend hearings for collateral relief in order to avoid the invidious discrimination on the basis of wealth which the equal protection clause forbids. In the postconviction process, furthermore, the constitutional mandate is even more urgent, for while states need not provide appellate review of criminal proceedings, the due process clause may well require them to establish postconviction procedures, at least where constitutional issues are raised. While the concept of due process may not require a uniform state procedure for redressing the deprivation of constitutional rights which led to a prisoner's incarceration, arguably the state must afford some remedy. The writs of postconviction relief are so fundamental to the protection of liberty that due process may require that they be available as of right.


1574. The Supreme Court has declared that prisoners must have a means for the assertion of constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 467 (1938); Mooney v. Holohan, 294 U.S. 103, 113 (1935); see Fay v. Noia, 372 U.S. 391, 399-400, 413-14 (1963). Postconviction writs afford the required means. The Court spoke of state postconviction procedures in Smith v. Bennett, 365 U.S. 708, 713 (1961), "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired.' Bowen v. Johnston, 305 U.S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution."

It is evident from the grant of certiorari in a case which squarely raised the issue of whether Nebraska was required by due process to provide post-conviction procedures that the United States Supreme Court may well be prepared to hold that the states must afford prisoners some post-conviction remedy. Case v. Nebraska, 177 Neb. 404, 129 N.W.2d 107 (1964), cert. granted, 379 U.S. 958, vacated, 381 U.S. 336 (1965) (per curiam) (remanded in view of supervening state statute which provides postconviction procedures). See Marshall v. Warden, 83 Nev. 442, 434 P.2d 437 (1967).

1575. Due process probably does not require the states to provide procedures for the many petitions which raise no constitutional questions. See Joyner v. Parkinson, 227 F.2d 505 (7th Cir. 1955).


1577. That the right of habeas corpus is so fundamental as to be required by due process can be seen by the specific prohibition against its suspension in the United States Constitution and all state constitutions. U.S. Const. art. I, § 9; Legislative Drafting Research Fund of Columbia Univ., Index Digest of State Constitutions 517-18 (2d ed. 1959).

One might even find an independent right to counsel in the existence of the writ and the prohibition against its suspension. It is arguable that the failure to appoint counsel for indigents is in itself an abridgment of the writ. Cf. Miranda v. Arizona, 384 U.S. 436, 458-66 (1966) (right to counsel required by privilege against self-incrimination).
If there is a right to test the validity of criminal proceedings by means of habeas corpus, coram nobis, or similar procedures, both the equal protection and due process clauses demand that the state appoint counsel for indigent prisoners to prepare their petitions and to assist at hearings. While there may be no right to a plenary hearing on petitions for postconviction relief, due process at least requires that state courts consider such petitions ex parte. The Douglas rationale dictates that the right to petition for postappellate remedies be no less available to the indigent prisoner than to those who can retain counsel to petition the courts.

2. The Initial Showing of Merit

Prior to Douglas v. California, the in forma pauperis appellant had to satisfy the trial court that an appeal would be of benefit to the court or the accused before counsel could be appointed. The United States Supreme Court in Douglas condemned this practice: "When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." And again:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Despite the considerations of unfairness which led the Supreme Court to forbid the requirement of an initial showing of merit in first appeals of right, the California supreme court has imposed just such a requirement to qualify for the appointment of counsel in postconviction proceedings. In fact, the test of merit for providing counsel in

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1583. Id. at 357-58.
collateral relief procedures appears to be very similar to that condemned in *Douglas* and, notwithstanding the fact that the California court has actually proceeded further in providing counsel than the Supreme Court, the California practice is inconsistent with the reasoning of *Douglas* and thus unacceptable.

Furthermore, just as the United States Supreme Court has invalidated all preliminary tests for the sufficiency of first appeals,\(^\text{1585}\) these same tests, which are now being variously applied to habeas corpus and coram nobis applications,\(^\text{1586}\) should be voided as they provide for effectively discriminatory treatment on the improper basis of wealth.\(^\text{1587}\) *People v. Shipman*\(^\text{1588}\) requires the California petitioner to show a prima facie case for relief in his petition for collateral relief. If the prisoner qualifies for a hearing, he will receive the assistance of counsel if he is unable to retain a lawyer. The strict requirement for substantive sufficiency in the petition forces the prisoner without legal assistance to

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1585. *Anders v. California*, 386 U.S. 738 (1967) (decision of appointed counsel that appeal had no merit, thus no counsel provided for the remainder of the appellate procedures); *Draper v. Washington*, 372 U.S. 487 (1963) (decision of trial judge that the appeal was frivolous, thus no transcript provided); *Eskridge v. Washington State Bd.*, 357 U.S. 214 (1958) (decision of trial judge that the appeal would not promote justice or that there was no reversible error, thus no transcript provided); *Griffin v. Illinois*, 351 U.S. 12, 15 n.7 (1956) (determination of presiding judge that post-conviction petition was insufficient to require an answer, thus no free transcript was provided).

1586. The petitioner in *Lane v. Brown*, 372 U.S. 477, 481-82 (1963), was refused a transcript of his coram nobis hearing so that he could appeal the denial of postconviction relief, because the public defender believed that the appeal would be unsuccessful. The United States Supreme Court rejected this preliminary test of merit for the same reasons as it had vacated the tests applied to direct appeal procedures.


1587. Courts should avoid processing applications for postconviction relief before a lawyer is appointed to investigate the claims of the petitioner and redraft his petition if necessary. A.B.A., STANDARDS RELATING TO POST-CONVICTION REMEDIES § 4.4, at 64-67 (1967); see notes 1518, 1543 supra.

As the United States Supreme Court observed in *Lane v. Brown*, 372 U.S. 477, 485 (1963), preliminary screening procedures for all post-conviction applications are acceptable, *see, e.g.*, *Townsend v. Sain*, 372 U.S. 293, 131 (1963), but special tests of merit in order to qualify for a free transcript are forbidden by the equal protection clause. The same argument voided preliminary tests for the appointment of counsel on appeal in *Douglas*. Only after a docketing fee is forgiven, a free transcript is provided, and counsel is appointed to assist in preparing a proper petition, can a court make an adequate determination of the merit of the indigent petitioner's claim.

1588. 62 Cal. 2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965); *see cases cited note 1468 supra.*
run the gauntlet of invidious discrimination forbidden by Douglas. It is no more realistic to expect the petitioner without an attorney to meet the required showing of merit in collateral procedures than it was on appeal. The stricter the tests used in determining whether the court should grant a hearing and appoint a lawyer, the more necessary will be the assistance of counsel in preparing an application for a postconviction hearing.

The argument for appointed counsel is equally compelling with regard to federal remedies. In Townsend v. Sain the United States Supreme Court established guidelines for the federal courts in determining which collateral relief petitions would require evidentiary hearings. A hearing is mandatory if: (1) The merits of the factual claims of the petition were not resolved by state hearings; (2) the record did not fairly support the state determination of fact; (3) the state court's factfinding procedure was inadequate to provide a complete and fair hearing; (4) the petition alleged newly discovered evidence of a substantial claim; (5) the state court hearing did not adequately develop the material fact; or (6) any other reason which requires a plenary hearing. The prisoner's petition must ordinarily meet these exacting standards in order to qualify for further consideration. To pass this strict test of sufficiency the prisoner requires counsel's assistance in preparing an application for postconviction remedies with some chance of success. It is invidious discrimination, proscribed by the fourteenth amendment, for the availability of collateral relief procedures to depend upon the financial ability of the petitioner to retain counsel for the preparation of petitions which must make an initial showing of merit.

D. The Right to Petition for Redress of Grievances

The traditional view of the first amendment right to petition for redress of grievances limits the right to petitions addressed to legislatures for the purpose of obtaining changes in statutory law. The language of
the amendment itself, however, imports no such limitation: "Congress shall make no law . . . abridging . . . the right . . . to petition the Government for a redress of grievances." Since the judiciary is a branch of the "Government," it is quite logically arguable that the first amendment protects the right to petition the courts, as well as the legislative and executive branches.

There is strong historical support for such an interpretation. Both the Magna Charta and the Bill of Rights of 1689 upheld the right to petition the King. Early petitioners of the Crown, furthermore, sought judicial, rather than legislative, remedies:

> Petitions to the Crown appear to have been at first for the redress of private and local grievances, or for remedies which the courts of law assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances." CAL. CONST. art. 1, § 10; see Fla. Const. § 15 (declaration of rights); Idaho Const. art. 1, § 10; Ind. Const. art. 1, § 31; Md. Const. art. 13 (declaration of rights); Mass. Const. pt. I, § 19; Nev. Const. art. 1, § 10; N.H. Const. pt. 1, art. 32; N.C. Const. art. 1, § 25; Ohio Const. art. 1, § 3; Ore. Const. art. 1, § 26; Vt. Const. ch. 1, art. 20.

A few states explicitly provide that petitions may be addressed to any part of the government. The New York constitution is typical: "No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof." N.Y. Const. art. 1, § 9; see Ark. Const. art. 11, § 4; Kan. Const. § 3 (bill of rights); S.C. Const. art. 1, § 4; Wis. Const. art. 1, § 4. But most state constitutions follow the United States Constitution in guaranteeing the right to petition the government or those invested with the powers of government. E.g., Ala. Const. art. 1, § 6; Hawaii Const. art. 1, § 3; see Legislative Drafting Research Fund of Columbia University, Index Digest of State Constitutions 34 (2d ed. 1959).


1595. The Magna Charta reads in pertinent part: "[T]hat if we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one, or shall have transgressed any of the articles of peace or security; and the wrong shall have been shown to four barons of the aforesaid twenty-five barons, let those four barons come to us or to our justiciar, if we are out of the kingdom, laying before us the transgression, and let them ask that we cause that transgression to be corrected without delay." Magna Charta of 1215, 16 John I, c. 61; Sources of Our Liberties 21 (R. Perry ed. 1959).

The Bill of Rights of 1689, 1 W. & M. c. 5, reads: "That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." Sources of Our
could not grant. As equity grew into a system, petitions of this kind not seeking legislative remedies tended to become superseded by bills in chancery. Statutes were originally drawn up by the judges at the close of the session of parliament from the petitions of the Commons and the answers of the Crown.1596

The equity jurisdiction of the courts thus had its origin in the right to petition—a fact which lends substantial historical support to the contention that petitions directed to the courts fall within the scope of the first amendment protection.

A similar conclusion results from the application of a purely functional approach. Courts make law just as legislatures do. The right to petition the courts gives the petitioner the opportunity to effect a change in the law, at least with respect to himself, if not more generally. Many of the most important reforms in criminal procedure, for example, have arisen out of petitions for postconviction remedies.1597 In practice, the courts and the legislature are often alternative mechanisms for achieving a desired change in the law.1598

The exercise of the right to petition the government is traditionally characterized by a contribution to the marketplace of ideas.1599 This proposition is no less true of petitions addressed to the courts than of petitions seeking legislative or executive action. The courts provide a particularly appropriate forum for arguments which may well influence decisions and events of a political nature far beyond the confines of the courtroom in which they are heard. The arguments made in behalf of the petitioners on Death Row, for example, are intended not only for their immediate relief, but also to demonstrate the case against capital punishment to the whole world.1600

There is thus no legitimate basis, historical or otherwise, for excluding petitions to courts from the first amendment guarantee. Acceptance of this principle creates another strong argument for the
extension of the right to counsel to postconviction remedies; for just as
the privilege against self-incrimination, rather than the sixth amendment
guarantee, was held to require the presence of counsel in *Miranda v. Arizona*,\(^6\) so the first amendment can be read to require appointed
counsel for indigent prisoners.

Just as the first amendment, notwithstanding its negative language,
implies an affirmative obligation on the state to provide police
protection to peaceful picketing in order to insure the rights of assembly,
speech, and petition,\(^6\) it also imposes a positive duty upon the courts,
legislatures, and administrators to receive and *consider* all petitions.\(^6\)
The implied requirement that petitions be not only routinely received,

U.S. 315 (1951). Apparently there is no freedom of assembly or right to petition for redress of

U.S. 315 (1951). Apparently there is no freedom of assembly or right to petition for redress of

but also actually considered on their merits, is crucial, because courts simply cannot afford this minimally adequate consideration to petitions prepared by the average prisoner without the assistance of counsel.1604

Fortunately, this is not true of petitions addressed to the other branches of government. The legislature and the executive are established to consider the views of the people. Petitions to these branches ordinarily need not meet strict requisites of form and specialized language in order to be considered. While courts can and do receive the petitions of laymen, however, they almost inevitably experience difficulty in fully considering them.1605 Lawyers are required to translate the grievances of their clients into language which exhibits them in a form which does full justice to the merits of the petitioner's argument.

The courts should also consider the practical burden of making legal assistance available to petitioners for collateral relief from criminal sentences in the light of the preferred position of first amendment freedoms. Even if the state has a rational basis for not providing counsel, this abridgment of the right to petition cannot stand.1606 The state might argue that the filing of petitions in propria persona is a reasonable alternative to the appointment of counsel to prepare petitions. But even if the legislative purpose in not providing counsel is reasonable, it unduly impinges upon the first amendment right to petition and is invalid. Finally, although the first amendment might not provide an independent basis for the right to counsel, its potential application to postconviction procedures suggests another facet of the importance of these proceedings to society. This importance, in turn, demonstrates the need for the appointment of counsel.

E. Some Practical Considerations

1. The Allocation of Legal Resources

Both courts and commentators have shown considerable awareness of the mounting number of petitions for collateral relief from criminal sentences in state and federal courts.1607 Only 1,298 such petitions were

1604. See notes 1534-52 supra and accompanying text.
1605. See notes 1542-45 supra and accompanying text.
1606. Reasonable regulation of prisoners' petitions is not precluded by finding that the right to petition applies. See Brown, supra note 1603 at 733-34. See generally 2 T. Cooley, CONSTITUTIONAL LIMITATIONS, 908-12 (8th ed. 1927); Note, 55 W. Va. L. Rev. 275 (1953). But if the right to petition is among the preferred freedoms, any regulation must have more than a mere rational basis to survive the clear command of the first amendment. See McKay, The Preference For Freedom, 34 N.Y.U.L. Rev. 1182, 1213 (1959).
filed in the federal courts in 1950; 1,851 were filed in fiscal year 1960; and 7,693 were recorded in 1966. Similar patterns of growth have been experienced by the state courts. Both state and federal legislatures have responded to the pressure of these increased numbers by enacting changes in the judicial procedure for handling postconviction remedies.


By far the largest cause of the growth in federal post-conviction proceedings has been the increase in habeas corpus petitions filed by state prisoners.


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By far the largest cause of the growth in federal post-conviction proceedings has been the increase in habeas corpus petitions filed by state prisoners.

The number of lawyers now constitutionally required to participate in the various stages of criminal proceedings has placed an imposing burden upon the legal profession in general, and the criminal bar in particular—more accurately, upon the relatively few lawyers available for appointment in criminal cases.\footnote{1611}

These limited resources should clearly be allocated to those procedures of the criminal law and those cases which involve the most serious potential consequences for the rights of the individual. Society has a strong interest in seeing that justice is done in all cases,\footnote{1612} but its strongest interest must be in capital cases, where mistakes can mean the taking of innocent lives.\footnote{1613}

The history of the right to counsel\footnote{1614} demonstrates the proper working of the allocation process. The right to counsel was first declared for the most critical stage of criminal procedure—the trial\footnote{1615}—and was then progressively extended to the pretrial, appellate, and postappellate periods,\footnote{1616} as the importance of these processes required and the limited resources permitted. Similarly, the right to counsel was first enunciated in capital cases, and only later—as practical limitations were overcome—extended to felony and misdemeanor cases. Such a progression was fully justified by the decreasing gravity of the offenses and penalties involved. The courts have used the determination of whether a proceeding is criminal and, if it is criminal, whether it is critical, to allocate resources of legal manpower.\footnote{1617} A stage is considered critical when the burden of providing counsel is outweighed by the benefit which results.\footnote{1618} The allocation process results in the declaration


\footnote{1612. "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Coppedge v. United States, 369, 438, 449 (1962) (footnote omitted); see note 1517 supra.}

\footnote{1613. See notes 174-96 supra and accompanying text.}


\footnote{1616. See notes 1458-68 supra and accompanying text.}

\footnote{1617. See notes 1492-1533 supra and accompanying text.}

\footnote{1618. See notes 1492-1518 supra and accompanying text.}
of the right to counsel in cases which involve the most serious deprivation of rights. The first cases to declare the fundamental constitutional doctrines of procedural due process have often been those which involve prisoners sentenced to death.\textsuperscript{1619} Later, the Supreme Court included felonies within the criminal proceedings which the sixth amendment guarantee of assistance of counsel covers.\textsuperscript{1620} Whether there is a right to appointed counsel in misdemeanor prosecutions is still unclear.\textsuperscript{1621}

The evolution of this basic constitutional right thus provides the basis for two important conclusions: First, the accepted limits of the right at any given time are not immutable. The Court's interpretations of the Constitution are limited by practical considerations\textsuperscript{1622}—sometimes not made explicit in the Court's decisions. Each successive expansion of the meaning of procedural due process has resulted in an increased demand for the limited resources of legal and judicial manpower. Only as these resources have become available have the courts expanded the right to counsel into new areas. Second, once it is clear that an extension is both constitutionally desirable and practically possible, the criteria for determining its precise nature are simply the relative importance of the competing procedural stages and the severity of the penalties involved.


\textsuperscript{1622} Constitutional rights are in some measure dependent upon their feasibility. \textit{See} Schaefer, \textit{Federalism and State Criminal Procedure}, 70 \textit{Harv. L. Rev.} 1, 6 (1956).
Pursuing these two criteria, the next logical step in the evolutionary process which began with Powell v. Alabama is the extension of the right to counsel to the postconviction period—at least in capital cases. From the standpoint of the availability of manpower resources, this step can be taken today. This conclusion follows only in part from the belief that existing manpower resources, though nowhere unlimited and in some areas already heavily taxed, can support a greater burden. The United States Supreme Court has shown scant reluctance to expand the right to counsel despite the increased commitment of legal manpower which such expansion necessitates. Equally important is the fact that the contemplated extension might well involve a much less significant increase in the caseload of courts and attorneys than is commonly supposed. The tremendous growth in the number of applications for postappellate review of criminal sentences is at least partially the result of the continuing revolution in the United States Supreme Court's concept of procedural due process in criminal cases. A number of the most important changes wrought by recent decisions, however, are only prospective in effect, and thus will not effect many prisoners. While it is too soon to know whether the spread of knowledge concerning the limited applicability of such rulings will result in a decrease in the number of applications for collateral relief, it is certain that the increased attention given the procedural machinery in the investigatory, custody, trial, and appeal stages will in the future substantially reduce the necessity for recourse to post-conviction remedies.

Finally, the overwhelming proportion of postconviction petitions

1623. 287 U.S. 45 (1932).
1624. There are some 26,000 inmates in the California prison system. DEPARTMENT OF CORRECTIONS, CALIFORNIA PRISONERS 6 (1963). As of June 3, 1968, there were 77 men on Death Row. Execution Data, California State Prison, San Quentin, June 3, 1968 (mimeographed monthly release on file with California Law Review).
1628. See President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts 54 (1967). It should be noted that the growth in the number of postconviction petitions filed has recently slackened. See notes 1608-09 supra.
lack any apparent merit and are summarily dismissed. Though many prisoners, who have substantive claims for relief from breaches of fundamental fairness in their cases, may heretofore have been silent or unsuccessful solely because they were unable to draft an intelligible petition without the assistance of counsel, the net effect of the appointment of counsel would be a substantial increase in the number of meritorious petitions and greater justice for the prisoner, but not necessarily a heavier burden on the courts. The increase in the number of meritorious petitions would be more than offset by the decrease in the number of successive petitions by the same prisoners and by other increases in judicial efficiency discussed in the next section.

Assuming, therefore, that an extension of the right to counsel is both desirable and feasible, it is equally clear that the area of postconviction remedies is the appropriate context for such a step. Furthermore, if legal manpower resources are considered inadequate to allow appointed counsel for all prisoners seeking postconviction relief, the court could reinstate the distinction between capital and noncapital cases to afford the right to appointed counsel at least to prisoners charged with capital crimes. When the courts determine that there is no longer such a shortage of legal resources that the capital and noncapital distinction is warranted, they could then extend the right to appointed counsel to all those convicted of felonies, or even for all those in jail.

Such a distinction between capital and noncapital cases for the purposes of procedural due process has strong historical precedents, which would support the restricted grant of counsel in the postconviction period of capital cases. In 1932 Powell v. Alabama announced the right to counsel at trial in a capital case, while reciting


1630. See text accompanying notes 1657-65 infra.


1632. There is some historical evidence that the framers of the Constitution intended the sixth amendment to apply only to capital cases. W. BeaneY, Right to Counsel in American Courts 21 (1955).

1633. 287 U.S. 45 (1932).
numeous circumstances of aggravated unfairness, but refused to consider whether there was a right to counsel in noncapital cases. Ten years later the Court in Betts v. Brady\textsuperscript{1634} upheld under the due process clause a Maryland practice of not providing appointed counsel for defendants charged with noncapital crimes at least in the absence of circumstances constituting the denial of a fair trial. Although the Betts decision did not discuss whether the due process clause required appointed counsel in capital cases, the Court six years later in Bute v. Illinois,\textsuperscript{1635} finding no special circumstances justifying the provision of counsel in a noncapital case, intimated that "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps."\textsuperscript{1636} In 1956 the Court held unconstitutional a state practice of providing a trial transcript on appeal only in capital cases and required the provision of a free transcript to a defendant convicted of the noncapital charge of armed robbery.\textsuperscript{1637} Five years later the Court demonstrated that the defendant need show no special circumstances to qualify for the appointment of counsel in a capital case, by observing that "when one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."\textsuperscript{1638} But in 1960 the Court struck down a federal statute which did not guarantee the right to a jury trial for military dependents overseas in time of peace charged with a noncapital offense.\textsuperscript{1639}

Finally, in 1963 the United States Supreme Court in Gideon v. Wainwright\textsuperscript{1640} overruled Betts v. Brady\textsuperscript{1641} in holding that the sixth amendment was enforceable against the states through the fourteenth amendment.\textsuperscript{1642} Under the sixth amendment there was a right to counsel in noncapital cases without the showing of special circumstances, which the due process fair hearing approach of Betts v. Brady required.\textsuperscript{1643}

\textsuperscript{1634} 316 U.S. 455 (1942).
\textsuperscript{1635} 333 U.S. 640 (1948).
\textsuperscript{1636} \textit{Id.} at 674; see Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948) (dicta).
\textsuperscript{1637} Griffin v. Illinois, 351 U.S. 12, 23 (1956) (concurring opinion of Frankfurter, J.).
\textsuperscript{1638} Griffin v. Illinois, 351 U.S. 12, 23 (1956) (concurring opinion of Frankfurter, J.).
\textsuperscript{1639} Hamilton v. Alabama, 368 U.S. 52, 55 (1961).
\textsuperscript{1640} Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 248-49 (1960). The Court had declared the same procedures unconstitutional with respect to capital crimes in Reid v. Covert, 354 U.S. 1 (1957). The government in the later case attempted to salvage the procedures complained of by claiming that there was a distinction between capital and noncapital cases under the fifth and sixth amendments. The Court refused to follow the government's argument. The right to a jury trial under the fifth amendment and the right to counsel under the sixth cannot be conditioned upon the distinction between capital and noncapital cases.
\textsuperscript{1641} 372 U.S. 335 (1963).
\textsuperscript{1642} 316 U.S. 455 (1942).
\textsuperscript{1643} See note 1489 \textit{supra.}
\textsuperscript{1644} 316 U.S. 455 (1942).
While the majority did not mention the distinction between noncapital and capital offenses, concurring opinions by Justices Harlan and Clark applauded the purported end to a distinction "which has no basis in logic and an increasingly eroded basis in authority." From that day to this the Court has steadfastly refused to discuss the existence of the distinction between capital and noncapital cases for the purposes of procedural due process. But the Court has never expressly repudiated the distinction for all procedural due process purposes. It has simply been swallowed up by the declaration of the right to counsel in all felony cases under the sixth amendment.

The existence of the death penalty provides an independent justification for differences between the procedural requisites of capital and noncapital cases. If there is to be a death penalty, it must be the result of a determination that some rational distinction exists between a life sentence and capital punishment. If the only possible constitutional justifications for the death penalty are that it is a greater deterrent to crime than life imprisonment and protects society better by insuring that the defendant will not repeat his act, the death penalty's finality and harshness is a strong reason for distinguishing between the elements of procedural due process in capital and noncapital cases.

States recognize a distinction between capital and noncapital crimes in numerous ways. If this distinction is legitimate for certain criminal procedures, there can be no practical or theoretical reason for refusing to distinguish between capital and noncapital cases for the appointment of counsel in postconviction proceedings. Several states, including California, guarantee automatic appeal to the state supreme court only in capital cases. In some states it is error justifying retrial for the jury


1645. Id. at 349 (concurring opinion of Harlan, J.)

1646. Id. at 348 (Clark, J.) (concurring only in the result).

1647. Indeed, other courts have continued to recognize the distinction between capital and noncapital cases for some purposes. See Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966). But at least one case rejected the distinction between capital and noncapital cases for right to counsel purposes. United States ex rel. Coleman v. Denno, 313 F.2d 457, 460 n.1 (2d Cir. 1963).

1648. It is apparent that should the courts wish to grant a right to counsel in postconviction procedures only in capital cases the due process clause would afford the most appropriate means. Under Hamilton v. Alabama, 368 U.S. 52, 55 (1961), the Court has already determined that there is a due process right to counsel almost automatically in capital cases. There is a right to counsel at every step in the criminal proceedings in capital cases. Powell v. Alabama, 287 U.S. 45, 69 (1935); see Rankin v. State, 409 P.2d 641 (Okla. Crim. App. 1966).

1649. See notes 779-92 supra and accompanying text.

1650. E.g., CAL. PEN. CODE §§ 1239(b) (West 1957); ILL. REV. STAT. ch. 110A, § 606 (Bardette Smith 1968).
to be separated in capital cases, while generally the rules on separation are much less stringent in noncapital trials.\textsuperscript{1651} In some states the prosecutor and the defense can stipulate to a jury of less than twelve, except in capital cases.\textsuperscript{1652} A defendant charged with a capital crime may have the right to be represented by two lawyers, while other cases may allow only one defense attorney.\textsuperscript{1653} As Justice Jackson observed in \textit{Stein v. New York}, \textsuperscript{1654} "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."\textsuperscript{1655} This is as it should be. The quality of a civilized society may be judged by the substantial quality of the justice it affords its citizens, particularly those it proposes to deprive of life.\textsuperscript{1656}

2. Benefits of Appointing Counsel

At present there is substantial abuse of postconviction processes because successive petitions are both possible and prevalent.\textsuperscript{1657} The prisoner unlearned in the law cannot be expected to present ably all or even some of his claims for relief in any single petition. Prisoners often raise only one issue in each of several petitions or repeat precisely the same claim in successive petitions.\textsuperscript{1658} The resulting plethora of postconviction petitions is a considerable burden upon the resources of the courts.\textsuperscript{1659} Frequently, furthermore, courts accept patently unmeritorious petitions for hearing simply to be absolutely certain that the prisoner has no substantial claim.\textsuperscript{1660} But consideration and rejection of petition after

\begin{footnotes}
\textsuperscript{1652} \textit{E.g.}, State v. Romeo, 43 N.J. 188, 203 A.2d 23 (1964).
\textsuperscript{1653} People v. Darling, 58 Cal. 2d 15, 19, 372 P.2d 316, 318, 22 Cal. Rptr. 484, 486 (1962); \textsc{Cal. Pen. Code} § 1095 (West 1957).
\textsuperscript{1654} Other procedural distinctions between capital and noncapital cases include the bifurcated trial in capital cases only, \textit{see} \textsc{Cal. Pen. Code} § 190.1 (West Supp. 1967), and the allowance of twenty peremptory challenges in capital cases and only ten in noncapital cases, \textit{see} \textsc{Cal. Pen. Code} § 1070 (West 1957).
\textsuperscript{1655} 346 U.S. 156 (1953).
\textsuperscript{1656} \textit{Id.} at 196.
\textsuperscript{1658} \textit{See}, e.g., United States \textit{ex rel.} Hicks v. Fay, 230 F. Supp. 942 (S.D.N.Y. 1964) (65 petitions submitted by one prisoner); \textit{see} note 1629 \textit{supra}.
\textsuperscript{1659} President's \textsc{Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts} 54 (1967); \textit{see} Hardison v. Dunbar, 256 F. Supp. 412 (N.D. Cal. 1966); \textit{cf.} Bator, \textit{Finality in Criminal Law and Federal Habeas Corpus for State Prisoners}, 76 \textsc{Harv. L. Rev.} 441, 452 (1963).
\textsuperscript{1660} \textit{See}, e.g., Seidner v. United States, 260 F.2d 732 (D.C. Cir. 1958). \textit{See} note 1665 \textit{infra}.
\end{footnotes}
petition is neither an efficient use of the court's time nor a means for insuring that substantial justice will be done. Prisoners should not be able to retry the validity of their convictions every day of their confinement. But if a prisoner has a valid claim, he should not have to assert repeatedly his grounds for relief until he has achieved the requisite clarity and specificity in order to receive a hearing.1661

With a lawyer to investigate the case, marshall the arguments, select the relevant facts, and prepare an intelligible petition raising all the meritorious claims a prisoner may have, successive petitions would be unnecessary. Once he has litigated an issue in postconviction proceedings the courts discourage the prisoner from raising it again.1662 While res judicata in its collateral estoppel aspect is not applicable to postconviction relief petitions,1663 and prisoners may raise issues they did not urge in earlier petitions or did not press with sufficient particularity, once an issue is adequately raised and explored, the prisoner must establish special facts to obtain a new hearing on the same claim.1664 With an appointed counsel all meritorious claims in each prisoner's case would be raised at the first petition. Res judicata would bar further applications except in the unusual case where the first lawyer failed to raise an issue, the prisoner later discovers a new material fact, or the continuing development of the concept of procedural due process affects the case. Lawyers would certainly raise more justiciable issues in

1661. President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts 45-47 (1967). There may be abuse of the ability to successively petition the courts for postconviction relief, but this does not excuse the courts from doing substantial justice for each petitioner. See Fortner v. Balkcom, 380 F.2d 816 (5th Cir. 1967).

1662. "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application."


postconviction petitions than prisoners do at present. However, the increased burden upon the courts of litigating the substantive claims raised by appointed counsel would probably be outweighed by the increased efficiency resulting from fewer successive and inadequate petitions.1665

F. Other Stages of the Postconviction Period

The constitutional basis for the appointment of counsel for collateral relief procedures may also be applicable to the other phases of the postappellate period: Applications to the United States Supreme Court, sanity hearings, and petitions for executive clemency.

1. Preparation of Petitions to the United States Supreme Court

The present practice of the Supreme Court is to appoint counsel for indigents only if it accepts the case for hearing on the basis of a consideration of the prisoner's petition filed in propria persona.1666 This practice discriminates against the technically insufficient petitions filed by persons unlearned in the law and conflicts with the rationale of Douglas v. California1667 in that the sort of justice a petitioner receives depends upon his financial ability to retain a lawyer.1668

Without the assistance of counsel the task of preparing an acceptable petition for certiorari to the United States Supreme Court is nearly insurmountable. The required showing of merit is even higher than a prima facie claim of deprivation of constitutional rights.1669 The petitioner must show "special and important reasons" for granting the writ.1670 For example, the prisoner would have to know about and stress

1665. "We think it would promote orderly procedure if the legislation, [Criminal Justice Act, 18 U.S.C. § 3006A (Supp. 1967)], also provided appropriate legal assistance for inmates of Federal penal institutions in the preparation of their § 2255 petitions. The effect of this would not be to increase the number of such proceedings, but to enable judges to determine more readily which petitions merit hearings and which do not. Under the present practice, frequently the judge feels constrained to order a hearing, fearing that there is no other way to ascertain the nature and merits of the case." Report of the Committee on Habeas Corpus, 33 F.R.D. 363, 385 (1963). See Stewart, The Indigent Defendant and the Supreme Court in the United States, 58 LEGAL AID REV. 3 (1960).
1667. 372 U.S. 353.
1668. Justice Clark, dissenting from the decision in Douglas, noted the marked similarity between the procedures rejected by the majority of the Court in that case with respect to direct appeals and the procedures of the Court itself. He concluded, "There is an old adage which my good Mother used to quote to me, i.e., 'People who live in glass houses had best not throw stones.'" Douglas v. California, 372 U.S. 353, 360 (1963).
1669. Cf. notes 1584-87 supra and accompanying text.
conflicts among the rulings of lower courts as they touch upon his case.\footnote{1671} In addition, the successful petitioner often has to predict future developments of the concept of procedural due process from past trends in court decisions.\footnote{1672} The semiliterate prisoner is clearly unqualified to meet those stringent demands.\footnote{1673}

Appeals or petitions for certiorari to the Supreme Court from a criminal conviction are even more closely connected with the original prosecution than are collateral relief proceedings. Applications to the Supreme Court are similar to first appeals of right in that they are direct outgrowths of the criminal trial. If postconviction proceedings are criminal in nature,\footnote{1674} an appeal or petition to the Supreme Court from an adverse decision in the state or federal courts is also criminal. Rights or claims may be lost if the Supreme Court refuses a hearing just as they might be lost at the first appeal. At this later stage, just as in post-conviction proceedings, a life and death decision renders the procedure "critical."\footnote{1675} Hence, the sixth amendment requires the appointment of counsel to prepare petitions to the Supreme Court.

Although there is no right to be granted a writ of certiorari to the Supreme Court,\footnote{1676} there is a right to have the Court consider applications.\footnote{1677} This right should be no less available or valuable to indigents than to those who can retain counsel to prepare their petition papers.\footnote{1678} The extremely high threshold set for an initial showing of merit before the Court will accept a case accentuates the invidious discrimination between petitioners on the improper basis of wealth. Equal protection demands that counsel be appointed to prepare petitions for writs of certiorari and appeals to the United States Supreme Court.

Petitions to the Supreme Court are clearly petitions to the government for redress of grievances. The Supreme Court more than any

\footnotesize{\begin{itemize}
  \item \footnote{1671}{See R. Stern \& E. Greisman, Supreme Court Practice 125-36 (3d ed. 1962).}
  \item \footnote{1672}{Cf. notes 1458-68, 1503-15 supra and accompanying text.}
  \item \footnote{1673}{See R. Stern \& E. Greisman, Supreme Court Practice 125-36 (3d ed. 1962). Cf. notes 1458-68, 1503-15 supra and accompanying text.}
  \item \footnote{1674}{The Supreme Court makes the same allowances for petitions filed pro se by prisoners unlearned in the law as do other courts. U.S. Sup. Ct. R. 53(5); see note 1542 supra and accompanying text. The Court also requires that the substance of its rules be followed. U.S. Sup. Ct. R. 53(5). It is difficult to believe that the semiliterate petitioner is any more successful in meeting the Supreme Court's requirements of specificity, see U.S. Sup. Ct. R. 23 (1967), than he is in other courts. See notes 1543-44 supra and accompanying text.}
  \item \footnote{1675}{See text accompanying notes 1542 supra.}
  \item \footnote{1676}{See text accompanying notes 1520-30 supra.}
  \item \footnote{1677}{Cf. Brown, The Right to Petition: Political or Legal Freedom?, 8 U.C.L.A.L. Rev. 729, 733 (1961).}
  \item \footnote{1678}{See Burns v. Ohio, 360 U.S. 252, 258 (1959). While the grant of review by the Supreme Court of Ohio was discretionary, equal protection required that the indigent have the same opportunities to invoke the discretion of the Supreme Court of Ohio as had the rich man.}
\end{itemize}}
other court makes law in much the same sense that legislatures make law. Court decisions have sweeping practical consequences. Rulings are sometimes only prospective in effect. Arguments addressed to the Supreme Court often concern subject matter which is appropriate to legislative consideration. In order to avoid creating a barrier to the fundamental right to petition for redress of grievances in the United States Supreme Court, counsel should be appointed for indigent prisoners to prepare petitions.

Because the first, fifth, and sixth amendments require the provision of counsel to assist in the preparation of applications to the United States Supreme Court, the question arises, "Who should assign and reimburse appointed attorneys?" The traditional answer to this question is that the court before which the indigent is to appear should provide him with counsel. The small size and diverse character of the Supreme Court bar make this solution impractical if each indigent is to receive the assistance of counsel in preparing his petition. The most practical alternative would be to require the counsel appointed for prior proceedings to continue his service by preparing petition papers for the United States Supreme Court.

This attorney would already be familiar with the case and should be reimbursed by the state responsible for his appointment.

Because it is the state—rather than the Supreme Court—which has an interest in upholding the prisoner’s conviction and imposing the penalty, it should provide the accused with appointed counsel to challenge the constitutionality and validity of the conviction in the state appellate courts and in the United States Supreme Court. This suggestion seemed to carry the day in Mempa v. Rhay, 389 U.S. 128, 137 (1967). This solution has apparently been rejected by each of the three courts before which it was made. Peters v. Cox, 341 F.2d 575 (10th Cir. 1965); United States ex rel. Coleman v. Denno, 313 F.2d 457, 460 (2d Cir. 1963); State v. Davis, 270 N.C. 1, 154 S.E.2d 749 (1967). In State v. Davis, supra, the North Carolina supreme court reversed the unreported decision of a trial court judge awarding the appointed counsel of Elmer Davis, Jr. compensation for the legal assistance given Davis after the first appeal to the Supreme Court of North Carolina. It is settled law that there is no right to compensation. See Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964) (assignment of counsel is taking of property for which reimbursement is required), rev’d, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966), and the cases cited therein. The Davis case demonstrates the need for appointed counsel throughout the postappellate period and the benefit for greater criminal justice flowing therefrom. Davis’ attorneys, who were appointed only for the trial and direct appeal to the North Carolina supreme court, petitioned for rehearing in the North Carolina supreme court, petitioned for certiorari to the United States Supreme Court, petitioned for postconviction relief in the North Carolina courts and for certiorari to the United States Supreme Court, and petitioned for habeas corpus in the federal courts, finally gaining Davis’ release on the third attempt to gain United States Supreme Court review on the ground that his confession was coerced. Davis v. North Carolina, 384 U.S. 737 (1966).

On August 15, 1968, the Governor of California approved S.B. 1028, an act to amend
case for state appointment of counsel for petitioners to the Supreme Court is even stronger when the state opposes the prisoner's application with responsive pleadings.

2. Petitions for a Sanity Hearing After Appeal and Prior to Execution

The principle that a man must be sane to be executed is derived from the common law and may be a substantive due process right. Commentators have offered several reasons for the rule. One outmoded explanation is that if the objective of the death penalty is retribution, the condemned man will not suffer adequately unless he is sane. If capital punishment is explained by the need to deter crime, deterrence is not lessened by exempting insane men from the death penalty. Another explanation analogizes the execution to earlier stages in the criminal proceedings and professes concern that if the

Section 1239 of the Penal Code, which as amended reads in part: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel. If the defendant is unable to afford the services of counsel, the Supreme Court shall appoint counsel to represent him in any appeal to the Supreme Court, or any appeal or other review in the Supreme Court of the United States." California has thus recognized that it is the state's responsibility to provide indigent prisoners with appointed counsel to prepare petitions to the United States Supreme Court in capital cases.


1685. Although rejected by commentators, Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 U.C.L.A. L. REV. 381, 386-87 (1962), this explanation maintains a measure of grisly vitality: "[T]here is agreement among the examining physicians that at the time of the hearing the petitioner had lost awareness of his precarious situation. . . . [I]f he were taken to the electric chair, he would not quail or take account of its significance. There is reaction neither to audible nor physical stimuli. He takes no nourishment voluntarily. . . . We accept therefore the finding that the petitioner is insane and that such insanity has befallen him since his conviction nearly two years ago. . . . We declare immunity to any clamor of vengeance or to the moving recital of a brutal murder heretofore adjudged and condemned. We are content to stand upon ground higher than the common urge of outraged reprisal which revives the lex talionis, demanding a life for a life." Musselwhite v. State, 215 Miss. 363, 367-72, 60 So. 2d 807, 809-11 (1952).

condemned man is not sane, he will be unable to present reasons for clemency or think of some last minute argument that his conviction is unjust.\textsuperscript{1687} Possibly, the real reason that society has long felt that an insane man should not be executed is simply the desire to prevent unnecessary deaths or to limit as much as possible the exercise of the death penalty.\textsuperscript{1688}

California has accepted this principle,\textsuperscript{1689} but at the same time has enacted statutory means for determining whether a prisoner is sane before execution which vitiate the right.\textsuperscript{1690} Under present procedure, the sole judge of whether there is "good reason to believe that, a defendant under judgment of death, has become insane"\textsuperscript{1691} is the prison warden. In the unlikely event that the warden determines that a prisoner's sanity is doubtful, he must inform the district attorney of the county in which the prisoner is incarcerated.\textsuperscript{1692} The district attorney must then institute proceedings for a sanity hearing with a jury at which the district attorney must be present.\textsuperscript{1693} There is no right to counsel either at the hearing or for petitioning for the hearing.

In 1958 the United States Supreme Court upheld the validity of the procedure which allows the warden alone to decide whether a prisoner is sufficiently sane to be executed.\textsuperscript{1694} Since that time there have been dramatic developments in the Court's concept of the requisites of procedural due process. The time has come for a reconsideration of the grounds on which Justice Frankfurter strenuously dissented in Caritativo v. California\textsuperscript{1695} and Solesbee v. Balkcom.\textsuperscript{1696} The California procedure is lacking in fundamental fairness in that it authorizes the warden to make an ex parte determination of the prisoner's sanity. Due process requires a judicial not an ex parte determination of sanity.\textsuperscript{1697} In view of the


\textsuperscript{1689} Cal. Pen. Code § 1367 (West 1956). This provision has been law since California gained statehood. Ch. 119, § 615, [1850] Cal. Stats. 321.


\textsuperscript{1691} Id. § 3701.

\textsuperscript{1692} See B. Davis supra note 625, at 121-27.

\textsuperscript{1693} Cal. Pen. Code §§ 3701-02 (West 1956).


\textsuperscript{1695} 357 U.S. 549, 552 (1958).

\textsuperscript{1696} 339 U.S. 9, 14 (1950).

\textsuperscript{1697} See Specht v. Patterson, 386 U.S. 605 (1967).
evidence that prisoners approaching the date of execution often suffer demonstrable elements of mental illness, it is remarkable that so few sanity hearings are held under the present procedure. The warden need not accept assistance from qualified psychiatrists in making his decision whether the man is to die. Nor is he provided with adequate guidance as to the definition of insanity to be applied in this situation.

Since retribution is no longer recognized as a proper objective of punishment, the condemned man's awareness of what is abstractly right or wrong is irrelevant to questions of his sanity at time of punishment. Instead, the test for insanity at execution should be similar to those which determine if a man should be involuntarily committed to an institution.

1698. See notes 647-55 supra and accompanying text.
1699. Only twice since 1950 have the postconviction sanity procedures determined that condemned men were insane. Letter from James W.L. Park, Associate Warden, San Quentin, to authors, Feb. 20, 1968 (on file with the California Law Review).
1700. CAL. PEN. CODE § 3701 (West 1956); see CALIFORNIA SPECIAL COMM'NS ON INSANITY AND CRIMINAL OFFENDERS, SECOND REPORT 65 (1962)."Psychiatric examinations are given by a panel of three (3) Department of Corrections psychiatrists within 90 days after the man arrives, again 30 days prior to an execution date and finally about a week prior to the execution date. In special cases, such as that of Aaron Mitchell, additional examinations were given the night before and the morning of the execution. The Penal Code specifies that psychiatrists will be employees of the Department of Corrections." Letter from James W.L. Park, Associate Warden, San Quentin, to authors, Feb. 20, 1968 (on file with the California Law Review). But see Raudebaugh, Mitchell Collapses at the Gas Chamber, Cop Killer Carried to Execution, S. F. Chronicle, April 13, 1967, at 1, col. 8.
1701. CALIFORNIA SPECIAL COMM'NS ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 58 (1962). Associate Warden James W.L. Park described this test for insanity presently being used in California: "I believe the test for insanity is contained in the case of Caritativo vs. California, 357 U.S. 549—1958 U.S. Supreme Court. I am told there is a case of Phyle which is pertinent but I could not identify this case. In accordance with court decisions, the test is whether or not the man is aware that he is about to be executed and he knows of the crime for which he is to be executed. The law does not make provisions for mental illness—simply the awareness." Letter from James W.L. Park, Associate Warden, San Quentin, to authors, Feb. 20, 1968, (on file with the California Law Review).

This test does not derive from the sources suggested by Associate Warden Park. See Caritativo v. California, 357 U.S. 549 (1958); In re Phyle, 95 F. Supp. 555 (N.D. Cal. 1951); Phyle v. Duffy, 34 Cal. 2d 144, 208 P.2d 668 (1949); In re Phyle, 30 Cal. 2d 838, 186 P.2d 134 (1947), cert. dismissed sub nom. Phyle v. Duffy, 334 U.S. 431 (1948). It is probably an artificial outgrowth of the test for the competency to stand trial and is inappropriate for deciding whether a man is competent to be executed. Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 U.C.L.A.L. REV. 381, 394-95 (1962).
1702. See note 259-61 supra and accompanying text.
1703. See CALIFORNIA SPECIAL COMM'NS ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 58 (1962); ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT 127 (1953); Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 U.C.L.A.L. REV. 381, 394-95 (1962).
while insane should require the warden to appoint an impartial commission of psychiatrists from outside of the prison system to determine each prisoner's competency.\textsuperscript{1705} If the commission determines that a prisoner is not competent, the warden should call a hearing, at which all indigent prisoners should be represented by appointed counsel.\textsuperscript{1706} Here again a jury will decide whether or not a man is to die.\textsuperscript{1707} This is another "critical stage" in proceedings which are a direct outgrowth of criminal processes.\textsuperscript{1708} At present, though the district attorney must attend and participate in the proceedings,\textsuperscript{1709} there is no one at the hearing to protect the prisoner's rights. As in the case of other "critical stages," the due process and sixth amendment requirements dictate the appointment of counsel in order to make effective the principle that no person shall be executed while insane.

3. Petitions for Executive Clemency

The power of executive clemency is vested in the Governor by the California Constitution.\textsuperscript{1710} No state provides statutory or constitutional standards for the exercise of clemency, but a number of factors apparently affect the decision: (1) The nature of the crime; (2) the degree of certainty as to the guilt of the prisoner; (3) the fairness of the trial; (4) the relative guilt and sentences of participants in the same crime; (5) the desire for equality of sentences between rural and urban areas; (6) the extent to which the condemned man has been or could be rehabilitated; (7) the mental and physical condition of the prisoner; (8) dissenting opinions of the highest state court; (9) recommendations of mercy by the trial judge or prosecution; (10) political pressure and publicity; (11) the Governor's views on capital punishment; (12) the Governor's evolving views on capital punishment; (13) the Governor's views on capital punishment; (14) other mitigating circumstances.\textsuperscript{1711} California does not provide as of right appointed

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\item 1705. See note 1700 supra.
\item 1706. CALIFORNIA SPECIAL COMMS'NS ON INSANITY AND CRIMINAL OFFENDERS, SECOND REPORT 64-65 (1962). While there is authority for the proposition that the hearing should be conducted as an ex parte inquiry, People v. Riley, 37 Cal. 2d 510, 515, 235 P.2d 381, 384 (1951), the recent decisions of the California supreme court and the United States Supreme Court granting a right to counsel in the "civil" commitment proceedings growing out of a criminal prosecution suggests that due process might require the appointment of counsel for sanity hearings. See Specht v. Patterson, 386 U.S. 605 (1967); People v. Fields, 62 Cal. 2d 538, 542, 399 P.2d 369, 371, 42 Cal. Rptr. 833, 835 (1965).
\item 1707. See CAL. PEN. CODE § 3701 (West 1956).
\item 1708. See the requirements of the right to counsel under the sixth amendment in notes 1489-1533 supra and accompanying text.
\item 1709. CAL. PEN. CODE § 3702 (West 1956).
\item 1710. CAL. PEN. CODE §§ 4800-52 (West 1956).
\item 1711. Note, Executive Clemency in Capital Cases, 39 N.Y.U.L. REV. 136, 159-77 (1964). In California nearly all these factors are significant: "Concerning the factors affecting the decision as
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counsel to represent prisoners at clemency proceedings. The hearing may be conducted by the Governor with the assistance of his clemency secretary or by the clemency secretary alone. Indigent prisoners must rely upon volunteer assistance, if it is available, although there is an apparent recognition that all those seeking clemency must be represented by a lawyer. The attorney selects the factors in the prisoner's case which might justify clemency, marshals arguments in the condemned man's favor, demonstrates the application of clemency precedents to the prisoner's situation, and appears in the prisoner's behalf. Clemency proceedings determine whether the prisoner is to live or die. Although they might be labelled "civil" or "administrative," they are as critical to the ultimate disposition of the prisoner's case as "criminal" proceedings. Furthermore, clemency proceedings are outgrowths of former criminal prosecutions and often concern the same subject matter. The sixth amendment and due process requirement of a fair hearing to the granting of executive clemency, I feel that three of the items listed in your second paragraph (from the New York University Law Review article) are not relevant to the decision-making process used by the present Governor. These are "political pressure," "the Governor's views on capital punishment," and "precedents evolved from earlier clemency decisions." The Governor's approach is to take each case on its individual merits and to decide whether in that particular instance it would be appropriate for him to intervene through the exercise of his power of executive clemency. . . . Other relevant factors not included in your list would be information about the case which was not available at the time of trial, or which was not presented to the judge and/or jury.” Letter from Edwin Meese III, Legal Affairs Secretary to Governor Ronald Reagan, to authors, March 21, 1968 (on file with the California Law Review). See Braithwaite, Executive Clemency in California: A Case Study Interpretation of Criminal Responsibility, 1 Issues in Criminology 77 (1965) (mental condition); Ringold, The Dynamics of Executive Clemency, 52 A.B.A.J. 240, 241-42 (1966); Scott, The Pardoning Power, 284 Annals 95, 98 (ed. T. Sellin 1952) (political influence and views of governor on capital punishment); Wolfgang, Kelly & Nolde, Comparison of the Executed and Commuted Among Admissions to Death Row, 53 J. Crim. L.C. & P.S. 301 (1962); Yager, Executive Clemency, 33 Cal. S.B.J. 221, 227-28 (1958); Comment, Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94, 129 (1958).

1714. "In every case considered by Governor Reagan, lawyers have appeared for the prisoner at the clemency hearing. This same situation has prevailed in the past. While there is no legal provision for appointment of a person to present the prisoner's case, there has been no difficulty in obtaining an attorney to handle the clemency proceedings, either from among the attorneys who have previously represented the prisoner at trial or on appeal, or a new attorney selected by the prisoner. Often, attorneys from such groups as the ACLU handle such cases, upon the request of, or by agreement with the prisoner.” Letter from Edwin Meese III to authors, March 21, 1968 (on file with the California Law Review).
1715. “The presentations made at the hearing are usually oral, but any lawyer is permitted to present written material if he wishes. In most cases, however, he has already been encouraged to present his written views as a part of the clemency investigation, which is normally completed prior to such hearing.” Letter from Edwin Meese III to authors, March 21, 1968 (on file with the California Law Review). See generally Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803 (1961).
clearly suggest the right to counsel. But again the strongest argument for the appointment of counsel derives from the equal protection clause of the fourteenth amendment. It is invidious discrimination for the sort of hearing an individual receives to depend upon his wealth. Due process does not require the state to provide for executive clemency. But once the state establishes procedures for the grant of executive clemency, the equal protection clause forbids the state from making relief contingent in any way upon the petitioner’s financial resources. If there is to be capital punishment, the state cannot shrink from providing the condemned with an equal opportunity to invoke their constitutional rights and the state’s mercy through the appointment of counsel.

CONCLUSION

Avoiding the moral arguments which pervade the capital punishment debate, this Comment has attempted to demonstrate that both legally relevant pragmatic considerations and settled principles of constitutional law compel the judicial abolition of the death penalty.

Part I concludes that execution is so self-defeating a means to all conceivably legitimate ends as to violate the rational basis standard of substantive due process. Statistical evidence universally fails to lend any credence to the proposition that capital punishment is a more effective deterrent to crime than is imprisonment. The mere existence of capital punishment leads to the loss of innocent life: Murders have been committed by criminals attempting to avoid apprehension for prior capital offenses; innocent people have been killed by suicidal individuals seeking execution; innocent men have been executed. Less directly, the existence of the death penalty cannot but “brutalize the temper of a society” and thereby weaken the values which compel voluntary obedience to laws designed to eliminate brutality.

Recidivism cannot justify execution consistently with the requirements of equal protection; parole statistics demonstrate conclusively that capital parolees are less likely to return to crime generally, and less likely to commit capital crime specifically, than are other parolees. Retribution per se is simply not a legitimate governmental objective.

1716. Most of those sentenced to death are indigent. See notes 1544-45 supra. In addition, “... there is reason to suspect—and statistically significant evidence to support the suspicion—that Negroes have not received equal consideration for commutation of the death penalty.” Wolfgang, Kelly & Nolde, Comparison of the Executed and Commuted Among Admissions to Death Row, 53 J. CRIM. L. C. & P. S. 301, 311 (1962).

The United States Supreme Court has on several occasions hinted its disapproval of execution:

Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.1718

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.1719

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.1720

The only apparent explanation for the Court's refusal to hold the death penalty unconstitutional per se is the Court's reluctance to pass judgment on the wisdom of legislative decisions. But retention of capital punishment is not merely unwise; it is flatly inconsistent with constitutional principles which are—at least in theory—immune from legislative diminution.

Part I demonstrates that the threat of execution coerces guilty pleas even without the active encouragement of the state. Because inefficacious, the death penalty thereby "needlessly penalizes the assertion of a constitutional right."

Part II discloses the invalidity of the premises upon which the consistency of execution with "the constitutional concept of cruelty" rests. By any standard, the psychological torture inherent in every execution, and the physical torture quite probably inflicted by many executions, render capital punishment far crueller than expatriation. Yet the latter has been held violative of the eighth amendment,1721 and the former has not.

Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?1722

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1722. Id. at 125 (dissent of Frankfurter, J., joined by Burton, Clark & Harlan, JJ.).
Part III's analysis of the Court's recent scrupled juror decision concludes that the Court's rationale is constitutionally valid only if carried to its logical conclusion: A defendant's right to a jury trial on the issue of punishment includes the right to a jury which is representative of all significant community attitudes concerning capital punishment. Because absolute opponents of the death penalty are significant in number, only a "hanging jury" can condemn a man to die.

Part III also concludes that California's failure to provide penalty juries with standards to guide life or death decisions violates due process. This lack of standards assures an arbitrary selection of defendants who will die. But arbitrariness cannot be cured by penalty trial standards: Part III demonstrates that the entire process in capital cases, from legislation through appellate review, is riddled with arbitrary distinctions far more irrational and conducive to the application of personal prejudice than those the Court condemned when the sanction was sterilization.

We must not pile conjecture upon conjecture and posit the decision of life or death upon a pyramid of guesses.

Part IV indicates that the irrationality of the imposition of capital punishment is magnified rather than alleviated in postappellate proceedings. The failure to provide capital defendants with counsel throughout the postappellate period—discretionary review, collateral relief, and executive clemency—violates the rights to counsel, to a fair hearing, to equal protection, and the right to petition the government for redress of grievances. It is self-evident that a postappellate scheme which favors those wealthy enough to retain an attorney adds economic discrimination to the social discrimination already inherent from the initial through the appellate stage.

The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.

In short, courts which continue to tolerate capital punishment can only contribute to "a grim sequence of judicial error." The moral

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1723. Skinner v. Oklahoma, 316 U.S. 535 (1942). "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Id. at 542.
1725. President's Comm'n, supra note 39, at 143.
argument is simple: "Executions cheapen life. We must cherish life." The constitutional arguments compel a conclusion which is equally to the point: if the "evolving standards of decency that mark the progress of a maturing society" do not now demand judicial abolition of the death penalty, society has bypassed maturity for senility.

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