Running head: DEFENDING ASSIGNED COUNSEL

An Objectivist and Libertarian Defense of the Right to Be Assigned Counsel

Christopher A. Robinson, PhD
University of Alabama at Birmingham

Abstract

The Objectivist and Libertarian notion of rights is conceived as a negative one. Rights, in this view, specify one's freedom to perform the acts necessary for survival, while prohibiting one from infringing on another's right to do the same. There is, however, at least one apparently positive right that is consistent with the Constitution and Objectivist-Libertarian ideals: the right to be provided with counsel. In this essay, I discuss the positive and negative views of rights, with a particular emphasis on the Objectivist-Libertarian notion of negative rights. After this, I discuss some background history of the right to counsel, showing how it changed from a negative right to an apparently positive one. Though published comments have been vague, Objectivist-Libertarian discussions lead one to suspect that these movements would be opposed to this right, because it is conceived of as a positive right. I will argue that the nature of this right has been mischaracterized and that, properly understood, this is a negative right. As such, Objectivists and Libertarians should recognize this right because acknowledging the right to be assigned counsel—indeed, the right to the same resources as the prosecution—is an extension of basic Objectivist-Libertarian notions of negative rights.

An Objectivist and Libertarian Defense of the Right to Be Assigned Counsel

> The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.
>
> —Sixth Amendment to the U.S. Constitution

In the later 20th century, there are perhaps no words in that American's more associate with police than those of the Miranda warnings. Nearly everyone, whether through experience with the law or not, knows they have the right to remain silent, anything they say can be used against them, and that they have a right to an attorney even if they cannot afford one. This last right, the right to an attorney, is controversial in many arenas. In particular, Objectivist and Libertarian thinkers appear opposed to this right for it seems counter to their notions of the proper role of the government. In this essay, we will review Objectivist-Libertarian notions of rights and the history of the right to be assigned counsel, and we will conclude that this right is actually a natural extension of Objectivist-Libertarian thinking on the nature of rights.

Objectivist-Libertarian Theory of Rights

There are two basic ways of conceiving of rights. In Libertarian theory they are called the positive and negative views. We could also contrast them as the object and action views. In the positive (object) rights view, we have the right to objects, such as food, clothing, shelter, and the like. In this view, if we did not have any food, we could demand that someone provide us with food. In the negative (action) view, rights solely pertain to one's freedom to perform actions. In this view, one has one fundamental right, the right to "live your life as you choose so long as you don't infringe on the equal rights of others" (Boaz, 1997, p. 59). In this view, if one were hungry, one would have the right to attempt to work for food, but not the right to demand to be fed. To paraphrase a familiar expression, if one had the right to happiness they could demand that another make them happy; if they have the right to the pursuit of happiness then another could not interfere with that pursuit. In the present paper, I will adopt the action/object characterization of rights, for it better illustrates the right to consult with a lawyer contrasted with the right to be assigned a lawyer if one cannot afford one.

In multiple places, Ayn Rand makes it clear that Objectivism holds the action view of rights. She wrote, "a right is the sanction of independent action" (1946/1998, p. 83). A "right," she later indicates, "is a moral principle defining and sanctioning a man's freedom of action in a social context" (1963, p. 110). In the same article she expands on this, saying, "The concept of a 'right' pertains only to action—specifically, to freedom of action. It means freedom from physical compulsion, coercion or interference by other men." Leonard Peikoff, in his explication of Objectivism, reiterates this point, "Rights are rights to the actions necessary for the preservation of a rational being" (1991, p. 354).

In Objectivism, no right is the right to an object. At its root, the right to an object would require that one violate the rights of another, to enslave another in order to provide that right. This is clearly against Objectivist principles. As Rand says, men have "the right to be free, but not the right to enslave another" (1946/1998, p. 84). "No man," she later asserts, "can have a right to impose an unchosen obligation, an unrewarded duty or involuntary servitude on another man" (1963, p. 113).

A discussion of rights naturally leads into a discussion of the proper role of the government. In several places, Rand makes it clear that the only proper function of the government is "retaliation by force against those who initiate force, *and nothing else*" (1998, p. 650, emphasis in original). The functions necessary to protect individual rights are the police, the courts, and the military. The clear implication is that these are the only proper functions which individuals should be forced to pay for. As we will see, this principle will help us understand how the right to be assigned counsel can work in practice.

Action-Right History of Sixth Amendment

The Sixth Amendment to the U.S. Constitution states that, "The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." There are two main ways this right could be interpreted. The first, and historically predominate view, is that this is as an action right. Thus, one would have the right to be represented by a lawyer. The other interpretation is that this is, or seems to be, an object right—the right to be assigned a lawyer even if one cannot afford one. This is the modern interpretation of this right (Beaney, 1972; Garcia, 1992).

As an action-right, the development of the right to counsel has had a long and somewhat bewildering history. It is bewildering because, in England from whence America derives many legal traditions, the right to consult with counsel was originally recognized in only non-capital trials but not in capital trials. It is also somewhat bewildering because the right to be assigned counsel is not actually derived from the wording of the Sixth Amendment. It is defended based on interpretations of the Fourteenth Amendment right of due process and the Fifth Amendment right against self-incrimination (Garcia, 1992).

In many ways, the American tradition is exactly opposed to the British system at the time the colonies were founded. There it was assumed that everyone would represent themselves, for example even an idiot was required to represent themselves because they lacked the ability to choose a "proper substitute." It was felt that the judge would take care of his or her best interest. When lawyers were first allowed, it was only in non-criminal cases (Blackstone, Book III, Chap. 3, Sect. 25–26).

As Sutherland reviewed in his opinion in *Powell*, from its earliest days the United States has rejected the English interpretation of this right and almost exclusively held to a tradition allowing a defendant the right to consult with counsel. The earliest guarantee of this in the United States was in the 1641 charter of the *Massachusetts Bay Commonwealth*:

> Any man that findeth himself unfit to plead his own cause in any Court, shall have the liberty to employ any man against whom the Court doth not except, to help him provided he give him no fee or reward for his pains (Section 26).

Naturally, Objectivists and Libertarians would applaud this long history of the right to consult with counsel. At its most basic form, an acceptance of a division of labor would imply that individuals cannot spend their time becoming knowledgeable in all professions. As the study of law is specialized, it is only right that an individual should have the means to consult with someone knowledgeable if they have access to them.

Shift to Object-Right

As we have seen, for most of the past two and half centuries, the Supreme Court has perceived the right to counsel as an action right. Recent decisions, however, have affirmed that this is an (seemingly) object right applicable in many situations. This shift began when the court opined that the fundamental importance of counsel necessitated that an individual be assigned counsel even if they could not afford it. The initial reasons had to do with words that do not appear in the Constitution, but seem consonant with its spirit: fair play.

As the Court wrote in *Palmer v. Ashe*, "without a lawyer a defendant could not have an adequate and fair defense" (1951, p. 698). Or as the Court said in *Gideon*, "Any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" (p. 861). Therefore, the court mandated that criminal defendants be provided with counsel.

The Court's argument has more underpinning than simple notions of fair play. The Court has ruled that the failure to appoint counsel is a violation of due process clause of the Fourteenth Amendment. In other words, without adequate counsel an individual cannot be assured their Constitutional right to due process.

Sutherland's opinion in *Powell v. Alabama* marked this fundamental shift in the right to counsel. In this opinion, the Court first reiterated that the action-right to counsel was so fundamental as to be essential to any trial of a case against a prisoner. He summed up the importance of this right in his famous opinion:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

After establishing the fundamental importance of this action-right, Sutherland then declared that it was so crucial to due process that the right to have counsel appointed was a logical corollary of the right to have the assistance of counsel:

> Under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . The right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.

In Sutherland's opinion, the object-right to counsel was a logical corollary to the importance of the action-right.

What is the scope of this right?

In order to continue discussing the history of this right, and to flesh out the importance of this right, we must also consider several other issues, such as when the right to counsel applies, what type of counsel it mandates, and when the obligation is satisfied. We should also consider whether indigence is the proper criterion for deciding who is allowed assigned counsel.

These are difficult issues, and I can only indicate the Court's position on these issues, and whether they seem consistent with the principles of Libertarianism.

When is this right operative?

There is good justification, sometimes followed by the Court, for making the right to consult with, or to be assigned, counsel operative earlier rather than later. It seems to me that the crucial act is not the arrest, but the initiation of proceedings by the government.

The Court has held that the crucial legal step initiating the right to counsel is the "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" (Kirby v. Illinois [1972]). I wholeheartedly agree with this stance because it is at this stage when the government "is no longer merely engaged in the task of determining who committed an unsolved crime; rather, it is preparing to convict the defendant of the crime he allegedly committed" (Stevens, quoted in Garcia, 1992, p. 27).

Because the individual has the right to counsel at this stage, they also have the right to counsel for several common judicial activities occurring around this time.

Juries tend to believe confessions, whether they are obtained in the squad room or the courtroom. It is understandable that juries would believe confessions, as the Court has noted, "Deliberate confessions of guilt are among the most effectual proofs in law . . . [because] . . . a rational being will not make [deliberate and voluntary] admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience" (United States v. Montgomery [1875]). Therefore, if an individual is to be protected against self-incrimination, he must be protected early in criminal proceedings. This was the underpinning of the *Miranda* ruling.

The ruling in Powell linked the right to be assigned counsel to the Fourteenth Amendment; the ruling in *Miranda* linked it to the Fifth. The *Miranda* opinion emphasized that one of the Court's objections to coerced confessions was that they were in violation of the Fifth Amendment's right against self-incrimination (Ringel, 1972, p. 58). Since the Court believed that counsel would rarely, if ever, encourage a client to confess, the Court mandated counsel as soon as the investigation began centering on an individual to ensure that confessions were voluntary.

As Cook (1974) argues, the underlying assumption of due process is that humans have free will and when that will is overborne any evidence is unreliable (p. 22). In truth, however, unreliability is secondary to the distaste to the techniques used to obtain involuntary confessions. Thus, the right to counsel is designed to protect the dignity of the individual and of the legal system. In this capacity of protecting the integrity of the legal system, counsel benefits the legal process in several ways. As has been noted, counsel can increase the trustworthiness of a confession, reduce the risk of coercion (or provide a witness to it), and ensure the accuracy of statements made by a defendant (cf. Cook, 1974, pp. 98–99). It also makes the proceedings appear fairer to those who observe them.

Thus, in short, the Court has argued that the importance of counsel in legal proceedings demands that an individual be provided with counsel to prevent his due process rights from being violated, especially his right against self-incrimination. Further, as we have seen, in *Dauber* the Court placed great emphasis on counsel's ability to discredit shaky evidence. Thus, with a greater acceptance of evidence, the need for counsel to ensure due process also increased.

There are other pre-trial situations that sometimes require the assistance of counsel. An individual's trip through the legal system has many stops; one common stop is identifying the individual. There are many kinds of identification, and the distinction is important for us (Cook, 1974). Let us consider identification in a lineup. If an individual identifies the accused as the perpetrator, then that person will continue through the system. At trial, usually months later, the person will sit in the witness box and confidently identify the person in the defense box as the perpetrator. This will usually be very effective. However, the witness has had months to solidify his or her memory, and knowing that the prosecutor is going forward will usually increase their confidence in their identification. Finally, on the witness stand, it is a fair bet that the accused will actually be at the defense table.

The remedy to this (over-inflated) confidence is to involve counsel at the stage in which an individual is being identified. This right follows naturally from other Constitutional rights, since it seems clear that the right to confront witness includes the right to confront how they made their identifications (Cook, 1974, p. 209). The main issue at this stage is being able to reconstruct the identification to make sure that the accused was not improperly identified. Further, to counter the confidence on the witness stand, it is important that juries be told how confident the people identifying the accessed were of their identification at the time. The Court has already recognized the importance of considering the level certainty at the time of identification (Cook, 1974, pp. 236–237).

The Court has been clear on this issue: after an individual has been indicted, they generally have the right to the assistance of counsel to ensure the procedural accuracy of the identification, such as it was free of suggestiveness (Cook, 1974, p. 214).

To what types of crimes does it apply?

The other issue is what type of crimes an individual has the right to counsel. The Court has generally held that an individual is entitled to a lawyer for offenses that realistically have imprisonment as a punishment. There is much to recommend this view, especially on practical grounds. I can see no reason to provide lawyers for every traffic violation.

We must ask whether an individual is entitled to counsel for appeals. This is a difficult issue, and would require an analysis of the function of appeals to demarcate whether this blanket proscription is grounded is real-world justification or whether individuals should be entitled to a lawyer depending on the type of appeal. At present, the Court has ruled that the convicted are entitled to counsel for their first level of appeals (*Douglas v. California [1963]*), but not discretionary appeals (Garcia, 1992, p. 13).

We can also ask whether the right should we expanded even further, say, to private suits. The answer here is no, they should not. First, and most importantly, in private suits an individual's liberty is not threatened. Second, this would open the door for private investigators for both parties, such as in divorce suits.

What kind of counsel does it mandate?

This is a tricky issue, and one not easily resolved in the present systems to assign counsel. I sympathize with the Court's concern of appellate retrials for every criminal who is convicted and who then claims they were only convicted because of ineffective counsel. I also applaud its restraint in specifying how counsel must perform.

Generally, the focus of this question has been about the competence of counsel. That is, the question has been whether or not the defendant's counsel was ineffectual (Garcia, 1992). The Court has allowed wide latitude in what qualifies as acceptable counsel. In the past, it has cleared lawyers who were drunk, seriously ill-prepared, and otherwise unable to defend their clients with their full attention. Usually, the burden is on the convicted individual to prove that his defense was grossly negligent and that that substantially hindered his case.

Nonetheless, as the Court has recognized an effective counsel is essential to our adversarial system of justice. It is difficult to believe that this can be effectively accomplished with one side (the government) having vast resources and the other (e.g., the assigned counsel) provided with few resources. Therefore, it seems to me that the issue should not simply involve questions about counsel's competence, but also about the capability of counsel to marshal an effective defense. This is only most likely in situations where defense counsel has access to the same resources as the prosecution.

Should only the indigent have the right of assigned counsel?

It is usually assumed that only the indigent have the right to be assigned counsel. Indeed, one must prove they are indigent before they can be assigned counsel. This strikes me as somewhat perverse. The only justification offered for this criterion is that expanding the right would overburden the system.

There are two main reasons for removing the indigence requirement. First, there is no other right whose exercise depends on one's income. Second, it is often costly to mount a proper defense. For some crimes, even if one is innocent, defending oneself will make one indigent. Therefore, many individuals plea bargain to avoid the cost of a trial, even if they feel they could win. It would be unjust if successfully defending oneself against an accusation wiped out one's resources to return to the life one lived prior to indictment.

The Sixth Amendment and Objectivism-Libertarianism

Rand's views on the right to be assigned counsel are never explicitly stated, but can be easily gleaned from her writings on related issues. As we have seen, she has written that no man has the right to enslave another. "Nobody," she writes, "is forced to provide you with the means of exercising a right" (1999, pp. 268–269). At first glance, it seems that having the right to counsel implies that someone be forced to provide you with counsel—either directly as the counsel or indirectly through taxes. This implies that Rand would be opposed to this right.

Rand alludes to the right to be assigned counsel in several places. In each of her mentions, she takes a dim view of this right. In a book review, she wrote, "Most of the Constitutional guarantees protecting the individual, have been infringed, suspended, negated or eroded in regard to businessmen; today these guarantees are respected only in regard to criminals. The criminals' rights have legal protection, the businessmen's rights have none" (1963, p. 30). Rand clearly saw this as deplorable, echoing the author's claim that, "whenever a country's criminal laws are more

lenient than its civil laws, it means that the country is accepting the basic principle of statism and is moving toward a totalitarian state."

In a later article, her opposition to this trend is made even clearer. After quoting an editorial favorable to "accused individuals, racial and religious minorities, the impoverished and ignorant," she cynically comments, "This means that we must fight the world's drift toward statism by protecting the rights of criminals" (1974, p. 307). She expanded her comment against the rights of the accused, saying, "Don't remind me that an accused person is not necessarily a criminal and that he must be protected against unjust accusations" (pp. 307–308), presumably because the accused are "(probably) criminal" (p. 308).

Thus, although there are no direct mentions, there is reason to believe that Rand would have been opposed to the right to be assigned counsel.

I suspect there are two reasons that discouraged Rand from fully considering the right to be assigned counsel as an extension of Objectivist ideals. First, Rand's definition of the proper functions of the government discourages this view. She defines one of the functions of the government, the police, as "to protect men from criminals." She also describes the accused as probably criminal. This leads me to think that Rand did not fully distinguish between the lower standard of evidence sufficient to accuse an individual and the more stringent standard of evidence necessary to convict an individual. This distinction should not be erased, as it reflects both the epistemological reality of contextual certainty and the legal reality of the difference between an individual suspected of a crime and an individual found guilty of one.

If we recognize these two different standards of evidence, as well as that people are innocent till proven guilty, then it is clear that we cannot embrace Rand's assertion that the accused are "(probably) criminal."

The second reason is that Rand (1990) emphasized the role of law in establishing rules of forensic evidence. At present, there are two applicable principles governing the forensic admission of evidence. The first applicable principle, the Federal Rules of Evidence, gives the trial judge great discretion in accepting evidence. The second applicable principle is several Court rulings on the admissibility of scientific evidence. The most famous ruling was the Frye rule, which allowed Courts to accept evidence from techniques that had a general acceptance within a particular field. Subsequent decisions limited this requirement, till finally in *Daubert v. Merrell Dow Pharmaceuticals* the Court rejected even this standard. In this Opinion, the Court put great emphasis on a vigorous defense to weed out junk science.

Quite clearly, this only increases the importance of defense counsel. Without a proper rebuttal, a hair analysis' certainty, for example, can mask fundamental limitations of the method. To continue with this example, a hair analyst, under prosecutorial coaching, may be led to declare that a hair taken from a crime scene "matches" the suspect's, which implies that the analyst can tell the two are indeed from one origin. In fact, however, the analyst should only declare whether the two are "consistent" (Nickell & Fisher, 1999, p. 62). This distinction is not a mere shift in words, but a shift in potential culpability. If a hair "matches" a subject's, this implies that the subject is the source of that hair; if the hair were merely "consistent" with the subject's, this would only mean that the subject could not be excluded. Without adequate defense counsel to indicate and emphasize this distinction, it would be easier for the government to win the conviction of an innocent individual on seemingly solid evidence.

Now that we have reviewed Objectivist thought on this, we can examine the Libertarian viewpoint. As we have seen, Libertarians also have a negative view of rights (i.e., they hold the

action right view). Libertarian thought is somewhat vague on this specific point, but the implication is that they would be opposed to a right to be assigned counsel.

David Boaz (1997), in his well-received primer on Libertarianism, discusses different interpretations of rights. In his discussion, he takes great pains to argue against false views of rights, including an "equality of outcome" and "equality of opportunity" interpretation of rights. An equality of outcome view holds that all individuals are entitled to possess all the same products. Any theory of rights that requires an equality of outcome would by necessity hold an object view of rights. Individuals would have the rights to outcomes—products—and other individuals would be required to provide outcomes—clothing, food, good grades—to them.

Many who reject an equality of outcome view nonetheless implicitly accept an equality of opportunity conception of rights. In this view, we must ensure that everyone begins on equal footing. In Boaz's view, this argument is one step away from arguing that individuals have the right to equality of outcome. The reasoning is straightforward: Individuals will never be completely equal in innate ability, available resources, and other relevant factors. Therefore, someone who does not acquire some desired product—such as some desired income—could potentially complain that they unfairly had so much further to travel in order to acquire that product. So, to try and ensure that everyone starts out equally, some individuals must necessarily either be given resources to bring them level to others or others must be deprived of resources that would otherwise give them an "unfair" start. Thus, there will be a constant arbitrary fiddling and adjusting in order to try and assure that everyone does indeed start out equally.

Some could, and probably have, argue that those who able to afford a high-priced lawyer receive better legal representation that those who are not able to afford such lawyers. This, in effect, creates an inequality of opportunity to demonstrate innocence. One extreme form of this difference is when an individual cannot afford counsel and is up against the D.A. who has the resources of the government at his or her disposal. Since the Libertarian notion of rights does not require equality of opportunity, it follows that Libertarians would not object to this circumstance. That is, the standard of Libertarianism would not require that an individual be provided with an equal opportunity to defend himself as the D.A. has to attempt to convict him.

Tibor Machan (1989) hints, I believe, at why many Libertarians are suspicious of the right to be assigned counsel. In several works, he discusses rights in the context of people who argue for the existence of basic welfare rights, such as to food. He points out that many who argue for the existence of welfare rights hold that there is "typically" a conflict between the rights of the rich and the poor. For example, many supposed that there is a conflict of rights between the rich who have more food than they need and the poor who cannot even afford the food they need. From this perspective, welfare is designed to ameliorate this conflict.

As will become clear, this is not the underlying rational behind the right to counsel in this paper. The conflict discussed here is not between the rich and the poor, but of both groups against the government. It is probably true that the poor would benefit most from the right to be assigned counsel, but this is only because the rich would probably still prefer to hire their own lawyers for the specialized attention they give them.

While not explicitly denying the right to be assigned counsel, the Libertarian party platform is vague on this issue. The platform states,

> Until such time as persons are proved guilty of crimes, they should be accorded full respect for their individual rights. We are thus opposed to reduction of constitutional safeguards of the rights of the criminally accused.

Considering that it is not clear whether Libertarians view the right to be assigned counsel as a "constitutional safeguard," and good initial reasons to suspect that they would not, the platform should have been clearer on this point. As I will argue, they could make this clearer by explicitly endorsing the right to be assigned counsel.

An Objectivist-Libertarian Defense of the Right to Be Assigned Counsel

The necessity of a solid philosophical basis for this right is very clear as one reads the history of this right. As a history of the right to counsel reveals, even the Devil could cite a Supreme Court opinion to support his own (see Garcia, 1992). The Court's Opinions in this area have generally been to establish a bright line with one opinion and then use later opinions to blur it. Indeed, many of their rulings are not integratable by a reasonable person. In general, however, the Court is moving to limit this right; as such, this paper is against the common trend in Supreme Court decisions.

As we have seen, Objectivist-Libertarian thought also appears to be antagonistic to the (apparently) object-right interpretation of the Sixth Amendment. Discussion of the issue has also often been unduly vague. This is unfortunate because the point is complex.

There are two ways which the right to be assigned counsel can fit easily within Objectivist-Libertarian theory. The first, and preferred way, is to deny that it is actually an object right at all. The second is to clearly demarcate the situation—one in which the government is deciding the fate of one's life and limb—as a case demanding the object-right. This later interpretation would prevent this object-right from being hijacked and used by those who would expand it to include a wide range of entitlements.

As we have seen, most Objectivists and Libertarians would readily agree that the Courts are a main function of the government. In Objectivist and Libertarian theory, the government, just as the individual, cannot initiate force. Surely, then, just as it is a proper function of the government to punish the guilty, it is also imperative that the government insures that it not initiate force by punishing innocent individuals. It is imperative that the Courts follow due process in regards to all citizens, and counsel is the first line of this defense.

One function of the legal system is to identify and punish the guilty. Too often this function has been interpreted to mean that the function of the government is to assemble evidence against a guilty individual. The squad that investigates the causes of fires, for example, is not called "the fire investigation squad," but the Arson squad—its function is to look for signs of arson. This, at the outset, biases the investigation. Properly, however, the function of identifying and punishing the guilty requires that the legal system not only identify whether an individual is guilty, but equally whether he is innocent.

Just as many individuals believe that the government's role is to identify and punish the guilty, we see that very often the government is granted the right to have evidence collected against an accused individual. If, for example, a rape occurs and the D.A. decides to prosecute, then the D.A. is in fact using governmental power to order evidence to be collected. The D.A. can use the police to collect eyewitness accounts, to gather crime scene evidence, to order DNA tests. With all these resources on the side of the prosecution to assemble evidence of guilt, in order to ensure that force is not initiated it is only right that an accused have the right to force the collection of evidence of innocence.

One form of this right is already contained within the Sixth Amendment. The accused is granted the right to "compulsory process for obtaining Witnesses in his favor." Under the present interpretation, Objectivist-Libertarian theory would expand this and revive the spirit of a clause in the New Jersey Constitution of 1776:

> All criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to (Art. XVI).

There are many reasons—most prominently mistaken identifications—why the government might in good faith accuse an innocent individual of a crime. In may also convict them of a crime as well. Indeed, the evidence is incontrovertible that the Courts have convicted innocent individuals, even for capital crimes (XX). Thus, this argument for the right to counsel is actually an argument for the right to obtain potentially exculpatory information. Whatever means of disposal the government has to convict, the accused should have to exonerate. Most clearly, the accused should have the right to DNA tests where biological material is recovered from the crime scene.

Objectivists and Libertarians seem to accept that Constitutional protections such as due process inherent in Objectivist and Libertarian thought (e.g., Machan, 1995, p. 62). Due process, as we have seen, requires that an individual be represented by counsel.

Objectivists should also support the right to be assigned counsel for the right to counsel is another right designed to protect an individual from the power of the government. As such, it must be considered in the context of our notions about the fair, proper use of force against an individual by the government. While we accept that a justly convicted individual is subject to punishment, we believe that the government should rightly be under strict restraints in exercising this power. We require, for instance, that the government follow procedural due process in convicting individuals.

There is a resemblance, but not a correspondence, between what we can call inductive and forensic procedure. For our purposes, there are two main differences. First, in contrast to simply "finding out the truth" the Courts have a notion of "fair play," especially in regards to what information the accused can be forced to reveal. The second difference is that "double jeopardy" only allows the prosecution only one shot at proving its case.

These goals sometimes conflict with one another, as the history of the Court's opinions have shown. Specifically, at times the interest of crime control has led them to emphasize the fact that they only have one shot at the apple, and so to be lenient with admitting evidence. At other times, the Court has emphasized the notion of fair play. We include in our notion of fair play that an individual cannot be forced to make communicative statements as to his guilt; we also include in our notions that an individual has the right to know they cannot be forced to make such statements; we also include in this notion that individuals can deal with the government through a qualified intermediary. They have, in other words, the right to counsel.

There are good reasons to deplore the present emphasis on "crime control" and the relaxing of standards of admitting evidence and of the limiting the right to counsel. It is often said that "it is better to let one guilty man go free than convict one innocent man." It is easy to consider why. If we let a guilty man go free, we have made one mistake: a criminal does not face punishment. To convict the wrong person of a crime is to make the same mistake and another one: we initiate force against an innocent person and fail to convict the correct person. The real criminal is out

there. We, therefore, have a much greater vested interest in ensuring that individuals are not falsely convicted; effective counsel is the first line of that defense.

Thus, the view that we have the right to be assigned counsel fits within Objectivism-Libertarianism political theory because in these theories the government is permitted to punish the guilty but prohibited from initiating force against the innocent. Punishing an innocent individual would be an initiation of force. The best way to guard against this violation is a vigorous, competent defense provided with the same resources as the prosecution. In short, whatever right the accuser has to assemble incriminating evidence the accused should have to assemble exculpatory evidence.

Funding this Proposal

Historically, there have been four methods for providing counsel to those who cannot afford it: assigned counsel, the voluntary defender system, the public defender, and a mixed private-public system (Beaney, 1972, Talarico, 1992). Objectivist-Libertarian theory provides guidelines to which system is most preferable.

The most objectionable of the four from the Objectivist-Libertarian position would be the assigned counsel system. This system is objectionable both in theory and in practice. In the assigned counsel system, the judge can assign defendants counsel either systematically or randomly. Random assignment could include picking a lawyer who happens to be sitting in the back of the courtroom at that moment. In either case, the counsel is required to take on a defendant that has been assigned to them. On top of this, they are either not compensated or compensated at such a low rate that it is impossible to perform an effective investigation. Very often, the assigned counsel attempts to plea-bargain the case in order to minimize their costs (Beaney, 1972).

This system is objectionable because it forces an individual to give their labor to another without their consent and, secondarily, to give it without just recompense.

In lieu of adequate voluntary defender system, the best alternative is the public defender's office. Just as an individual can enter the legal profession to prosecute people they believe are criminals, an individual should be able to enter the profession to defend those they believe are unjustly accused. If it is a proper function of the government to ensure that only actual criminals are punished, then there could be no objection to funding a Defender's office just as we fund the Prosecution's—through governmental revenue. If it is a right, then it is right to fund the means to implement it and right to fund the defense at the same level as the prosecution. If we accept this principle, it would eliminate the greatest problem with the public defender system as presently operated.

The quickest way to implement equality in access to forensic techniques would be to follow the advice of Scheck, Neufeld and, Dwyer (2001) and make crime laboratories independent third forces with budgets independent from that of the police and police officials (p. 353). The results of their investigations would be provided to both the prosecution and the defense.

Earlier, I mentioned that it seems unjust that the right to assigned counsel is only for the indigent. One way to potentially offset this unjustness, if one did not want to grant the right to assigned counsel to each person, is to have counsel vouchers.

Conclusion

In short, just as a magician's illusion is compelling until one learns the secret, a gossamer prosecution can appear solid unless challenged by effective counsel. For this purpose, the importance of effective counsel as an action right has long been recognized in this country. The Supreme Court recently has adopted a different view of this right, arguing that the importance of counsel—as well as other Constitutional guarantees—require that an individual be provided with counsel.

Although published writings on related issues in Objectivism and Libertarianism have been vague or seemingly opposed to this right, the right to be assigned counsel is a natural extension of the Objectivist and Libertarian ideals and theory of government. Since both groups accept a proper function of the government to punish the guilty, and both prohibit the government from initiating force, it naturally follows that the government should ensure that it does not punish the innocent. Effective counsel is the first line of this defense.

Finally, the right to be assigned counsel is not enough. If the government properly can use advanced forensic techniques to convict an individual, the accused should be provided with the same means to defend against the accusation. That is, this right is more than simply ensuring that an accused has counsel, they must also have adequate means to prepare their defense. Without this, the right to counsel would be hobbled.

References

Beaney, W. (1972). The right to counsel. In S. Nagel (Ed.), *The rights of the accused* (pp. 145–174). Beverly Hills, CA: SAGE Publications.

Boaz, D. (1997). *Libertarianism: A primer*. New York: The Free Press.

Christian, Chitty, Lee, Hovenden, & Ryland (1903). *Commentaries on the laws of England in four books with an analysis of the work by Sir William Blackstone*. Philadelphia: J. B. Lippincott.

Cortner, R. Powel v. Alabama. (1992) In K. Hall (Ed.), *The Oxford companion to the Supreme Court of the United States* (pp. 661–662). New York: Oxford University Press.

Garcia, A. (1992). *The Sixth Amendment in modern American jurisprudence: a critical perspective*. New York: Greenwood Press.

Lawrence, S. (1992). Gideon v. Wainright. In K. Hall (Ed.), *The Oxford companion to the Supreme Court of the United States* (pp. 338–339). New York: Oxford University Press.

Libertarian platform http://www.lp.org/issues/platform/safecrim.html.

Machan, T. (1989). *Individuals and their rights*. La Salle, IL: Open Court.

Machan, T. (1995). *Private rights and public illusions*. New Brunswick: Transaction.

Massachusetts Body of Liberties. http://www.winthropsociety.org/liberty.htm

New Jersey Constitution. The constitution of 1776. www.state.nj.us/njfacts/njdoc10a.htm

Nickell, J., & Fischer, J. (1999). *Crime science: methods of forensic detection*. Lexington, KY: University Press of Kentucky.

Palmer v. Ashe (1951).(1960). In M. Konvitz (Ed.), *Bill of Rights reader* (2nd ed.)(pp. 698–700). Ithaca: Cornell University Press.

Peikoff, L. (1991). *Objectivism: The philosophy of Ayn Rand.* New York: Meridian.

Rand, A. (1963). Man's rights. In *The virtue of selfishness* (pp. 108–117). New York: Signet.

Rand, A. (1963, August). Review of *The Language of Dissent* by Lowell B. Mason. *The Objectivist Newsletter, 2,* 30.

Rand, A. (1974). Moral inflation (Part II). *The Ayn Rand Letter, 3,* 305–308.

Rand, A. (1990). *Objective law* (Cassette Recording). Gaylordsville, CT: Second Renaissance Books.

Rand, A. (1998). Textbook of Americanism. In P. Schwartz (Ed.), *The Ayn Rand Column* (Revised Edition). New Milford, Connecticut: Second Renaissance Books. [Article originally published in 1946]

Rand, A. (1999). *Journals of Ayn Rand*. (D. Harriman, Ed.). New York: Plume.

Ringel, W. (1972). *Searches & seizures, arrests and confessions*. New York: Clark Boardman Company.

Scheck, B., Neufeld, P., & Dwyer, J. (2001). *Actual innocence*. New York: Signet.

Talarico, S. (1992). Right to counsel. In K. Hall (Ed.), *The Oxford companion to the Supreme Court of the United States* (pp. 200–201). New York: Oxford University Press.