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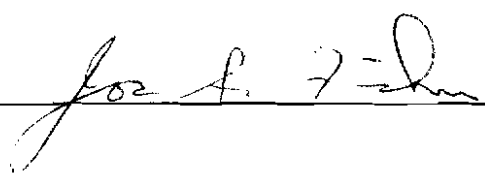
Abstract approved: 

The constitutional issue of the right to counsel for persons accused of criminal offenses in American courts has its origins in colonial America and has experienced a long evolutionary period of development. Through a close look at Supreme Court opinions spanning most of the nineteenth and twentieth centuries, we are able to observe the reasons for this transformation.

The right to counsel issue in American courts has primarily focused on the question of appointment of counsel for the indigent defendant and not on an individual's right to be heard by counsel privately obtained. Since the early history of the Republic was greatly influenced by the principle of federalism, it is understandable that the right to counsel doctrine in state courts was considered fundamentally a state matter. As a result, the doctrine followed various forms of development on the state level until the Supreme Court saw its way clear to begin a gradual imposition of a more uniform standard in the

1932 case of Powell v. Alabama. This new approach was made constitutionally appropriate through the application of the due process clause of the Fourteenth Amendment which the Court held to guarantee the indigent the right to counsel in all capital cases.

After Powell the Court would eventually extend the right of counsel to the indigent in all cases where a prison sentence was imposed. The gradual change, which took the Court through several stages and included such landmark cases as Betts v. Brady, Gideon v. Wainwright, and Argersinger v. Hamlin, seems to have been facilitated by the overall change in societal attitudes toward the indigent and the fundamental right to a fair trial.

THE SUPREME COURT AND THE RIGHT TO COUNSEL

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Chapter I

THE PRINCIPLE AND ITS HERITAGE

The question of an individual's right to be represented in our adversary legal system by competent, learned counsel is one that has been of great importance to many at least as long as there has been a legal profession. The issue in the United States is one that derived its basic nature from early colonial times to the present and has, because of its significance, been taken up from time to time by the highest tribunal of the land. As Judge Walter V. Schaefer of the Illinois Supreme Court has said, "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have."[1] While this concept has been accepted, at least in theory, for some time, it has, in relative terms, been only recently taken up at length by the United States Supreme Court.

We can explain this situation, which to some may seem like gross neglect on the part of the Court, by looking briefly at the concept of federalism as it emerged from the Philadelphia Convention. The "federalism" of today, except possibly in the minds of the most sheltered of civics teachers, quite obviously is not the same as it was in 1787, or, for that matter, throughout most of the nineteenth century. To some it has even become a dead doctrine that exists only in theory

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[1]Walter V. Schaefer, "Federalism and State Criminal Procedure," 70 Harvard Law Review (November 1956), 8.

and textbooks.[2] However we look at it today, federalism most certainly was alive and well in the early nineteenth century, and can go far to explain the relative inactivity on the part of the Court in the area of right to counsel. It was taken for granted at the Constitutional Convention that the states would handle their own criminal procedure, and, later, that the Sixth Amendment, had no effect on the actions of the several states.

As early as 1833, the Supreme Court affirmed this implication by officially recognizing that the Bill of Rights did not apply to the states. Speaking for the Court in Barron v. Baltimore, Chief Justice John Marshall proclaimed:

> The provision in the fifth amendment to the constitution of the United States, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states. The constitution was ordained and established by the people of the United States for themselves; for their own government; and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the power of its particular government as its judgement dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on powers, if expressed in general terms, are naturally and necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes. . . . Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. . . . These amendments demanded security against the apprehended encroachment of the government--not against those of the

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[2]Philip B. Kurland, Politics: The Constitution and the Warren Court (Chicago, 1964), 96.

> local governments. . . . These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[3]

In subsequent cases throughout the remainder of the nineteenth century, the Court refused to interfere in state criminal procedure, whether it be in regard to counsel or such other federally protected matters as self-incrimination, grand jury indictment, or trial by jury. In defense of the Court in this matter, it must be said that federal intervention in the field of state criminal procedure had virtually no constitutional footing until 1868.[4] However, the Court continued for some time thereafter to be tied to the principle of federalism. Even after the question arose as to what was required of states under the "due process" clause of the new Fourteenth Amendment, the Court remained very restrained in its application. In Walker v. Sauvinet, the Court, considering the jury issue and speaking through Chief Justice Morrison R. Waite, reflected the influence of federalism when it proclaimed that due process of law was "process due according to the law of the land. This process in the states is regulated by the law of the state." Keeping the recently ratified Fourteenth Amendment in mind, Waite went on to assert that "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way."[5]

Again in 1898, Justice Henry B. Brown, while recognizing that the Fourteenth Amendment for the first time gave the federal courts the

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[3]Barron v. the Mayor and City Council of Baltimore, 7 Pet. (32 U.S.) 243, 247-250 (1833).

[4]Schaefer, "Federalism," 1-4.

[5]Walker v. Sauvinet, 92 U.S. 90, 93 (1875). See also Kenard v. Louisiana, 92 U.S. 480 (1876) and Walston v. Nevin, 128 U.S. 578 (1888).

power to declare invalid laws of the states found to be in violation of individual rights, reaffirmed the belief that the first eight amendments only applied to the federal government and asserted his respect for the concept of federalism and noninterference with the states. The Court then went on to proclaim that law and procedure are progressive and what was right and proper when the Constitution was adopted may be unnecessary now.[6]

Justice Brown proceeded to indicate that changes would continue to take place in the process, and since the Constitution of the United States is virtually inflexible and difficult to change, states should not be prohibited from making changes that do not violate supreme law and are called for by the citizenry. He cited Hurtado v. California[7] to emphasize the benefit of flexibility which the Court believed would allow the several states opportunity to explore new methods and practices that might prove superior to the old, thus keeping the system vital. The Court asserted that "Great diversities in these respects (laws and remedies) may exist in two states separated only by an imaginary line."[8]

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[6] Holden v. Hardy, 169 U.S. 366, 386 (1898). While not a criminal case, Holden reflected a great deal on the Court's thinking in the area of individual rights and the federal role in their protection. Holden, a mining employer, charged with unlawful employment of a mine worker in violation of state (Utah) law, claimed the state action was not a valid exercise of the state's police power since both parties in the contractural arrangement entered willingly. The petitioner put up interesting arguments opposing any kind of labor legislation. However, Justice Brown cited several criminal cases in making his main point, which held against the petitioner by calling the action a proper exercise of state power. Though the Fourteenth Amendment had given the federal government the power to intervene in state affairs, Court rulings since the adoption of the Amendment had only partially applied the first eight amendments to state procedure.

[7] 110 U.S. 516 (1884).

[8] Holden v. Hardy, 169 U.S. 366, 388.

This idea that diversity was almost a sacred good would persist well into the twentieth century and become a real issue in the court cases that would arise dealing specifically with the right to counsel for indigents in state court proceedings. The attitude toward federalism and the question of the extent of constitutional limitation on the power and independence of the states persisted and came out again in a 1906 decision where the Supreme Court clearly stated its position once more. In Howard v. Kentucky, the majority was emphatic in declaring that "due process" in the Fourteenth Amendment did protect "fundamental rights," but was "not intended to interfere with the power of the state to protect the lives, liberty, and property of its citizens, nor with the power of adjudication to its courts in administering the process provided by the laws of the State."[9] The provisions of the Fifth and Sixth Amendments were still held to apply only to federal and not state proceedings.

The evolutionary change that finally began to take place in the Court's thinking on this persistent issue can be traced through the landmark Gideon case of 1963.[10] The origins of Gideon may be seen in the dissenting opinion of the first Justice John Marshall Harlan in a Court decision of 1908 that found Justice William H. Moody and the majority ruling that certain aspects of protection were actually not applicable in state courts.[11] Harlan's dissent in this Fifth Amendment

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[9] 200 U.S. 164 (1906).

[10] Gideon v. Wainwright, 372 U.S. 335 (1963).

[11] Twining v. New Jersey, 211 U.S. 78 (1908).

case would eventually win majority approval and bring us to where we are today. Justice Harlan questioned the Court's judgement when,

> in its consideration of the relative rights of the United States and of the several states, [it] holds, in this case, that, without violating the Constitution of the United States, a State can compel a person accused of a crime to testify against himself.[12]

He insisted that "immunity from self in-crimination" was "protected against hostile state action" not only by the Fourteenth Amendment assertion against laws abridging the "privileges and immunities of citizens," but also by the due process clause of that amendment. It is in the interest of the Federal Constitution for the Court to restrict state action when it adversely affects the individual, not when it does so in a positive or beneficial manner.

> No argument is needed to support the proposition that, whether manifested by statute or by the final judgement of a court, State action . . . must be regarded as wanting in the due process of law enjoined by the Fourteenth Amendment, when such state action substantially affects life, liberty or property.[13]

As we will see, even as late as Gideon, the critical issue would continue to be "the right of the states to run their criminal law without worrying about uniform national standards."[14]

In order to begin our look at the evolutionary development of this "most pervasive" of rights of an accused, we must look back to its early existance under English common law. The right to counsel is a safeguard of which Justice William J. Brennan, Jr. said, "Without the help of a lawyer all other safeguards of a fair trial may be empty."[15]

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[12] Ibid., 99.

[13] Ibid., 117.

[14] Anthony Lewis, Gideon's Trumpet (New York, 1964), 88.

[15] Quoted in William O. Douglas, "The Right to Counsel," 45 Minnesota Law Review (April 1961), 693.

While one could look at its unfolding on the continent, for our purposes it is sufficient to limit our investigation to England which obviously had the most direct influence on the original implementation of counsel guarantees in the original thirteen English North American colonies.[16]

The influence of common law in American legal evolvement has been studied by a number of noted legal historians,[17] and a brief look at its more recent development will suffice for us. Contrary to what might be presumed to have been the case from our current perspective, early English law, about the time of the first colonial settlement, made provision for counsel in less serious cases, specifically excluding major crimes such as felonies and treason from this right to counsel safeguard.[18] The legal profession developed quite early in England, and at least the rudiments of a counsel privilege may have existed as early as the twelfth or thirteenth century.

> The common-law practice of permitting counsel to defendants, and even assigning them when the defendants were indigent, thus arose at an early time. However, this right to the assistance of counsel was very definitely limited to either civil or misdemeanor cases.[19]

According to Professor Felix Rackow, this was not only permitted, it was required in misdemeanor cases, but the assistance provided by counsel was considerably different than that which we think of today.[20]

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[16]See William Seal Carpenter, Foundations of Modern Jurisprudence (New York, 1958), 149. See also William S. Holdsworth, A History of English Law (London, 1937), vol. IX, 188-199.

[17]William M. Beaney, The Right to Counsel in American Courts (Ann Arbor, Michigan, 1955). Felix Rackow, "The Right to Counsel: English and American Precedents," 3rd Series, 11 William and Mary Quarterly (January, 1954), 3.

[18]Rackow, "Right to Counsel," 5.

[19]Ibid., 4.

[20]Ibid., 7-8.

Although this English provision for counsel would seem, at least in some respects, quite liberal, even when judged by modern standards, counsel was not permitted in treason cases or felonies.[21] In many cases, however, where complicated legal questions were presented, the practice became one of appointment of counsel when the court believed it to be essential. This privilege was somewhat limited by the fact that the accused had to raise the legal issues himself before he could obtain counsel to help him with the problem. Counsel was also permitted when the accused was pursuing an appeal, either in capital or non-capital cases.[22]

While the distinction made by English courts between civil and misdemeanor cases where counsel was permitted, and more serious offences where it was not, seems quite paradoxical when looked upon from our modern concept of jurisprudence, it may not seem quite so distasteful when considered in its contemporary context. During the seventeenth century it was believed that a man's guilt or innocence in a charged serious offense would be quite obvious, making a defense impossible, and that it would require no particular skill to plead one's case.[23] The

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[21]Beaney, Right to Counsel, 8.

[22]Rackow, "Right to Counsel," 6.

[23]"Generally everyone of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest defence [sic], which in cases of this kind is always the best; the simplicity, the innocence, the artless and the ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own. And if it be further considered that it is the duty of the court to be indifferent between king and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to

belief also persisted that the court would act as counsel for the defense and could be of more effective assistance than a trial lawyer.[24] Since the preservation of the absolute nature of the monarchy and its laws were thought to be essential, it must also be kept in mind that felonies and the offense of treason were considered to be much more of an affront to the state than they are today. It was, therefore, natural for the process to be slanted "to favor the state at the expense of the defendant."[25]

A major step in the direction of modern trial procedure was finally taken in 1695 when the Treason Act of that year was passed permitting counsel for the defense in treason proceedings.[26] Though this is looked upon as a milestone in the progression of criminal law, and

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fear but that generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than a prejudice in having the court their only counsel. Whereas, on the other side, the very speech, gesture, countenance, and manner of defence [sic] of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defense of others speaking for them." This would indicate a belief that counsel would simply obscure the truth with technicalities. (Hawkins, Pleas to the Crown, quoted in Rackow, "Right to Counsel," 6-7).

[24]This assumption has been attacked by the Supreme Court in this century and will be explored later. In Powell v. Alabama, 287 U.S. 45, 60-63 (1932), for example, the Court questioned the ability of the trial judge to offer the necessary help, especially when it came to out of court investigation and consultation. The Court here actually insisted that it was impossible for the court to represent the defendant, as had been the common law rule, and at the same time carry out its judicial function.

[25]"In an offense of felony or treason, 'an offense more political than criminal,' an offense which may have affected the security of a relatively absolute monarch, it is only natural that the court procedure would be designed to favor the state at the expense of the defendant." Rackow, "Right to Counsel," 7.

[26]Ibid., 9. Rackow cites the English law, quoting from 7 Wm. III, c. 3, sec. I.

unofficial changes transpired in the role of counsel during the eighteenth century in felony proceedings, it was not until 1836 that counsel was allowed by statute in England in most felony cases.[27]

As would be expected, many aspects of English common law were transplanted to North America when the early colonies were established. "But to the credit of her [England's] American colonies, let it be said that so oppressive a doctrine [as denying counsel in felony cases] had never obtained a foothold there."[28] We find that in many colonies during the half century prior to independence,[29] legislation was implemented to broaden the English rule on counsel, and even where legislation for counsel did not exist, the courts often acted on their own to appoint counsel where it seemed warranted.[30]

The reason for this shift in attitude between mother country and colonies may have several explanations, most of them purely speculative. One such explanation, most of which would seem quite feasible, was mentioned by Justice Joseph Story in an opinion written in 1829. As he put it, "The Common Law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general

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[27]Beaney, Right to Counsel, 8. Rackow also cites 6 & 7 Wm. IV, c. 114, sec. 1.

[28]Holden v. Hardy, 169 U.S. 366, 386. See also Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development (New York, 1951), 110.

[29]Rackow, "Right to Counsel," 13-20, discusses colonial precedents for the evolving right to counsel and gives a number of specific examples of colonial legislation and practices before the 1787 Constitution in the area of counsel, and how they differed from practices in England.

[30]Beaney, Right to Counsel, 18. The author here concludes that in several of these cases there was actually a significant advance made over common law practice.

principles and claimed it as their birthright; but they brought with them only that portion which was applicable to their condition."[31] An example of this can be seen in the colonial attitude toward the right to acquisition of counsel, a right not recognized under common law. We can safely say that with but few exceptions, the right to obtain counsel has always been respected, at least in theory, among the English colonies of North America. The question in the United States would evolve around the responsibility of the state to insure that all those accused in the courts of this country would enjoy the same benefits, regardless of their economic status.

A brief look at the early federal and state statutes and actions in this area may help to support this point. The fact that many new state constitutions and legislative acts protected the "pervasive" right would seem to show its wide acceptance among the former colonists. There are also records, according to Rackow, that show the appointment of counsel for indigent civil litigants in colonial New York and Maryland in the early eighteenth century,[32] and there seems to be no reason to believe that these practices did not continue. In New Hampshire, for example, the constitution of June 2, 1784, provided for the right of every person accused of a criminal offense to be represented by counsel. "This provision was implemented in 1791 by a statute which required the appointment of counsel in cases involving offences punishable by death."[33]

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[31] Van Ness v. Packard, 2 Peters 137, 144 (1829).

[32] Rackow, "Right to Counsel," 17-19, cites Richard B. Morris, Selected Cases of the Mayor's Court of New York City, 1674-1784.

[33] Rackow, "Right to Counsel," 14.

In Powell v. Alabama, a case which will receive more extensive attention later, Justice George Sutherland for the Court expounds English precedent and changes made in the colonies before and after independence. In regard to the question, does the denial of counsel to indigents violate due process of law, the justice comments that English common law at the time of the adoption of the Constitution does not support an affirmative answer to this question.[34] There, until 1836, counsel was denied in serious offenses, even to those who would obtain their own, but was allowed in petty cases. Even in England, this practice was violently assailed long before it was changed. However, this rule was rejected by the colonies when, after independence, most adopted articles in their constitutions which asserted the right to counsel. Pennsylvania even had provision for the "assignment" of counsel in capital cases.

> It thus appears that in at least twelve of the thirteen colonies the rule of English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes; and this court seems to have been of the opinion that this was true in all the colonies.[35]

According to William M. Beaney, after 1776 most states began to do by statute what England had done through court practice since 1750.[36] However, as he indicates, some of the infant states implemented very broad legislation in regard to counsel, and it would seem that the mere

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[34] Powell v. Alabama, 287 U.S. 45, 60-63.

[35] Ibid., 64-65

[36] Beaney, Right to Counsel, 20.

fact that the right to counsel was considered to be important enough to insure its continuance with constitutional and statutory provisions may be viewed as a significant advance in itself. Whatever we might make of the comparison of English common law practices and early state and colonial procedure in North America, it would seem that with the adoption of the first state constitutions, if not sooner, the universal practice was to allow counsel in virtually all judicial proceedings.

The right to counsel as a federal question in the United States has its origin in the 1787 convention which for the first time provided a national judiciary for the infant Republic. The Founding Fathers actually gave little thought to the issue, which they would have entrusted to the courts.[37] While the founders gave little or no thought to the right to counsel issue, the mere fact that the original Constitution did not include a reference to the right could also be taken as an indication of how widespread was the acceptance of the principle that an accused could not be denied this safeguard. It also can be assumed that the right to obtain counsel was believed to be adequately guaranteed by the individual states and would be continued under their protection.

In addition, there were a number of men in Philadelphia who saw no need for a separate statement of fundamental freedoms. Alexander Hamilton, for one, expressed this view in Federalist #84 when he claimed

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[37] Ibid. See also Rackow, "Right to Counsel," 21, who indicated that, if one looks at this issue along with others contained in the Bill of Rights, there is evidence to show that the protections, which were later included in the Constitution as the first ten amendments, were considered at the convention. These safeguards against federal abridgement of individual rights were not included in the original Constitution because many delegates simply believed them to be present in the original articles though not specifically stated.

that not only were the additional amendments unnecessary, they could be quite dangerous.[38] However, a number of prominent leaders believed the Constitution should contain its own bill of rights to protect the citizen from possible federal infringements, and ratification was obtained at least partially because of the promise that the First Congress would submit amendments to the Constitution to guarantee the sanctity of certain fundamental prerogatives. Amidst these, of course, would be the Sixth Amendment which, among other things, insured that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[39] The mere fact that this particular guarantee was included among the other safeguards to liberty

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[38]"The most considerable of the remaining objections is that the plan of the convention contains no bill of rights. . . . [T]he Constitution proposed by the convention contains . . . a number of such provisions." Hamilton went on to cite a number of provisions in the main articles that actually provided the type of protections opponents wanted and then continued: "Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government. . . . I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not dangerous. They would contain various exceptions to power not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers by the indulgence of an injudicious zeal for bills of rights." Alexander Hamilton, Federalist #84, in The Federalist or The New Constitution, intro. by Carl Van Doren, (Avon, Conn., 1973), 572-577.

[39]U.S., Constitution, Amendment VI.

would seem to show how important the right was to the political thinkers and citizenry of the early national period. It is also more than likely that the intent of the 1787 Constitution was only to protect the previously existing right to retain counsel, not to grant a right, since no one really denied the previous existence of such a right.

Even before the ratification of the Sixth Amendment in December of 1791, the First Congress had acted through the Judiciary Act of 1789[40] and subsequent legislation[41] to insure the right to counsel through federal legislation. But aside from these relatively brief statements, "It was left to the Courts to decide the scope of the clause with a minimum of guidance from the events and comments accompanying its (the Sixth Amendment) adoption."[42] Federal courts soon took up this challenge

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[40]"And be it further enacted, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." U.S., Statutes at Large, I, p. 92, 20 U.S.C. § 35.

[41]". . . any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses, to be produced on the trial for providing the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offenses, shall have such copy of the indictment and list of the jury two entire days at least before the trial: And that every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all reasonable hours . . . and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them." U.S., Statutes at Large, I, p. 118, 10 U.S.C. § 29.

[42]Beaney, Right to Counsel, 24.

and developed the practice of appointing counsel in serious cases, including non-capital ones, soon after ratification of the Bill of Rights.[43]

It is apparent then that by the end of the eighteenth century the American system of jurisprudence had not only borrowed significantly from its English heritage, it had pulled ahead of the common law system in two important respects. "English common law permitted the assistance of counsel in civil and misdemeanor cases, and, by statute, in treason trials; contemporary American practice also permitted counsel in all felonies, and assigned counsel [if not obtained by accused] when the defendant was indicted for a capital offense."[44] The application by the courts, however, of separate state and federal provisions on the right to counsel in their respective proceedings, went on virtually unhindered for the entire nineteenth and early twentieth centuries before the United States Supreme Court would begin to move toward a more uniform application of the "most pervasive right." The real issue would arise then over the question of counsel for the indigent in the federal and state courts, rather than the well accepted right of a man to obtain his own counsel when desired. The Court in the 1930's would also pick up the controversy, along with the idea, most probably not even conceived in 1790, that a person could not plead guilty or that a conviction would very possibly be invalid if the accused did not have counsel. At the very least, the state would have to show that an intelligent and

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[43] Ibid., 29. While the First Congress had made provision for counsel to be appointed in capital cases, appointment of counsel in serious non-capital cases seems to have been left to the discretion of the presiding judge.

[44] Rackow, "Right to Counsel," 27.

voluntary waiver of this right had been recorded and that prejudice had not resulted if counsel was not provided for the defense.[45]

[45] Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

Chapter II

FEDERAL AND STATE CAPITAL PROCEEDINGS

The Supreme Court's thinking on its role in right to counsel cases, as well as other due process matters, began to take on a different nature shortly after the turn of the century. The changing nature of American society in the new industrial age, which saw a rapid move away from the individualism that bolstered the role of state and local government and toward a more dominant role for the federal government, had its effects on the Supreme Court. Philip B. Kurland dealt with this changing role of the Supreme Court and quoted Justice Frankfurter who said, "The vast change in the scope of law between Marshall's time and ours is at bottom a reflection of the vast change in the circumstances of society."[1] The rise of a more personal society has changed our demands on the legal system and, as Walter V. Schaefer pointed out, "I do not think that decisions of the Court are arbitrary in the sense that they bear no relation to the prevailing standards of society."[2] The Court then, though sometimes being accused of arbitrariness in its application of the due process clause over the last half-century or more, has actually taken up the demands of a new type of citizenry in its employment of constitutional standards.

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[1]Kurland, Politics, 14.

[2]Schaefer, "Federalism," 6.

As we begin to consider the issue of counsel as taken up by the Supreme Court in this century, we must keep in mind the two aspects of the issue: (1) the right to counsel when obtained by the individual accused; (2) the right to counsel supplied by the state (governmental unit whether national or state). The question in the United States has never really been whether or not one is entitled to counsel, but rather when or if the state is obligated to provide counsel for the accused if he is unable to obtain counsel for himself.[3] Thus we can quickly put aside the first point, turn our attention to the idea of state-appointed counsel, and look first at the application of this principle on the national level.

As mentioned in the preceeding chapter, in the late eighteenth century the Sixth Amendment was interpreted to be "permissive only,"[4] in that few if any believed it had anything to say other than the protecting of an individual's right to employ his own counsel when desired. However, the Federal Crime Act of 1790, 10 U.S.C. § 29, and the development of subsequent court practice soon provided the precedent for the appointment of counsel when necessary in all serious cases, capital and non-capital.[5] Although in practice most federal courts had been assigning counsel, it was 1938 before the Constitution was said to require the

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[3]Neil W. Schilke, "Right to Counsel--An Unrecognized Right," 2 William and Mary Law Review (Summer 1960), 318.

[4]M. Glenn Abernathy, Civil Liberties Under the Constitution (New York, 1968), 181.

[5]Beaney, The Right to Counsel, 29-33.

appointment of counsel for an indigent's defense.[6] It was also in that year that the Court first gave indication that the failure to appoint counsel would cause the court in question to forfeit its jurisdiction in the case under consideration.[7]

The Court had, in fact, given an opposite view for the previous half-century, ruling first in United States v. VanDuZee in 1891 that the appointment of counsel was optional and to be left to the discretion of the trial court.[8] The Court procalimed that it was not mandatory to appoint counsel in cases other than those involving capital offenses since counsel was neither a constitutional nor a statutory requirement. This position would be recognized as late as 1931 when, as Abernathy explains, the Wickersham Commission, appointed by President Hoover for the purpose of investigating law enforcement, indicated that the right to counsel meant only the right to employ counsel.[9]

The Supreme Court was developing other ideas, however, and took up the question of appointment of counsel again in Johnson v. Zerbst,

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[6]Johnson v. Zerbst, 304 U.S. 458, 467. See also Heller, The Sixth Amendment, 110, and George W. Spicer, The Supreme Court and Fundamental Freedoms (New York, 1959), 38. Both authors discuss the fact that the Constitution had simply been held to protect the right to obtain counsel if desired, although many courts had been practicing indigent appointment prior to this. This change came as the Court began to take up the belief that one must have counsel to make his hearing meaningful.

[7]Johnson v. Zerbst, 304 U.S. 458, 467. If jurisdiction were lost, the court in question would risk opening up habeas corpus proceedings that could result in the release or retrial of the petitioner from the standpoint that they could not legally detain him. See Harlan v. McGovern, 218 U.S. 442 (1910).

[8]140 U.S. 169, 173.

[9]Abernathy, Civil Liberties, 181-182.

which resulted in a new precedent that would instruct federal courts not to withhold counsel in criminal cases and, to reiterate a point made earlier, that it was often futile to be heard if one was to be heard without counsel.[10]

Why this change of heart by the Supreme Court? To some it seemed that

> with no support from historical analysis, from the writings of the proponents of the Amendment, or from precedent, then, the majority, almost casually, held that the Sixth Amendment right to counsel extends to the appointment of counsel for indigent defendants in federal proceedings.[11]

We can, at least for part of the explanation, look to our earlier comment on the changing nature of society. Indeed, Justice Hugo Black said as much in his own justification of the change. He claimed "that the human policy of modern criminal law" had changed the nature of procedure to the point that it is no longer acceptable for a man to be tried without counsel.[12]

In order to do this landmark case justice, we must begin by taking a close look at the opinion itself to determine from their own words the reason the justices found 1938 the year to make this change in federal court procedure, which, in light of contemporary practice, may have been more of an endorsement than a radical change.

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[10] As indicated in Powell v. Alabama, 287 U.S. 45, 68.

[11] Abernathy, Civil Liberties, 184. This same type of opinion is reflected by Beaney, who says the Court actually misused historical data to come up with the conclusions in Johnson. Beaney saw this as a "late" discovery on the Court's part that free counsel was a right of indigents. William M. Beaney, "The Right to Counsel," in The Rights of the Accused: In Law and Action, Stuart S. Nagel (ed.), (Beverly Hills, 1972), 148-149.

[12] Johnson v. Zerbst, 304 U.S. 458, 465.

In one of his earliest opinions after joining the Court, Justice Black began his career as an advocate of the "absolutist" or literal interpretation of the Sixth Amendment, and other amendments of the Bill of Rights. In writing his Johnson opinion, Black would "establish that right [to counsel] in federal courts as a virtual absolute,"[13] although it would be some time before he would be able to gain the same acceptance for applying this on the state level.

In Johnson, a case that involved the closely related peripheral issue of waiver as much as it did the right to counsel question, Black, speaking for a five to three majority,[14] put the Court on a new track in regard to the issue under consideration. By using precedent that seems to be quite shaky for the new ground he was breaking, Black not only asserted the accepted idea that the Sixth Amendment would not allow the federal courts to deny an accused the right to counsel for his defense, but also, for the first time, insisted that this right was so absolute that, unless proper waiver is shown, the court was obligated to appoint counsel if one could not be obtained.[15] He went on to proclaim that

> this is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and property. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against

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[13]Gerald T. Dunne, Hugo Black and the Judicial Revolution (New York, 1977), 375.

[14]Justice Cardozo did not participate in the decision and the three dissenters, with only a brief statement, voiced their belief that waiver had been shown. Justice Frankfurter, soon to be a persistent antagonist of Black (or vice versa), was still a few months away from appointment to the Court.

[15]Johnson v. Zerbst, 304 U.S. 458, 462-463.

> arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done."[16]

Black proceeded to argue his point by citing Barron v. Baltimore[17] as a precedent for guaranteeing the right to counsel in all criminal cases in the federal courts unless this right was waived. While Justice Marshall, writing for the Court in Barron, did emphatically apply all the Bill of Rights to the federal courts in an absolute manner, he was actually more concerned with exempting the states from their provisions and said nothing directly about counsel, and most certainly not appointed counsel. Justice Black was careful not to make this distinction between appointed and obtained counsel in leading the Court to a new and very significant position on the issue.

Black also reemphasized a belief expressed in the landmark Powell case of 1932,[18] that the Sixth Amendment guarantee of counsel was very basic in protecting "life and liberty," and that the average defendant had little chance, without competent counsel, against a legally trained prosecutor.[19] Here Black was setting out a persistant thesis that would dominate his opinions in this area for the next two-and-one-half decades. The thesis is also found in the writings of analysts who have been consistent in their support for his philosophy. The theme, which understandably has received a great deal of attention, that the viability of

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[16] Ibid., 462.

[17] Barron v. Baltimore, 7 Peters (32 U.S.) 243.

[18] Powell v. Alabama, 287 U.S. 45.

[19] Ibid., 68-69.

the adversary system was dependent on a system that saw the right to counsel as essential, would actually come to make the right of an accused to be heard synonomous with the right to be heard by counsel.[20]

The second major point made by Justice Black in Johnson also took on a very basic nature as he established the need for an intelligent and knowing waiver if one is to be allowed to forfeit so basic a right.[21] This issue, while not a new one,[22] was given new vitality and importance through the Court's majority opinion.

Justice Black was adamant in his declaration that the Court must not "presume" that one had waived a basic constitutional right, as had been done in Johnson.

> The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[23]

The Court put the responsibility on the shoulders of the trial judge to determine "whether there is an intelligent and competent waiver by the accused," and for the first time really suggested that a defendant, under certain circumstances, may not be allowed to waive his right to counsel.[24]

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[20]David Fellman, The Defendant's Rights Today (Madison, 1976), 208. John Kaplan, Criminal Justice: Introductory Cases and Materials (Mineola, N.Y., 1973), 291.

[21]304 U.S. 458, 464.

[22]Patton v. United States, 281 U.S. 276 (1930).

[23]Johnson v. Zerbst, 304 U.S. 458, 464.

[24]Ibid., 465. This issue was also touched upon in a closely related case, Adams v. United States, 317 U.S. 269, 281-287 (1942). The question there was whether the conviction was valid since the accused had waived his right to a jury trial after previously waiving the right to counsel so he could conduct his own defense. The Court ruled that he could legitimately waive both rights and affirmed the lower court.

In dealing with the jurisdictional question raised by the habeas corpus proceeding in this case, Black asserted that if properly waived, the assistance of counsel is no longer required. However, if the record does not show waiver and the defendant can prove otherwise, "the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."[25] The jurisdiction of the court may be lost after the proceedings start if the court fails to comply with these prerequisites to conviction, including the "providing [of] counsel for an accused who is unable to obtain counsel."[26]

The Court, through Justice Frank Murphy in 1942, reiterated Black's caution concerning waiver, and proclaimed that "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence."[27] Justice Murphy claimed that the Sixth Amendment guarantee of counsel "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."[28]

However, in a strong dissent written by Justice William O. Douglas, with the concurrence of Black and Murphy, the right to waive a jury trial was questioned. They insisted that no laymen can make an "intelligent and competent" decision of this type, and that if a jury was to be waived, the accused must first have legal advice.

[25] Johnson v. Zerbst, 304 U.S. 458, 468. The statement concerning deprivation of "life and liberty" bears a striking similarity to the argument that would be set out in Argersinger v. Hamlin, 407 U.S. 25, (1972). We will look at this later as indicative of the evolutionary development of the right to counsel in the Supreme Court.

[26] Johnson v. Zerbst, 304 U.S. 458, 468.

[27] Glasser v. United States, 315 U.S. 60, 67 (1942).

[28] Ibid., 70.

In Glasser v. United States, a case involving a charge tried under a federal conspiracy statute, associate counsel for Glasser, William Scott Stewart, asked the court to allow him to act as co-defendant Kretske's attorney as well as assisting in Glasser's defense. For fear that this would have an adverse effect on the jury and thereby his case, due to possible conflict of interest, Glasser objected to the judge's appointment of Stewart in this dual capacity, though Stewart agreed to the assignment. In this particular case the court had been hasty in assuming that the defendant had "acquiessed" in its appointment of his attorney as counsel for co-defendant also, and, according to the Supreme Court, the trial record showed sufficiently that Glasser's defense was hindered by the fact that counsel was shared.[29] The Court went on to expand the right to counsel rule in the federal courts to include the "benefit of the undivided assistance of counsel," and to rule that the court in this instance had actually denied Glasser the "effective assistance of counsel."[30]

The current concept of the federal right to counsel was actually finalized in 1944 with the adoption by the Supreme Court of Rule 44 of the Rules of Criminal Procedure for the United States district courts.[31] This rule, which, according to David Fellman, was the "end result of an evolving doctrine," provided for appointment of counsel in all cases

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[29] Ibid., 72-75.

[30] Ibid., 75-76. See also Heller, The Sixth Amendment, 113-116.

[31] "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the Federal Magistrate or the court through appeal, unless he waives such appointment." U.S. Code, Title 18, Rules of Criminal Procedure, Rule 44, p. 1471.

where the accused was indigent at the earliest possible stage of the proceeding against him.[32] While the state courts would not be governed by "Rule 44,"[33] the doctrine, which had already begun to emerge in the early 1930's, would continue to evolve until the Supreme Court made the concept of the right to counsel virtually universal through application of the Fourteenth Amendment to the Constitution.

The problem of applying the right to counsel, in a form similar to that adopted by federal courts, to state courts, revolved around the issue of federalism. Though some analysts were calling it a dead issue, federalism still seemed to have held captive several members of the Court.[34] Some states made early provision for appointment of counsel for indigents, but at the same time they readily accepted waivers and were not diligent in advising the accused of his right to counsel.[35] As the federal right was expanded under the Sixth Amendment, the problem of appointment required for the indigent in state courts seems to have started to put more pressure on the Supreme Court since a somewhat ambiguous "fair trial" standard was still being applied to state court adjudication.[36]

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[32]Fellman, Defendant's Rights, 208-211.

[33]Heller, The Sixth Amendment, 117-119.

[34]Kurland, Politics, 96.

[35]Beaney, "Right to Counsel," 148.

[36]The "fair trial standard" will be developed further in the next chapter as it was discussed by the Court in Betts v. Brady, 316 U.S. 455 (1942). It has its origin in such cases as Twining v. New Jersey, 211 U.S. 78 (1908) and Frank v. Mangum, 237 U.S. 309 (1913). These cases and others had to do with various aspects of criminal procedure in the state courts. The Supreme Court was trying to determine

Since the United States Constitution really put no limitation on state court procedure, the Supreme Court really had no authorization for action until the adoption of the Fourteenth Amendment in 1868. For a number of years thereafter, the Court and society in general seemed to take a very limited view of the Amendment's intent. It was not until the 1930's and 1940's that a strong minority on the Supreme Court began to question the previous application of the key due process clause. A new evaluation seemed, to some, to reveal that a departure from the historically accepted approach was called for and Kurland suggested that the authors of the Amendment had intended for it to go beyond the immediate race issue of the nineteenth century. He suggested, reflecting yet another point made earlier, that the Fourteenth Amendment would inevitably be applied to reflect the changes taking place in modern society.[37]

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what guarantees of the first eight amendments were essential for fair treatment of a defendant in the trial court. Rather than setting down an absolute rule against self-incrimination, for a jury trial, or for provision of counsel, the Court, for some time, chose simply to determine whether or not a "fair trial" could be achieved without these provisions. If the circumstances indicated that it could or did, then the Court left the procedural questions up to the states.

[37]Kurland, Politics, 106. Cf. Schilke, "Right to Counsel," 329. See also Francis A. Allen, "The Constitution: The Civil War Amendments," in An American Primer, Daniel J. Boorstin (ed.), (Chicago, 1966), 165, who said "The great moral imperatives of due process and equal protection could not be confined to their historical understandings when applied to the emerging issues of modern American life. There is evidence that those who drafted Section 1 intended that the meanings of these phrases should evolve and expand with the passage of time and changes of circumstances. This, in any event, is what occurred. As a result, the history of Fourteenth Amendment interpretation reveals in sharp and accurate focus the principal public issues with which generations of Americans have been preoccupied in the past three-quarters of a century."

The issue to them was what was included in a definition of due process?[38] This, however, did not help to answer the question that was uppermost on the justices' minds throughout the late nineteenth and early twentieth centuries. The Court seemed to be

> unwilling to depart from its basic position that due process—being enumerated in the Fifth Amendment as a separate right, distinct from the various other procedural rights of the Bill of Rights—could not be treated as a short hand expression of all procedural rights required by the states by the Fourteenth Amendment.[39]

In other words, since the due process clause was separate and distinct from the Sixth Amendment's right to counsel provision in the Bill of Rights, the Court could not assume that the counsel provision was part of the due process clause of the Fourteenth Amendment and, therefore, to be imposed upon the states. As Carl Swisher indicated, before the adoption of the Fourteenth Amendment "it was not assumed that the due-process clause of the Fifth Amendment included the same content as that of the other prohibitions laid on the federal government by other provisions of the first eight amendments."[40] To circumvent this controversy, Professor Paul A. Freund suggested, in 1949, that the Court should solve its dilemma by declaring that the Sixth Amendment was not the reason for the counsel requirement in the federal courts, but that it is rather a matter of due process. The Sixth Amendment actually was just an affirmation of the right of an accused to hire counsel and,

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[38] Chicago, Milwaukee and St. Paul Railroad Company v. Minnesota, 134 U.S. 418 (1889). See also Beaney, Right to Counsel, 142, for a discussion of the historical conception of due process of law.

[39] Alpheus Thomas Mason and William M. Beaney, The Supreme Court In a Free Society (Englewood Cliffs, N.J., 1959), 279.

[40] Carl Brent Swisher, The Supreme Court in Modern Role (New York, 1965), 37.

therefore, should not be used by the Court in requiring appointment of counsel.[41]

In 1932 the Court began to deal with this dilemma in the landmark capital case, Powell v. Alabama.[42] While Powell is looked to as a major case in the right to counsel controversy, it may be important for more than just the provision for counsel in all state capital cases. Indeed, we may also be able to look to Powell as not only a reflection of the national sentiment of the period, but for the origins of the "special circumstances" debate that would dominate the courts in this area for some years thereafter.

Powell v. Alabama, which was the title that would actually include six other cases,[43] was, of course, the Supreme Court's portion of the celebrated Scottsboro case.[44] The constitutional issues raised, which are of primary importance, came to be of major significance not only to Alabama, but to the entire nation. The petitioners actually made three contentions, only one of which was decided by the Supreme Court at this time. First, it was contended that the defendants were "not given a fair, impartial and deliberate trial;"[45] second, that the

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[41] Louis A. Pollak, ed., The Constitution and the Supreme Court: A Documentary History, Vol. II (New York, 1966), 141-142.

[42] 287 U.S. 45 (1932).

[43] Ibid. Petitioners Roberson, Wright, Montgomery, Patterson, Weems and Norris were also involved in this appeal.

[44] For a fascinating account of the entire affair surrounding the alleged rape perpetrated by the Scottsboro boys and their subsequent trials and legal battles, see Dan T. Carter, Scottsboro: A Tragedy of the American South (Baton Rouge, 1969).

[45] The Court had adequate precedent in light of Moore v. Dempsey, 261 U.S. 86 (1923), to overrule Powell on this point alone, "A trial

accused was "denied right to counsel, with accustomed incidents of consultation and opportunity of preparation for trial;" third, the jury selection of Alabama "systematically" excluded blacks from jury service.[46] The Court decided to consider only the second point, and Justice Sutherland wrote the major points for the 7-2 majority.

The Court could have easily limited itself, as Justice Pierce Butler insisted in his dissent, to the issue of adequate time for preparation, since Alabama law required the appointment of counsel in cases of this type.[47] Had they done so, they could have simply ruled that the defendants were not given enough time to obtain their own counsel or prepare the case, and called this a denial of due process. But the majority chose to go much farther than this and, as Justice Butler put it, "declare 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.'"[48] To Justices Butler and James C. McReynolds this was an unnecessary intrusion into the realm of the state.

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for murder in a state court in which the accused are hurried to conviction under mob domination without regard for their rights, is without due process of law and absolutely void." 261 U.S. 86, 90. The fact that they chose to ignore this course and ruled instead on a point less firmly backed by precedent may reflect significantly on the temper of the Court and mood of the times on this issue. See also Frank v. Mangum, 237 U.S. 309, 335.

[46] Powell v. Alabama, 287 U.S. 45, 50. This issue would be raised by the Scottsboro attorneys after their third round in the Alabama courts and be heard by the Supreme Court as Norris v. Alabama, 294 U.S. 589, 590 (1935).

[47] Powell v. Alabama, 287 U.S. 45, 73.

[48] Ibid., 76.

However, Justice Sutherland, one of the more conservative justices,[49] delivered the opinion of a Court that did not believe the appointment of counsel, as it had been handled by the trial court judge, was adequate. He rejected the argument put forth by the respondent,[50] and long adhered to by the Court, that "The question of due process is determined by the law of the jurisdiction where the offense was committed and the trial was held."[51] In addressing this issue Justice Sutherland said:

> The sole inquiry which we are permitted to make is whether the Federal Constitution was contravened . . . and as to that, we confine ourselves . . . to the inquiry whether the defendants were in substance denied the right to counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.[52]

The key word in this statement is unquestionably "substance," for, as we have stated, the trial court did appoint counsel. If the court had not allowed time for preparation or time for the defendants to obtain the best assistance available, it might as well not have provided counsel.

In reviewing the record to find an answer to this question, the Court found that the defendants were not given adequate time or opportunity to communicate with friends or family who might have been able to

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[49]Carter, Scottsboro, 161. The author states that the "force" of the dissent's "criticism had been deflected by Hughes' success in persuading the conservative Sutherland to write the majority opinion."

[50]Philip B. Kurland and Gerhard Casper, eds., Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, vol. 27 (Arlington, Va., 1975), Powell v. Alabama, 337.

[51]Powell v. Alabama, 287 U.S. 45, 47.

[52]Ibid., 52.

render assistance in finding more competent counsel for the "boys."[53] The appointment of counsel so close to the trial was virtually a "denial of effective and substantial aid in that regard." It was not "until the very morning of the trial [that a] lawyer had been named or definitely designated to represent the defendants."[54] There was also no counsel for purposes of consultation during the "critical" period from the arraignment to the trial, a point that would find its way into many more decisions in years to come. Due to the circumstances mentioned above, the Court held "that defendants [in Powell] were not accorded the right to counsel in any substantial sense."[55] Sutherland went on to cite numerous state court decisions to support his position, reflecting his concern that this was not to be construed as a radical break with the past or something that was not already well-accepted in most states.[56]

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[53] Ibid. The fact that they were able to obtain competent counsel after conviction should have indicated that they could have done the same for the trial had they been given enough time. A number of groups rushed to their assistance including the NAACP and the Communist Party controlled International Labor Organization. See also Carter, Scottsboro, 53.

[54] Powell v. Alabama, 287 U.S. 45, 53-56.

[55] Ibid., 58.

[56] Ibid., 59. Justice Sutherland cites Commonwealth v. O'Keefe, 298 Pa. 169), "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." While this was not used as a basis for the Court's decision in the Alabama case, it is indicative of the emphasis the Court was placing on the practices that were becoming more common throughout the several states. It gives us some idea as to how the Court was looking for more uniformity in this area throughout the country's judicial systems, state and federal.

In dealing with its second and probably most critical point the Court ruled that, while it could not interfere with the state supreme court's ruling that Alabama law requiring the appointment of counsel for the indigent had not been infringed, it had to decide whether or not the "denial" was a violation of due process under the provisions of the Fourteenth Amendment. The Court accepted the rule, applied previously,[57] that since the Fifth Amendment's due process clause was separate and distinct from the other Bill of Right's provisions, the other provisions were not to be considered part of the due process clause of the Fourteenth.

> In the face of the reasoning of the Hurtado case, if it should stand alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause.[58]

In light of the facts before it however, the Court believed that the counsel provision should be expanded.

There were, in the justices' opinions, exceptions to this conservative rule for applying the provisions of the Bill of Rights. They went on to assert that "The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist."[59] Sutherland defined these "more compelling considerations" as rights that were of "such a character" that if they be denied, the principles of "liberty and

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[57]See, for example, Hurtado v. California, 100 U.S. 516, (1884). In this case the Court held that due process did not necessarily require the states to use grand jury indictment in their prosecution of murder. The "information" method used by California was acceptable in meeting requirements of the Fourteenth Amendment's due process clause.

[58]Powell v. Alabama, 287 U.S. 45, 66.

[59]Ibid., 67.

justice" would be violated. The right to the aid of counsel is of fundamental character, and is closely related to the well accepted right to a hearing. According to the Court, the latter was as old as the law itself and "would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[60] The Court had clearly indicated that to have a hearing would often be futile if one were not represented by counsel, and, thus, its belief that the right to a hearing or trial and the right to counsel were nearly synonymous.

The Court went on to expound the point that would be the subject of debate in non-capital cases for the next thirty years. This was the idea that even an intelligent defendant may be unable to adequately defend himself and may not have the ability to "establish his innocence." Throughout the major portion of his discussion of the right to counsel, Justice Sutherland, for the Court in Powell, made no distinction as to the classification of the offense in which counsel is considered "fundamental in character." He went on to make it clear, however, that at this point the Court was only ruling in a capital case where, in light of the circumstances, "the failure of the trial court to give them reasonable time and opportunity to secure counsel," or the failure to make proper appointment of counsel, was a denial of due process. In a capital case, "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."[61] The Court had not rejected

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[60] Ibid., 68.

[61] Ibid., 72. See also Schilke, "Right to Counsel," 320.

the possibility that this same logic might apply to all criminal prosecutions and actually, through its emphasis on the "circumstances," laid the ground work for the Betts[62] rule in non-capital cases soon to follow.[63]

The public response to the Powell decision, as handed down on November 7, 1932, reflected much the same dispute that would come to the forefront before the Supreme Court. While Alabamans reacted negatively, as would be expected, and attacks came from the political left charging that the Court had not gone far enough, newspaper reaction generally hailed the decree.[64] An interesting response also came from a Harvard law professor who was destined to become embroiled in the right-to-counsel-due process controversy in the near future.[65] In his New York Times article, printed only six days after the official announcement of Powell, Felix Frankfurter seems, at least at first glance, to take a somewhat more liberal position than would later characterize his own Supreme Court opinions. However, a careful look reveals many things that would be consistent with his later positions. Frankfurter reasoned that due to the fundamental nature of the question involved, especially

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[62]Betts v. Brady, 316 U.S. 455.

[63]It is interesting to note at this point that Powell, which was to have a great impact on American society in general for years to come, really did nothing to better the situation of the "boys" who brought the case before the Court, other than to give them immediate relief from the death penalties which had been assessed. The real problem in their situation was racial prejudice and after their second trial, with extremely adequate counsel and a sympathetic court, they were convicted again. See Carter, Scottsboro, 239-242.

[64]Carter, Scottsboro, 163.

[65]Felix Frankfurter, "A Notable Decision. The Supreme Court Writes a Chapter on Man's Rights," New York Times, November 13, 1932, sec. 2, p. 1.

since it was a capital case, the federal courts were justified in their ruling. Though the federal courts were not to "remedy all the errors that occur in the state courts," as this would be an intrusion into the separate state criminal systems, he did not see the "Scottsboro decision" as working any "impairment of these fundamental assumptions of our constitutional system."[66]

The future justice went on to outline a line of reasoning that would be identified with him for years to come. He claimed that the Fourteenth Amendment set only a very broad limitation on the states, but that it was the duty of the federal judiciary to assert that limitation, and the right of the accused under the federal Constitution to receive such protection. The Amendment, he insisted, had been cautiously applied by the Court, a position he firmly believed to be correct as "the Amendment is not the basis of a uniform code of criminal procedure federally imposed." The Court, in Frankfurter's opinion, had not tried to institute a code in any way, as they had simply asserted the position that "certain things are basic to the integrity of the judicial process." They had limited their ruling to the position that the right to counsel (adequately prepared and assigned) was a "fundamental requisite of the judicial process," and, therefore, the decision, based on the due process clause of the Fourteenth Amendment, was a "proper and heartening guarantee of fundamental law." The Court had not interfered with the determination of guilt or innocence, but had "declared only that the

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[66] Ibid., 1.

determination must be made with due observance of the decencies of civilized procedure."[67]

Toward the end of the 1930's, the "criminal implications" of the Fourteenth Amendment continued to give rise to differences of interpretation similar to those suggested by Justice Sutherland in 1932, and led to one of the most interesting continued debates between justices in Supreme Court history.[68] This confrontation, which was soon to focus upon two justices (Frankfurter and Black), was to be found in their dispute over "selective incorporation" on the one hand, or "absorption" on the other. While the former theory, in some respects, may be traced back at least as far as Twining v. New Jersey,[69] Palko v. Connecticut[70] "is generally regarded as the basis of selective absorption" or selective incorporation.[71] A Fifth Amendment case having to do with double jeopardy, Palko can be used to shed some light on this very important point of view which had already begun to carry over into the right to counsel controversy.

The Court, in Palko, rejected the petitioners argument that the Fifth Amendment was embodied in the Fourteenth Amendment and ruled that "The Fourteenth Amendment does not guarantee against state action all

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[67] Ibid., 2.

[68] Dunne, Hugo Black, 258.

[69] 211 U.S. 78. While the decision was against the petitioner, the Court made the statement that some of the Bill of Rights might be a part of the Fourteenth Amendment's due process clause.

[70] 302 U.S. 319 (1937).

[71] Spicer, The Supreme Court, 48. See also Swisher, The Supreme Court in Modern Role, 38-40.

that would be a violation of the original bill of rights if done by the Federal Government."[72] The Court went on to insist that

> The process of absorption whereby some of the privileges and immunities guaranteed by the federal bill of rights have been brought within the Fourteenth Amendment, has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[73]

The Justices insisted that in certain areas, like the right to counsel in Powell, the due process clause of the Fourteenth Amendment had been interpreted to safeguard against certain acts of the several states.

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.[74]

The Court was not willing to say that all the safeguards of the Bill of Rights were essential to the maintenance of "a fair and enlightened system of justice" in the states, or that justice could not be done without some of these.

Justice Benjamin N. Cardozo, after listing some rights that might be excluded by the states in their assessment of what constituted due process, insisted that

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[72] Palko v. Connecticut, 302 U.S. 319, 320. Whether it would have or not is impossible to say, but the Supreme Court expressed the belief that had they adopted the rule suggested by the petitioner, all the original Bill of Rights would be enforced on the states through the Fourteenth Amendment.

[73] Ibid., 320.

[74] Ibid., 324, 325. Justice Cardozo based his reasoning here on precedent that held to the basic belief that all the "privileges and immunities" of the Bill of Rights were not mandatory on the states. He held that these rights not made applicable to the states are reasonably deduced not to be so essential that justice could not be done without them.

> The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.[75]

The Court adopted a line of reasoning which, while not as far reaching, was very much like that suggested by Freund. It said that the decision in Powell had nothing to do with the fact that the defendant would have been entitled to counsel under the Sixth Amendment if tried in the federal courts. "The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of the hearing."[76] Therefore, the Powell decision really did not establish an absolute right to counsel, but actually laid the ground work for the "special circumstances" approach that would be accepted by the Court for nearly three decades. It is interesting to note at this point that Justice Black, in his first term on the high court, concurred with the majority in Palko and, therefore, joined the "judicial denial of the 'incorporation' doctrine, a thesis that was to be his jurisprudential hallmark."[77] Black and Frankfurter would soon split on this issue, however, and Chambers v. Florida[78] marked the beginning of Black's quest to "fill the Fourteenth Amendment with the Bill of Rights itself rather than the elusive

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[75] Ibid., 326.

[76] Ibid., 327.

[77] Dunne, Hugo Black, 258.

[78] 309 U.S. 235 (1940).

generalities of 'ordered liberty' and its inevitably wide judicial discretion."[79] As we will see as we follow the evolving right to counsel further, Black, joined by Justice Douglas and others in the steadfast minority, would continue to push his point, but would, in many cases, be forced to accept the more limited application approach.[80]

Justice Frankfurter, in opinions not inconsistant with his Times article, would continue to advocate the "propriety of state criminal procedures" and, in most cases, lead a majority that would fight for the idea that the Supreme Court should not be a tribunal for "revision of criminal convictions in the State Courts."[81] The issues arising under the due process clause were not easy ones for Frankfurter, said Philip Kurland, "For he could not satisfy himself that the more simplistic approaches of his brethren afforded appropriate resolution."[82] To Justice Frankfurter, the need for a clear separation of functions in government was a major influence on his decisions and, though an ardent supporter of the Bill of Rights, he was not willing to take the absolute

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[79]Dunne, Hugo Black, 259. The author discusses Black and "absolutes" in more depth, pp. 357-360. See also Paul A. Freund, On Law and Justice (Cambridge, Mass., 1968), 215-216.

[80]Justices Rutledge and Murphy joined Black and Douglas during most of the "case-by-case" period.

[81]Stein v. New York, 346 U.S. 156, 199 (1953). It is interesting to note that due to the nature of this particular case, which involved the acceptance of an alleged coerced confession, Justice Frankfurter was dissenting along with Black and Douglas. The three were found more often on opposite sides of constitutional issues, but dissented separately here. Justice Frankfurter reaffirmed his position with the above quote, but emphasized here a belief that the majority was deciding this case contrary to precedent in this area.

[82]Philip B. Kurland, Mr. Justice Frankfurter and the Constitution (Chicago, 1971), 142. Cf. Freund, On Law, 217.

position as did some of his colleagues.[83] Frankfurter had a strong belief in the integrity of the individual and believed it was important that the national government allow the states to run their own affairs when possible. He believed it was expedient to allow the states some freedom. However, if they failed, Frankfurter believed the Court had constitutional grounds for involvement.

In the landmark case just considered, we have seen that the proponents of a more liberal application of the due process clause of the Fourteenth Amendment won a major victory. Although most have looked to Powell as the basis for an absolute right to counsel in capital cases on the state level, the opinion itself really did not go as far as some modern observers seem to indicate. It was not until 1948 that the Court actually solidified this assumption, when, in a non-capital case, they verified the distinction between the two classifications and stated that the state court would have been required to provide counsel had this been a capital offense.[84]

As Justice Tom Clark pointed out in his Gideon concurrence, "Prior to that case [Bute v. Illinois] I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment."[85] Though the Court's

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[83]Freund, On Law, 146-162.

[84]Bute v. Illinois, 333 U.S. 640, 675 (1948). Even this language is something less than a clear statement of an absolute right. Two capital cases decided in 1945, William v. Kaiser, 323 U.S. 471, and Tomkins v. Missouri, 323 U.S. 485, had previously reaffirmed Powell in their result. These cases actually did imply that Powell required counsel in all capital cases.

[85]Gideon v. Wainwright, 372 U.S. 335, 347.

majority would virtually make the right to counsel in state capital cases absolute by requiring it at all stages of adjudication for indigents,[86] they would not be ready for some time to extend this same standard to the non-capital area.

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[86] Hamilton v. Alabama, 368 U.S. 52, 55 (1961). "We do not stop to determine whether prejudice resulted. . . . The degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." A more extensive look at the "critical stage" issue will follow.

Chapter III

RIGHT TO COUNSEL IN STATE COURTS: "SPECIAL CIRCUMSTANCES"

As the Court approached the end of the 1930's, a decade highlighted not only by some very significant decisions, but by a major confrontation between the judicial and executive branches as well, it had made some significant judgments in a number of areas involving civil liberties other than the right to counsel.[1] Civil liberties of all types have expanded significantly in the decades since Powell, and as Stuart Nagel suggests,

> one can readily observe the expansion of constitutional rights at the United States Supreme Court level by noting that it was not until the 1930's that the states were obligated to comply with any of the provisions of the Bill of Rights, and by the 1970's they were legally obligated to comply with virtually all of them.[2]

Various social movements can explain some of this change, along with the increasing sensitivity of decision makers to "pressure from below." The Supreme Court has not been exempt from this influence.

Shortly after the Powell decision was handed down, the Supreme Court held that "The due process clause of the Fourteenth Amendment governs any action of a state through its legislature, its courts, or its executive officers, including action through its prosecuting

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[1] One case that emphasized the importance of various rights was Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 307 (1937). The Court warned that trial courts must not "presume acquiesence" in regard to forfeiting of certain fundamental rights.

[2] Stuart S. Nagel, The Rights of the Accused: In Law and Action (Beverly Hills, 1972), 21.

officers."[3] In this case, as well as in others, the Court was careful not to "usurp" power, whether it be at the expense of the states or the United States Congress.[4] The Court continued to prefer reform on the state level in the area of criminal justice without a mandate from the federal judiciary, and, whenever possible, backed away from interference if there seemed to be possible state remedies. However, many states remained without "statutory directives" concerning appointment of counsel, and as a result, courts often did not consider it a constitutional duty to provide counsel in non-capital cases.[5] As a result, the Supreme Court found occasion, even before Betts v. Brady, to rule on the issue of state appointment where possible "prejudice" might have resulted from lack of counsel. These cases were handled through a case-by-case approach with careful attention to "special circumstances," and the lower federal courts passed up opportunities to expand Powell into the non-capital area.[6] Even after the Johnson decision of 1938, the Supreme Court resisted appeals to apply their federal ruling to the state courts.[7]

In the two years just prior to Betts, the Court laid the foundation for the celebrated 1942 decision. Addressing the counsel issue,

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[3] Mooney v. Holohan, 294 U.S. 103, 112 (1935). The Court here held against the petitioner who, they said, still had a state remedy to pursue.

[4] See Brandeis' concurrence in Ashwander v. TVA, 297 U.S. 288 (1936).

[5] David Fellman, The Defendants' Rights Today (Madison, 1976), 211.

[6] Beaney, The Right to Counsel, 158.

[7] Ibid., 160.

the Court, in 1940 and again in 1941, discussed the circumstances in a capital and a non-capital case that would have to be considered by the states if they were to avoid the risk of an appeal that would show denial of due process resulting from their failure to appoint counsel. In Avery v. Alabama,[8] Justice Black wrote the opinion of the Court which ruled against the petitioner who claimed he had not been given due process of law in light of the court's denial of a motion for continuance after its appointment of counsel. Though Black expressed the Court's "vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel," he found that the circumstances of this case indicated proper conduct, under Alabama law and the Fourteenth Amendment, by the trial court.[9] He asserted the Supreme Court's conviction that a mere formal appointment did not satisfy the constitutional requirement, but insisted that the Court had no desire to interfere with state sovereignty, and that the record of this case indicated that appointed counsel had sufficiently performed their function.[10]

In another opinion, just a year later, Black cut to the heart of the "special circumstances" standard in ruling for a petitioner whom he saw as a "picture of a defendant, without counsel, bewildered by court process strange and unfamiliar to him."[11] The particulars of this case are indicative of cases that would be quite frequent in their appearance before the Court in the post-Betts era. The petitioner, an uneducated

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[8]308 U.S. 444 (1940).

[9]Ibid., 445.

[10]Ibid., 450.

[11]Smith v. O'Grady, 312 U.S. 329 (1941).

man, was allegedly "tricked by state officers" into a guilty plea, thinking he had bargained for a lesser sentence. After receiving a sentence much stiffer than he had anticipated, the petitioner tried to withdraw his guilty plea and asked for appointed counsel, both of which were denied. The Supreme Court held that, at the very least, the petitioner should have been given the opportunity to prove his allegations in the state courts. If his claims were found to be true, he would have been entitled to a new trial with assistance.

As the country entered the tumultous 1940's, the United States Supreme Court had arrived at a point where most believed a new doctrine for state court criminal procedure was imminent. When Betts v. Brady entered the Court docket, the federal rule regarding the right to counsel was firmly established,[12] and many observers believed "that the same rule would be applied to state prosecutions."[13] However, the majority on the Court would not choose to go in this direction, and, as we will see, in an opinion not inconsistent with other rulings after Powell, made the right to counsel in state criminal proceedings hinge on a "fair trial" standard which continued to look to "special circumstances" in determining the necessity of appointed counsel for indigents.

In the case in question, petitioner Betts had been indicted for robbery in the Maryland courts. Upon appearing before the judge, he informed the court of his indigency and requested appointed counsel. The trial judge denied this request under a state law which called for

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[12] Glasser v. United States, 315 U.S. 60.

[13] Schaefer, "Federalism," 9. See also Beaney, Right to Counsel, 170.

appointment of counsel only in cases of murder and rape. After this motion was denied, Betts waived his right to trial by jury and proceeded to argue his case before the court, calling and examining witnesses. However, his defense was not convincing. He was convicted and sentenced to eight years in prison. Betts was given a hearing after initiating a habeas corpus petition in the state courts alleging a due process violation in denial of the right to counsel, but his contention was rejected. He then initiated action in the federal courts and eventually certiorari was granted by the United States Supreme Court.[14]

After hearing the case and deliberating on the issue involved, the Court handed down its decision on June 1, 1942.[15] Justice Owen Roberts, writing for the narrow 5-4 majority, made it clear that the Court was not ready to accept a new doctrine incorporating all of the Bill of Rights in the Fourteenth Amendment, or, for that matter, even to "equate the Fourteenth Amendment requirements with that [sic] of the Sixth Amendment."[16] However, the Court reasserted what it had made clear for some time, that a denial of some of these rights might work, under certain "circumstances," to deny due process protected by the Fourteenth Amendment. An

> Asserted denial is to be tested by an appraisal of the totality of the facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[17]

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[14] Betts v. Brady, 315 U.S. 791 (1942), certiorari granted.

[15] Betts v. Brady, 316 U.S. 455.

[16] Abernathy, Civil Liberties, 187.

[17] Betts v. Brady, 316 U.S. 455, 462.

The Court believed it should, therefore, avoid setting down "hard and fast rules" because the circumstances might vary from case to case.

Betts, however, was asking the Court to do something, virtually the same as Gideon would ask 20 years later, that would have removed the Court from the circumstances controversy. The petitioner asked the Court to do what would have amounted to declaring an absolute right to appointed counsel in all cases where the individual was charged with a crime and was unable to obtain his own lawyer.[18] "The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant."[19] The Court, therefore, was confronted with a direct challenge to the "special circumstances" doctrine that had been emerging since Powell. The petitioner's argument gave the Court an excellent opportunity to bring an end to the counsel issue by simply stating that in light of decisions in the years just past, counsel was a requisite to due process under the Fourteenth Amendment. This would have undoubtedly lifted a burden from the Court that it would be forced to bear for some thirty years, and would have been, to many, a logical step to take in light of decisions from Powell to Smith.[20] Justice

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[18] Ibid.

[19] Ibid., 464.

[20] Powell v. Alabama, 287 U.S. 45; Avery v. Alabama, 308 U.S. 444; Smith v. O'Grady, 312 U.S. 329. There is an important side issue here that may partially explain the Court's rejection of the petitioners' argument. In these three cases state law required the appointment of counsel. In Maryland, however, state law specifically required counsel only in murder and rape cases. How much influence this had on the Court is hard to say, but it is obvious that the Court preferred allowing the states to set their own standards unless a flagrant violation was shown, and was still hesitant about taking away state prerogatives in this area.

Roberts' majority, quite understandably, did not interpret their precedent in this way however, and, making a distinction between capital and non-capital cases, chose not to make the absolute federal requirement for counsel "obligatory upon the states."[21]

Some observers have seen this as a serious contradiction between counsel in federal and state courts, asking why, if counsel is necessary in one to protect due process, is it not also in the other?[22] Others, however, have seen Betts as being entirely consistent with the normal process of the time. Indeed, if we look at the decision from the perspective of the Court of that period, it is in no way surprising that they chose to take this more restrained course. As Jerold H. Israel indicates, the Court had not yet ruled on enough cases of this nature to be able to formulate a final decision on the counsel issue, as many questions had to be answered before a Gideon opinion could be reached.[23] The question of a fair trial without a lawyer would be handled through the "special circumstances" rule, which, as we shall see, was used so frequently to overrule cases in which the indigent was not given counsel, that the idea of counsel being appointed only on the basis of "special circumstance" was almost completely discounted by the end of the Betts era.

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[21] Betts v. Brady, 316 U.S. 455, 465.

[22] Louis A. Pollak, ed., The Constitution and the Supreme Court: A Documentary History, Vol. II (New York, 1966), 141.

[23] Jerold H. Israel, "Gideon v. Wainwright: The Art of Overruling," The Supreme Court Review, ed. Philip B. Kurland (Chicago, 1963), 261-263.

Justice Roberts used a quite common historical analysis to justify the majority's position, citing the history of state constitutional development on the issue to show that the right to counsel had never been generally accepted as a right to appointed counsel.[24] He also pointed out that historically the appointment of counsel in states had been handled through state statute and not the state constitution. The Court concluded that since most state constitutional provisions in this area did no more than the Sixth Amendment, the majority of the people of the states had not considered appointment of counsel a fundamental right "essential to a fair trial." Rather, the right to counsel had been considered a legislative matter and the Court should not "straight jacket" the state by making this a part of the Fourteenth Amendment. In light of the evidence, "We are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case."[25] Since any court could appoint counsel if it deemed necessary, the Court preferred a policy of non-interference unless the circumstances warranted federal intervention.

As far as the Betts case was concerned, the Court, fearing the possible ramifications of the broad counsel ruling that this could have

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[24] Betts v. Brady, 316 U.S. 455, 464-469.

[25] Ibid., 471.

been,[26] held against Betts who, they said, had average intelligence and knowledge of procedure. They expressed the belief that had the circumstances been different, the Maryland courts would have required the appointment of counsel. "[W]e cannot say that the Fourteenth Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."[27] The Court was expressing a fear that a ruling for Betts here would not be limited, and could lead to the requirement of appointed counsel, even in civil cases.[28] In light of the normal practice of limiting the scope of decisions to the case at hand, this argument was undoubtedly overstated for the time. No one expected a ruling broad enough to require counsel in civil cases, or

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[26] Ibid., 472. The major concern was that, as expressed below, of eliminating any justification for making a distinction between cases involving loss of liberty and those resulting in loss of property only. The majority also expressed the belief that the Supreme Court should not impose its will on the states in this area where state law had traditionally been allowed to govern.

[27] Ibid., 473. See also Beaney, Right to Counsel, 163, for a contrary view. Beaney upholds the argument of the dissent: "Rights are agreed upon in order to insure that justice will be done prospectively, in the ordinary run of affairs. To hold that an individual can be deprived of rights except in those cases where a retrospective view of events reveals a shocking situation is to defeat the whole rationale of the rule of law." He also said that the majority (Justices Stone, Roberts, Frankfurter, Reed and Jackson) had developed a loyalty to the traditional position on the balancing of state and federal power, and the opinion in Betts was, therefore, "satisfactory to them because it was calculated to retain state autonomy, subject only to a gentle supervision by the Supreme Court in order to prevent state 'excesses.'" This can be seen in the Court's opinion in Betts v. Brady, 316 U.S. 455, 461-472.

[28] Betts v. Brady, 316 U.S. 455, 472. The Court expressed a very logical concern as it is virtually impossible to justify, on purely constitutional grounds, this line drawing. However, as it had done in Powell and would later do in Gideon, the Court could have set the limit to those cases like the one in question.

even misdemeanors for that matter, and it would have been out of character for the Court to extend its decision beyond the scope of the Betts case itself. The same concern, however, was raised by the state in Gideon, and, as later cases would show, there was room for "fearing" possible results since they were opening doors to an expanded ruling in light of the wording of the due process clause.

The dissent, championed in Betts by Justice Black, assured the majority that it was not necessary to force counsel in all cases by a ruling in favor of the petitioner in this case.[29] While he expressed his belief that the Fourteenth Amendment made the Sixth applicable to the states, Black said he would not press this point, although that is actually what he did, and insisted that even under the currently accepted view of due process, the judgment should be reversed. Black did emphasize, however, the need for equitable justice and insisted that "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subject innocent men to increased dangers of conviction merely because of their poverty."[30] The right to counsel, in Black's judgment, was "fundamental" in criminal proceedings, and he cited his own historical precedent for equating the right of counsel for the

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[29] Ibid., 474. Black was joined by Justices Douglas and Murphy. Justice Wiley B. Rutledge, who would frequently join these three in dissent, joined the Court the following year. The argument is well taken as the Court has seldom allowed its decisions to carry farther than the case under consideration. Indeed, Gideon would not affect cases of misdemeanor offenses or civil actions, at least not immediately.

[30] Ibid., 476.

indigent with that of privately hired counsel.[31] Black uses much the same approach as that used by the majority when he cited numerous state statutes and judicial decisions to support his position that provision of counsel was already a widely accepted practice. Justice Roberts differed with Black primarily in his emphasis on the lack of constitutional provision for this right which indicated, to him, the necessity of judicial non-interference. Black, on the other hand, feared that the majority opinion would force the Supreme Court into a vast supervisory role that was worse than simply stating the right as mandatory for the states.[32]

Betts v. Brady reemphasized the "rising doctrinal debate within the Court" that found the right to counsel as only one facet of the conflict. The Betts dissent was indicative of the position held by Black and Douglas that the procedural rights of the Bill of Rights were forced on the states by the Fourteenth Amendment.[33] As mentioned previously, this approach was sharply rejected by Frankfurter and the majority who continued to insist that due process of the Fourteenth Amendment was to protect against state authority and "not simply a short-hand notion referring back to the specific right listed in the Bill of Rights, but

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[31] Ibid., 476-477. Black cites an Indiana Supreme Court decision of 1854 to illustrate his position that states have recognized this right for the poor. (Webb v. Baird, 6 Ind. 13, 18.)

[32] Francis H. Heller, The Sixth Amendment, 130.

[33] This theory was reemphasized in the non-counsel case of Adamson v. California, 332 U.S. 47. See Dunne, Hugo Black, 262. Dunne indicated that Betts was the first decision written by Black setting forth his belief that the Fourteenth Amendment made all provisions of the Bill of Rights applicable to the states. For further discussion of Black's incorporation theory, see Dunne, 357-360.

rather was a generalized guarantee of fundamental fairness—a guarantee whose particular content might vary from case to case and decade to decade."[34]

In addition, Frankfurter would continue to express little faith in the Court's ability to "design general rules of criminal procedure," and find his solace "in the case by case judicial process" which "he found [to be] the appropriate means for establishing such rules."[35] The basic differences on the Court, which were quite pronounced after Betts, were of a fundamental nature that included basic interpretation of the Constitution and a different concept of the function of the Court. However, the Justices' goals were basically the same, and this may account for the fact that the vast majority of cases heard by the Supreme Court in the twenty years between Betts and Gideon were to be decided in favor of the petitioners' right to counsel under a number of different circumstances.

As expressed by Jerold H. Israel, "the very nature of the Betts rule made it inevitable that lower court application would always be uncertain and uneven."[36] The Betts ruling obviously left open grounds for numerous appeals and reversals, and in retrospect, we might say, caused many problems for the Court that could have been avoided had the minority opinion prevailed in 1942. As this was not the case, however,

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[34]Pollak, The Constitution, 141. See also Dunne, Hugo Black, 263: "Frankfurter denied that the Fourteenth Amendment was a covert way of imposing the whole Bill of Rights on the States."

[35]Kurland, Mr. Justice Frankfurter, 116.

[36]Israel, "Gideon v. Wainwright," 266. See also Schilke, "Right to Counsel," 321.

the Court handed down over twenty opinions during the years prior to Gideon that dealt directly with the counsel issue. Though the Court was unwilling in the post-Betts era to "rule against the states where it could not find that lack of counsel resulted in a miscarriage of justice,"[37] in most of the cases they found "special circumstances" that indicated the need for counsel. Of the twenty-four decisions between 1942 and 1962, considered here, seventeen were decided in favor of the petitioner's claim that he had been denied due process for lack of counsel.[38] It may also be important to note that of the seven that went against petitioner, five were decided by a tight 5-4 majority, and in all five of these a guilty plea had been entered to complicate the counsel issue.[39] Out of the twenty-four cases decided, none went against a petitioner who had not pleaded guilty and had chosen to go to trial forced to represent himself. Of the twelve cases decided after 1948,

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[37]Fellman, Defendants' Rights, 214.

[38]Rice v. Olson, 324 U.S. 786 (1945); Townsend v. Burke, 334 U.S. 736 (1948); DeMeeler v. Michigan, 329 U.S. 663 (1947); Marino v. Ragen, 332 U.S. 561 (1947); Wade v. Mayo, 334 U.S. 672 (1948); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Gibbs v. Burke, 337 U.S. 773 (1949); Palmer v. Ash, 342 U.S. 134 (1951); Chandler v. Fretag, 348 U.S. 3 (1954); Massey v. Moore, 348 U.S. 105 (1954); Herman v. Claudy, 350 U.S. 116 (1956); Moore v. Michigan, 355 U.S. 155 (1957); Cash v. Culver, 358 U.S. 633 (1959); Hudson v. North Carolina, 363 U.S. 697 (1960); McNeal v. Culver, 365 U.S. 109 (1961); Chewning v. Cunningham, 368 U.S. 443 (1962); Carnley v. Cochran, 369 U.S. 506 (1962).

[39]Canizio v. New York, 327 U.S. 82 (1946); Carter v. Illinois, 329 U.S. 173 (1946); Foster v. Illinois, 332 U.S. 134 (1947); Gayes v. New York, 332 U.S. 145 (1947); Gryger v. Burke, 334 U.S. 728 (1948); Bute v. Illinois, 333 U.S. 640 (1940); Quicksall v. Michigan, 339 U.S. 660 (1950).

only one went against the petitioner, that in 1950, and this became the last case decided rejecting the claim of counsel.[40]

The key to all of these decisions became the circumstances involved in each, and it soon became evident, as Mason and Beaney pointed out in 1959, that the state had to offer to appoint counsel, at least if the defendant were "young, ignorant, or inexperienced or the case complex."[41] The cases themselves can be placed into two somewhat distinct categories which will aid in our analysis. The first grouping consists of those cases that in some way involved a guilty plea which was treated as a waiver by the lower courts, and the second, those cases where the accused did not plead guilty and proceeded to make his own defense after being denied court appointed counsel. The Court was quick to dispel this first assumption of waiver when in Rice v. Olson, 1945, Justice Black warned the trial courts that a plea of guilty in itself did not constitute a waiver.[42] Justice Black explained

> A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his own defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel.[43]

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[40] Quicksall v. Michigan, 339 U.S. 660.

[41] Mason and Beaney, The Supreme Court, 283.

[42] 324 U.S. 786. In 1942 the Court may have misled the state courts in the federal court decision of Adams v. United States, 317 U.S. 269. The Court, with an adamant dissent from Black, Douglas, and Murphy, ruled that in criminal prosecutions in the federal courts a defendant may intelligently waive both his right to counsel and right to trial by jury.

[43] Rice v. Olson, 324 U.S. 786, 788-789.

Of the fourteen cases to follow Rice in this category, seven were decided for the petitioner, and seven against.[44]

In the latter group, three examples will suffice to illustrate the reasoning of the Court in denying petitioner's claim. In 1948 the Supreme Court heard two cases, very similar to each other in some ways, related to this issue. In Bute v. Illinois the majority opinion reflected the overriding concern for the integrity of state law and criminal procedure, while at the same time giving recognition to the supremacy of the Federal Constitution and its amendments. In this non-capital case, and others like it, the Court suggested that its decision turned "upon the meaning of 'due process of law' under the Fourteenth Amendment in relation to the assistance of counsel for the defense of the accused in state criminal trials such as these."[45] Justice Burton went on to indicate that there were cases where the Supreme Court's

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[44]The first of these cases, decided in 1946, was somewhat unique in character and may deserve a separate category of its own. The mere fact that Justice Black wrote the opinion for the majority would tend to support its uniqueness. In Canizio v. New York, 327 U.S. 82, the defendant had pleaded guilty without counsel, but was given counsel before sentencing in time to withdraw the plea if he had believed it to be the best course. Black, who at least partially abandoned his more characteristic position, seems to have allowed himself to be swayed by the evidence pointing to the defendant's guilt and the influence of stare decisis. The dissenters, Rutledge and Murphy, normally in the company of Black, could not follow his reasoning on this occasion and forcefully proclaimed the absolute position that would be consistently supported thereafter by Black.

The other three cases in this group, not discussed in the main body of the paper, were Carter v. Illinois, 329 U.S. 173; Gayes v. New York, 332 U.S. 145; Foster v. Illinois, 332 U.S. 134. All three cases were decided by the same 5-4 majority with Justice Frankfurter writing for the Court. Carter was a capital case, but, as a guilty plea had been entered by defendant, the Court did not feel bound by Powell.

[45]Bute v. Illinois, 333 U.S. 640, 648.

application of the Fourteenth Amendment's due process clause was valid and beneficial in the area of state criminal procedure where "fundamental principles of liberty and justice" are threatened. Such was not the case, according to the Court, under the circumstances in Bute. The Court, reaffirming its Betts rule, claimed that the nature of the guilty plea, and the simple language of the indictment, made the appointment of counsel a matter entirely in the hands of the state.

To the majority in Bute, it seemed that, in light of the varying state procedures, a ruling by the Supreme Court against this particular standard of counsel appointment would cause confusion where clarity was essential. However, the vocal minority and a number of other outspoken critics claimed that by affirming its Betts rule in Bute, the Court was actually muddying the waters and making it more difficult for state courts to know what was to be required of them in court procedure.[46] The dissent went on to take this opportunity to strike out sharply at the Betts rule which they saw as an "ill-starred decision" that worked to deny counsel while at the same time professing to be working to guarantee a "fair trial."[47] Justice Douglas denounced the differing standards that were being allowed to exist between federal and state procedure in the area of counsel. While the need for counsel in all capital cases, whether they involved a guilty plea or contested charges, was obvious,

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[46]Abernathy, Civil Liberties, 189. "As more and more 'special circumstances' requiring counsel impressed themselves upon the majority of the Court . . . the pressures of argument and case-load pushed almost inexorably in the direction of a more clear-cut rule."

[47]Bute v. Illinois, 333 U.S. 640, 677.

> Those considerations are equally germane though liberty rather than life hang in the balance. Certainly due process shows no less solicitude for liberty than life. A man facing a prison term may, indeed, have as much at stake as life itself.[48]

Though they would have preferred to see Betts discarded, the minority saw a basis, even in Betts, for upholding the claim of Bute under these circumstances.

Two months later the Court ruled on Gryger v. Burke, a case involving a special "fourth offender" hearing, where the petitioner had pleaded guilty without the benefit of counsel, a deficiency he later claimed was a denial of due process.[49] The 5-4 majority, after reviewing the record, found "no exceptional circumstances" present in this case that would render the petitioner's conviction invalid due to "The State's failure to provide counsel for this petitioner on his plea to the fourth offender charge."[50] The Court accepted the state's contention that since this was a fourth offense, the sentencing was automatic under state law and, therefore, counsel could not possibly render a necessary service. The minority, however, saw this case in a much different light, and Justice Rutledge insisted that "Even upon the narrow view to which a majority of this Court adhere concerning the scope of the right to counsel in criminal cases, as guaranteed by the Fourteenth Amendment's requirement of due process of law," this case must be decided for the petitioner.[51] In particular, if, as the minority insisted, the trial

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[48] Ibid., 681.

[49] 334 U.S. 728.

[50] Ibid., 731.

[51] Ibid., 732-733.

judge could wield some discretionary power over the sentence imposed, it would be hard to square this decision with others already decided by the Court.[52] Consequently, the dissentors insisted that imposing a life sentence in this case was not mandatory, and therefore, the absence of counsel denied the petitioner the right to be heard in matters concerning sentencing. The minority insisted that false information was presented by the prosecutor in regard to the petitioners prior record, and that while counsel might not have changed the sentence, he could have insured that the sentencing decision was based on accurate information.[53]

In 1950 the Court rendered its last decision rejecting the right to counsel in Quicksall v. Michigan.[54] Justice Frankfurter wrote the opinion of the Court which reaffirmed the case-by-case approach in this instance where the charge was murder, but capital punishment was not involved. Quicksall had pleaded guilty to the charge and the Supreme Court found nothing in the record indicating either a request for or offer of counsel.[55] With Justice Black registering a lone dissent,[56]

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[52]On the same day it decided Gryger, the Court handed down a ruling in Townsend v. Burke, 334 U.S. 736, which the dissent used as part of its argument favoring Gryger. The Court held in Townsend that counsel at the hearing might not have affected the sentence, but could have insured "fair play" on the part of the prosecution in presenting background on the accused. The major difference between the two cases was the fourth offender statute that did not play a part in Townsend.

[53]334 U.S. 728, 741. [54]339 U.S. 660.

[55]Ibid., 661. At this particular point in the case-by-case era, the Court did seem to place considerable emphasis on the fact that the record did not indicate a request for counsel by the defendant. The fact that capital punishment was not involved was also an obvious influence on the Court's opinion in this particular case.

[56]Justice Douglas took no part in this decision, and Rutledge and Murphy were no longer on the Court in 1950.

the Court, finding nothing to indicate that the defendant had been denied due process under the Fourteenth Amendment, affirmed the state court ruling.[57] As the Court had expressed it earlier in Carter v. Illinois, "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt."[58] Justice Frankfurter would continue, even after he lost the support of a majority of the justices, to express the belief that the Supreme Court had no authority under the Fourteenth Amendment to impose a "uniform code of criminal procedure" on the states, even though he believed that under certain circumstances the need for counsel might exist at every stage of the proceeding.[59]

Though Black stood alone in his dissent at this time, he did not lack for support outside of the Court. Writing in 1954, William M. Beaney claimed that "the illogic and unfairness of treating non-capital cases in a manner different from capital ones reaches its highest point" in Quicksall v. Michigan.[60] The Court was allowing itself to judge whether serious injustice had been done regardless of the errors found in state proceedings. In 1951 another critic, Francis Heller, had pointed out the reluctance of the Court to force the Sixth Amendment provision for counsel on the states. Heller insisted that the Court

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[57]Quicksall v. Michigan, 339 U.S. 60, 61.

[58]Justice Frankfurter's opinion for the Court in Carter v. Illinois, 329 U.S. 173, 174.

[59]Kurland, Mr. Justice Frankfurter, 152.

[60]Beaney, Right to Counsel, 177.

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[59]Kurland, Mr. Justice Frankfurter, 152.

[60]Beaney, Right to Counsel, 177.

would have to decide, once and for all the question: "does due process of law demand that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant?"[61] A decision of this nature, however, was not forthcoming for some time.

In considering the seven cases in the first group where a guilty plea was involved but decisions were for petitioners, initially one can observe that four came before the Quicksall opinion of 1950. The first two cases involved guilty pleas to murder charges where the Court ruled that the "petitioner[s] [were] deprived of rights essential to a fair hearing under the Federal Constitution."[62] In both cases the age of the defendant at the time of prosecution, in addition to the serious nature of the charges, seemed to be the basis of the Court's ruling.

In Uveges v. Pennsylvania, the majority, as it had done in Powell and subsequent non-capital cases,[63] emphasized the youth of the defendant as a factor in their reversal. Here the petitioner had pleaded guilty to four separate burglaries, was sentenced, and later initiated habeas corpus proceedings where he alleged that "he was not informed of his right to counsel[;] nor was counsel offered him at any time during the period between arrest and conviction."[64] He also raised the issue of his youth, and the Supreme Court, believing that the "record

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[61]Heller, The Sixth Amendment, 129.

[62]DeMeerler v. Michigan, 329 U.S. 663, 665, per curiam opinion. See also Marino v. Ragen, 332 U.S. 561.

[63]DeMeerler v. Michigan, 329 U.S. 663, 664-665, and Wade v. Mayo, 334 U.S. 672, 684. Powell v. Alabama, 287 U.S. 45, 51-52, 71.

[64]Uveges v. Pennsylvania, 335 U.S. 437, 439.

adequately raised the federal constitutional question as to denial of counsel," granted certiorari. Justice Reed emphasized his commitment to the practice of considering each case according to "its own facts" and the need to consider "special circumstances" such as "the gravity of the crime, . . . the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged" in determining whether or not the court could proceed without furnishing counsel for indigent defendants. If any of the above circumstances exist,

> the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.[65].

The court was then to apply the circumstances standard to determine the necessity of appointed counsel unless it could be shown that a proper waiver had been registered.

Without mentioning the Sixth Amendment, the Court justified its "philosophy" on the basis that due process required by the Fifth and Fourteenth Amendments insure the provision of counsel if it would seem that a defendant could not get a fair trial or adequate defense without such provision. Under the circumstances in this case, the Court held that "the requirements of due process" made the appointment of counsel, or at least the offer of counsel, for the defendant necessary before he could be "permitted to plead guilty."[66] The Court was of the opinion that there was a real need for the advice of counsel before entering a

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[65] Ibid., 441.

[66] Ibid., 442.

plea. Due to the youth and inexperience of the defendant, it was impossible for him to have known "the intracacies of criminal procedure when he pleaded guilty to crimes that carried a maximum sentence of eighty years."[67] Counsel could have acted where the court had not to advise the defendant of the consequences of his plea.

Three years later Frankfurter demonstrated his commitment to the case-by-case, special circumstances approach through his announcement of Justice Black's opinion in Palmer v. Ash, another case coming to the United States Supreme Court from Pennsylvania.[68] In Palmer, a case that came to them some eighteen years after initial sentencing, the majority said,

> This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and fair defense.[69]

The special circumstances in Palmer included the petitioner's claim that he was not shown the indictment against him and believed he was pleading to a lesser offense, and that he was young and not in a normal mental state.

In a 1956 decision, Herman v. Claudy, the Court ruled in favor of the petitioner who claimed to have pleaded guilty to a number of non-capital charges as a result of coercion by state officers.[70] Black reiterated the Court's position in Uveges, and pointed out that the fact

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[67] Ibid.

[68] 342 U.S. 134.

[69] Ibid., 135.

[70] 350 U.S. 116

that Herman had one previous conviction did not indicate that he had enough experience to conduct his own defense.[71]

The last case in this category to be decided by the Supreme Court prior to Gideon came a year later when, in Moore v. Michigan, a seventeen year old, black youth with a seventh grade education pleaded guilty to murder after informing the court of his desire to waive his right to counsel.[72] The petitioner was given the maximum sentence of life with no possibility of parole, and twelve years later, in 1950, filed for a new trial claiming the right to counsel. According to Justice Brennan, writing for the Court's majority, certiorari was granted to decide the issue of "a plea of guilty to [a] charge of murder when the accused was without benefit of counsel."[73] Even though the record was clear that the trial judge had taken great care to explain the implications of waiver, the Court's 5-4 majority claimed that under the circumstances, the petitioner could not have been protected fairly without counsel.[74] They emphasized that "The right to counsel is not a right confined to representation during the trial on the merits."[75]

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[71] See also Gibbs v. Burke, 337 U.S. 773, where the petitioner had six prior convictions, and the Court ruled that circumstances called for counsel.

[72] 355 U.S. 155.

[73] Ibid., 157.

[74] Ibid., 160. Petitioner claimed he had been threatened with fear of mob violence, and the Supreme Court also saw the possibility of numerous available defenses that the ignorant defendant did not pursue.

[75] Ibid.

From the record of this case, the Court found reason to believe that counsel could have advised the defendant, prior to pleading, of numerous defenses available to him, the technical nature of which made these options incomprehensible to the uncounseled defendant. The Court held that the petitioner had shown that the pressure of circumstances influenced him and that, under these circumstances, the statements made to the trial judge did not necessarily constitute an "intelligent and understanding" waiver. The Court's minority, led by Justice Harold H. Burton, with concurrence from Justices Frankfurter, Clark and Harlan, picked up on this point and criticized the majority opinion for its lack of respect for the trial judge's previous actions and statements. They believed that the record called for upholding the state court's decision that the waiver had been freely and intelligently made.[76]

In the second category mentioned above, where the petitioner had actually been tried without assistance of counsel, all the cases went in favor of the petitioner's later claim of denial of due process. The first, Wade v. Mayo, saw Justice Murphy speaking for the Court in a case that, in some respects, resembled Gideon.[77] In Wade the Court found at least three "special circumstances" which, in light of Betts, were sufficient to call for appointment of counsel for the defense. Wade was only eighteen years old, he was inexperienced and unfamiliar with court procedure, though not a first offender, and the Court believed the record clearly showed that he was "not capable of adequately representing himself" even though the legal issues involved were not particularly complex.[78]

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[76] Ibid., 166 [77] 334 U.S. 672. [78] Ibid., 683.

> There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. . . . Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.[79]

The following year, Justice Reed, who dissented in Wade, expressed his, and the majority's continued commitment to the Betts case-by-case approach by rejecting the respondent's argument that to hold to the current precedent left "state prosecuting authorities uncertain as to whether to offer counsel to all accused who are without adequate funds and under serious charges in state courts." The Court insisted that it could not

> offer a panacea for the difficulty. Such an interpretation of the Fourteenth Amendment would be an unwarranted federal intrusion into state control of its criminal procedure. The due process clause is not susceptible of reduction to a mathematical formula.[80]

In support of the Court's majority, it may be said that the states were being given the opportunity to set their own, more liberal, standards. Had they, as in this case, felt the need for a more definitive rule, they could have simply implemented a broader standard for themselves. Indeed, some were suggesting by the end of the Betts era that the states would have been much better off had they followed the lead of the federal courts in the counsel area and adopted more liberal standards where they did not already exist. Kurland suggested that the states might well have retained considerably more flexibility had they done this, but, because some refused, the Warren Court would eventually tighten the reins on state court procedure because "the loose rein was

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[79] Ibid., 684.

[80] Gibbs v. Burke, 337 U.S. 773, 780.

found inadequate." Kurland also suggested that Frankfurter and the majority, which included Justice Reed, were actually "trying to preach to the state courts by example. Our constitutional history would have taken a different turn if the state courts had voluntarily adopted requirements that were later imposed on them."[81]

While the majority seemed to be willing to wait for the states to take necessary action, contenting themselves with a supervisory role through the Betts rule, the minority, led by Justices Black and Douglas, continued to call for a more definitive ruling. In Gibbs v. Burke, Black and Douglas concurred in the result, but called for the overruling of Betts, a theme they were to echo directly or indirectly for the next fourteen years.[82]

The next case to be considered in this area came in 1954. Massey v. Moore, decided by a unanimous Court, was used to restate the special circumstances that would require the state to provide counsel.[83] Justice Douglas, for the Court, insisted that the Court had "not allowed convictions to stand if the accused stood trial without benefit of counsel and

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[81]Kurland, Mr. Justice Frankfurter, 119. See also Mason and Beaney, Supreme Court, 283-284; Beaney, Right to Counsel, 198. "It would have been better if the states had themselves reformed their criminal procedure by providing counsel for all indigent defendants at public expense, but the simple fact is that a minority of States failed to act despite a long period of warning." Archibald Cox, The Warren Court: Constitutional Decision As An Instrument of Reform (Cambridge, 1968), 87.

[82]337 U.S. 773, 782.

[83]348 U.S. 105. Just prior to Massey, the Court affirmed the absolute right of an accused to be given opportunity to obtain his own counsel in Chandler v. Fretag, 348 U.S. 3. This case, however, did not fall under the Betts rule according to the Court as it involved those who could hire their own counsel and made no reference to the indigent.

yet was unskilled, so ignorant or so mentally deficient [the circumstances in this case] as not to be able to comprehend the legal issues involved in his defense."[84]

Several cases reached the United States Supreme Court between 1959 and 1963 that were very similar to each other in many respects and continued to press the counsel issue upon the Court. While most states had, by this time, adopted very liberal rules or practices in regard to appointed counsel for the indigent defendant,[85] a few continued to hold on to the old practices, using Betts and other federal rulings as precedent for denying counsel in some felony prosecutions. It is quite obvious that by the end of the 1950's there was increasing demand throughout the country, at least from those professionally linked to the issue, for the Supreme Court to firm up its position on the right to counsel by overruling Betts.[86] Changing circumstances, then, saw more and more states voluntarily providing counsel, many individuals demanding

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[84] Ibid., 109.

[85] Yale Kamisar, "The Right to Counsel and the Fourteenth Amendment," 30 University of Chicago Law Review (Autumn 1962), 17. At the time of the decision in Johnson v. Zerbst, see above chapter 2, p. 22, thirty states already provided counsel "as a right to all indigent defendants." By 1962, when his article was published, thirty-seven were in this group and thirty-nine went beyond the Betts standard. See appendix to the article at pages 67-74. A look at the material gathered here shows that even in the remaining thirteen states "whose statutes or rules do not provide for assigned counsel as of right in all felony cases," ten states in practice, went beyond Betts in providing counsel for the indigent felon. According to Anthony Lewis, Gideon's Trumpet (New York, 1964), 132, a copy of Kamisar's manuscript for this article was sent to the Fortas staff as they were preparing the brief for Gideon's case. See also Schilke, "Right to Counsel," 334-335.

[86] See Beaney, Right to Counsel, 234; Schaefer, "Federalism," 9; Mason and Beaney, The Supreme Court, 283; Kamisar, "The Right to Counsel," 17; Schilke, "The Right to Counsel," 321.

a new ruling, and the Supreme Court consistently overruling cases arising under the Betts rule. These made the reversal of Betts essential, if not inevitable.[87]

Even the issue of overburdening the states financially by a sweeping counsel ruling was confronted by those desirous of change. Walter F. Mondale, at that time serving as Attorney General of Minnesota, insisted,

> Nobody knows better than an attorney general or a prosecuting attorney that in this day and age furnishing an attorney to those felony defendants who can't afford to hire one is 'fair and feasible'. . . . As chief law enforcement officer of one of the 35 states which provide for the appointment of counsel for indigents in all felony cases . . . I can assure you that such a requirement does not disrupt or otherwise adversely affect our work.[88]

Mondale seemed to be convinced that the cost of supporting such a system was negligible when compared with the social and humanitarian benefits of providing counsel for all indigents in serious cases.

Even with this growing demand for change, the Court was reluctant to give up completely on the Betts ruling.[89] Although the Court

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[87]Israel, "Gideon v. Wainwright," 267.

[88]Kamisar, "The Right to Counsel," footnote, p. 10. The above was a portion of a letter written to the Attorney General of Florida in response to a request from that state to join them in their Gideon position by filing a brief amici curiae.

[89]Beaney, Right to Counsel, 235. The Court must require counsel in all criminal proceedings in order to insure a fair trial. "If our vaunted claim of 'equal justice under the law' is to be more than an idle pretense, the right to have counsel must be extended in practice to all persons accused of crime." See also Schilke, "Right to Counsel," 325-326, who said, "The illusive test applied by the Supreme Court has proved to be untenable and irrational. It is utterly impossible to tell at any given time what the law would be in a specific instance. . . . Can right to counsel logically mean different things to the same court, dependent only upon where the case was heard? The answer must, of course, be in the negative; but recognizing the principles of our court system it becomes clear that logic alone cannot move the court."

continued to give verbal support to the doctrine that in practice, if not in theory, the Betts rule had been abandoned. As Israel pointed out, the "history of the 'special circumstances' cases shows the Court had consistently whittled away at the Betts rule until with [the rulings in] Chewning [v. Cunningham] and Hudson [v. North Carolina] it was almost completely eroded."[90]

In the Hudson case, the petitioner, eighteen years old and indicted for robbery, was being tried with two co-defendants.[91] The Court refused to grant his request for counsel, but the attorney representing one of the co-defendants volunteered to assist Hudson. When counsel's client pleaded guilty to a lesser charge, he withdrew from the case. The court took no steps to protect the remaining defendants from potential prejudice and they were convicted.

A post-trial hearing found no special circumstances which necessitated the appointment of counsel. Though the age and education of the petitioner had some influence on the Supreme Court, the Court was primarily concerned with the prejudice that may have resulted due to the trial court's failure to instruct the jury regarding the co-defendant's guilty plea. This concern with the possibility that the jury might have unjustly assumed guilt on the part of the petitioner because of the confession of guilt by petitioner's alleged partner in crime led the Court to hold that these circumstances, arising "during the course of the petitioner's trial[,] made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law

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[90]Israel, "Gideon v. Wainwright," 260.

[91]Hudson v. North Carolina, 363 U.S. 697.

guaranteed by the Fourteenth Amendment."[92] This is obviously a very difficult thing to determine and Kamisar questions the ability of the Court to make such a determination from the record.[93]

The following year Justice Douglas, with whom Justice Brennan joined, once again called for the overruling of Betts, but the majority remained content with the "fair trial" standard.[94] Douglas speculated that if the present Court would hear Betts, the decision would not be upheld. He insisted, reflecting a very general change in attitude toward the poor, that in light of Chandler v. Fretag, where the Court affirmed the unqualified right of one to obtain his own counsel, it should no longer be permissible to deny that right to a man solely for financial reasons. "This draws a line between rich and poor that is repugnant to due process."[95] Betts, he proclaimed, should be discarded because it forces the indigent defendant to prove that he should have had counsel, "Which is so at war with our concept of equal justice under the law that it should be overruled."[96]

In 1962 Justice Douglas, for the Court in Chewning v. Cunningham, concluded that the trial on Virginia's complex habitual criminal statute was a serious one since it could result in a lengthy jail sentence and that the "potential prejudice resulting from the absence of counsel [is] so great that the rule we have followed concerning the appointment of

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[92] Ibid., 703.

[93] Kamisar, "Right to Counsel," 53.

[94] McNeal v. Culver, 365 U.S. 109.

[95] Ibid., 118.

[96] Ibid., 119. See also Douglas, "The Right to Counsel," 693.

counsel in other types of criminal trials is equally applicable here."[97] The Court was now in a position of speculating as to what might have been had the defendant been represented by counsel, and virtually using this speculation to create circumstances under which the state court could be overruled.[98] The Court was approaching the point, finally reached in Gideon, where the presumption of prejudice would exist "whenever the defendant is deprived of counsel, on the ground that the probability of prejudice is greater and the extent of actual prejudice difficult to determine."[99] The last case to be heard before the Betts rule was retired permanently, came just two months later and gave the Court further opportunity to expand its waiver rulings.[100]

In Carnley v. Cochran, arising from the Florida courts as would Gideon just a year later, the Court found numerous circumstances that would "accentuate the unfairness of trial without counsel," so the real issue was whether counsel had been properly waived. "The record must show, or there must be allegations and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."[101] The Court could not assume that the mere lack of a request was synonymous with a waiver.

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[97] Chewning v. Cunningham, 368 U.S. 443, 447.

[98] Israel, "Gideon v. Wainwright," 252-255.

[99] Note, "Effective Assistance of Counsel for the Indigent Defendant," 78 Harvard Law Review (May 1965), 1436. The Betts decision held that prejudice did not necessarily occur when counsel was not present for the defense.

[100] Carnley v. Cochran, 369 U.S. 506.

[101] Ibid., 516.

In a Court that found justices joining or concurring much as they would the following year in Gideon, Justice Black, in a separate opinion, reiterated his belief that the Fourteenth Amendment applied the Sixth Amendment right to counsel in all state criminal cases and that Betts had only served to confuse the issue. It was time, Black insisted, to abandon the vague Betts rule and recognize "that the defendants in state courts have[,] by reason of the Fourteenth Amendment[,] the same unequivocal right to counsel as defendants in federal courts have been held to have by virtue of the Sixth Amendment."[102] While Black had the agreement of three other justices (Warren, Douglas, and Brennan), the Court's opinion, perhaps due to the fact that circumstances here were of a nature that did not require a direct confrontation with the Betts rule, would fall short of plotting a new course.

The following year, however, in a case that would be almost identical to Betts, the United States Supreme Court would be unable to avoid a decision on the merits of the twenty year old rule. The old approach had become so confused with rulings that attempted to uphold the generally accepted requisite for a "fair trial" without imposing a uniform standard, that the lower courts were faced with an unwieldy

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[102] Ibid., 519. Black went on to call directly for the overruling of Betts and to say that "The Fourteenth Amendment protects life, liberty, and property and I would hold that defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution." This reasoning would seem to have called immediately for a rule similar to that which was ten years away, if not a broader rule, which, had it not been for the inclusion of the term "criminal procedure," could have been said to call for counsel in civil cases where loss of property is also a serious reality. We should keep this in mind when we consider the criticism of Argersinger. See below 89-90.

enumeration of precedents from which to determine a proper course of action. A new approach was imminent and the resulting opinion would usher in a new and long overdue era in the right to counsel.

Chapter IV

THE RIGHT TO COUNSEL SINCE GIDEON

By the end of 1962, the Supreme Court had in effect expanded the right to counsel doctrine although it had not formally decreed a new doctrine beyond the Betts rule. The Court, by applying the "special circumstance" approach, had come to guarantee that at least in those cases where an accused was young, uneducated and inexperienced in legal proceedings, or faced with complex charges, the assistance of counsel would be provided if desired. While the Court had not closed the door on the adoption of additional circumstances to further expand their guarantee, the 1942 rule had seemingly run its course and problems arising from the application of the vague "fair trial" standard were more pronounced than ever.

As Gideon v. Wainwright entered the Court docket, many parts of the nation, at least as they were represented by various state officials, stood ready for a change in the nature of the Supreme Court's counsel rule.[1] This can be seen from the outpouring of amici curiae briefs

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[1]Israel, "Gideon v. Wainwright," 257, 261. As Israel puts it, the Gideon decision was a result of the gradual erosion of the Betts ruling through later decisions. "As a practical matter, Betts had already been overruled. . . . Surely after the Chewning dissent, the Court in Gideon could well have maintained that Betts indeed had been overruled sub silento by the subsequent course of decisions, so that all that remained to be done was to publish its obituary."

filed with the Supreme Court calling for the overruling of Betts.[2] Surprisingly, one of these briefs, joined in by 22 states, came at least partially as a result of the request made by the state of Florida for the other 49 states to show their support for Florida's position.[3] These states were joined by the American Civil Liberties Union,[4] and only the attorneys general of Alabama and North Carolina saw fit to join Florida in calling for affirmation.[5] The evolving right to counsel doctrine had reached a point, long overdue for some, where the only thing left for the Court at this point was the formal discarding of the outmoded Betts rule. As Neil Schilke had said in 1960,

> Our nation is . . . dedicated to the proposition that all men are created equal. . . . If these are truly our principles, then inability to obtain counsel (most frequently due to indigence) should never be a reason for denying the right to counsel. Early in our history poverty was equated with immorality[,] but this fallacious reasoning has long since been completely over-ruled.[6]

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[2]Brief for State Governments' Amici Curiae, Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, eds. Philip B. Kurland and Gerhard Casper, vol. 57, 558-559. "Betts v. Brady, already an anachronism when handed down, has spawned twenty years of bad law. That in the world of today a man may be condemned to penal servitude for lack of means to supply counsel for his defense is unthinkable. We respectfully urge that the conviction below be reversed, that Betts v. Brady be reconsidered, and that this Court require that all persons tried for a felony in a state court shall have the right to counsel as a matter of due process of law and equal protection of the law."

[3]Lewis, Gideon's Trumpet, 141-142.

[4]Landmark Briefs, 463-525.

[5]Ibid., 576. While they admitted the Betts rule was not perfect, they saw it as the "best one for our American way of life." It was essential, they insisted, that individuals in the several states have the ability to make the changes they saw as necessary through their various state legislatures and judicial systems.

[6]Schilke, "Right to Counsel," 346.

The opportunity came, of course, as a result of a petition filed in forma pauperis by a prisoner, Clarence Earl Gideon, serving time in the Florida state penitentiary for conviction on a non-capital felony charge.[7] The facts in Gideon seemed to reveal no "special circumstances" that under the Betts rule would warrant reversal,[8] so counsel, appointed by the Court to argue the case for the petitioner, was forced into a head-on confrontation with the Betts precedent. As a result, Abe Fortas, counsel for the petitioner, called on the Supreme Court to overrule Betts, a step, as indicated, they were probably ready to take anyway.

The petitioner, initiating the review himself, relied solely on his claim, made before the trial judge, that the Supreme Court had given him a right to counsel, an assumption on his part that was technically untrue at the time. As a result, the argument for the petitioner focused around the "fundamental" nature of the right to counsel for all persons "hailed into court," including the indigent. In essence, Gideon was asking the Court to force conformity on the states in this area, and to reject the idea, at least as it related to counsel, that diversity could be beneficial in state criminal procedure. The state, on the other hand, continued to hold on to the old arguments of federalism and the virtue of the Betts case-by-case approach.[9]

As far as Justice Black was concerned, there was no virtue in the Betts approach which, in his opinion, had only created a situation

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[7]For a much heralded account of the Gideon story, see Lewis, Gideon's Trumpet.

[8]Gideon v. Wainwright, 372 U.S. 335.

[9]Landmark Briefs, 397. See also Lewis, Gideon's Trumpet, 156-159.

in which "the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts."[10] The Gideon opinion, to one biographer of Justice Black, was the culmination of the justice's persistent pursuit of literalism in regard to the Sixth Amendment's right to counsel and its application through the Fourteenth Amendment, a position he had continued to take from the time of his opinion in Johnson v. Zerbst.[11] Black's opinion for the Court in Gideon was actually a transformation of his Betts dissent that would thereafter carry the force of law, and he wasted no time getting to the heart of the issue by proclaiming that "upon full reconsideration we conclude that Betts v. Brady should be overruled."[12] Justice Black, as he had argued so many times before, insisted that Betts could have, indeed should have, been decided the other way by declaring that the right to counsel was "fundamental" under the due process clause and, therefore, a necessary requisite to a "fair trial." The Betts Court, of which only he and Justice Douglas remained, was in fact wrong in its conclusion that the Sixth Amendment right to counsel was not one of the fundamental rights applicable to the states through the Fourteenth Amendment, and was mistaken in its application of precedent. While the Court was unanimous in the result, there remained some conflict on this issue.

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[10] Gideon v. Wainwright, 372 U.S. 335, 338.

[11] Dunne, Hugo Black, 375.

[12] Gideon v. Wainwright, 372 U.S. 335, 339.

Justice John M. Harlan, the beneficiary of Frankfurter's school of thought,[13] saw Betts in a much more sympathetic light. In his concurrence, attempting to give Betts "a more respectful burial," Harlan justifiably concluded that Betts was not a break with its past. He insisted that the imposition of the Johnson standard on the states would have been the break, since Johnson applied only to federal court appointment of counsel in non-capital cases.[14] Harlan justified the overruling on the grounds that Betts had in reality already ceased to exist as "The Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial."[15] As we have seen previously, in

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[13]Mr. Justice Frankfurter had retired from the Court in 1962. It is probably fair to speculate that he would have been with the Court on the Gideon decision had he still been in service. Though a cautious man when it came to the rule of stare decisis, Frankfurter was not unyielding, as he had shown by voting with the majority in Brown. It is likely he would have reasoned that the states had been given adequate time to adjust the inequities themselves and supported the move toward a judicial solution in light of overall circumstances.

See also Walter Murphy, "Deeds Under a Doctrine: Civil Liberties in the 1963 Term," 59 American Political Science Review (March 1965), 69. The author here suggests that the Court's majority was becoming quite well known for its support of libertarian causes. "[D]ecisions of the 1963 term were overwhelmingly libertarian." Murphy sees, at the core of this situation, a new concept of jurisprudence that encompassed the basic concepts of "freedom and social equality."

[14]"A close reading of Powell seems to support Justice Harlan's view that Betts fell well within the basic pattern cut by the Powell opinion." Israel, "Gideon v. Wainwright," 236. The Court in Powell had carefully restricted the states' duty to appoint counsel and did not intend a broad interpretation as claimed by Black. See also G. Theodore Mitau, Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964 (New York, 1967), 159.

[15]Gideon v. Wainwright, 372 U.S. 335, 351. As far as Harlan was concerned, the Court had actually already reversed Betts by holding that even what he considered minor "special circumstances" were sufficient to uphold the right to counsel. The cases decided in the previous decade

Powell "Justice Sutherland obviously sought to decide the particular question before him while at the same time allowing for such future growth as the Court might later find desirable." As Israel indicated, Powell actually "provided a stepping stone to either a Betts or a Gideon, depending upon how far and how fast the Court utilized the opinion's potential for expansion.[16]

Justice Black preferred to utilize Powell as a vehicle to advance his thesis that Betts was indeed a break with precedent and then emphasize the necessity of counsel and the need to ensure its provision without regard to the financial status of the defendant. Echoing the arguments that the proponents of an expanded counsel rule had been proclaiming for some time, Black insisted that "the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries," could be found in the fact that the government hires prosecuting attorneys, and defendants with financial means hire their own lawyers for defense.[17] The Court, finally having reached a point where, while not necessarily agreeing on the logic, unanimously agreed that the "special circumstances" rule had long outlived its usefulness. The Justices agreed that the rule should be abandoned and that counsel should be a prerequisite to a "fair trial."

While Black did not limit the opinion to cases involving substantial prison sentences, Justice Clark, in the second of three concurring

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had eroded the Betts rule to a point where it existed only as a formality. See above 29-30.

[16]Israel, "Gideon v. Wainwright," 237-238. See Israel for a more detailed analysis of the justification of overruling.

[17]Gideon v. Wainwright, 372 U.S. 335, 344-345.

opinions,[18] was careful to take up the slack by tracing the evolution of the right to counsel since Betts and limiting the decision to the case at hand. He said that "The Court's decision today, then, does no more than erase a distinction [between capital and non-capital cases] which has no basis in logic and an increasingly eroded basis in authority."[19] The Court could not make the judgment that to deprive a person of life was necessarily worse than depriving him of his liberty. Though the Court's ruling in Gideon was limited technically to cases where substantial prison sentences were possible, in language very similar to that used by Black in his Carnley v. Cochran concurrence the previous year, Justice Clark left the door open for a continued evolution of the right to counsel. He reminded the Court of the fact that the Constitution mentions liberty and property and life in an equal context in the Fourteenth Amendment. While the Court was not expanding the right to counsel at this time beyond the limits of Gideon, Clark implied that the "fundamental right" to counsel could be still in the process of evolving and might be expanded further at a later date.[20]

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[18]Douglas also wrote a separate concurring opinion in which he gave support to the "absolutist" interpretation of the Fourteenth Amendment's incorporation of the Bill of Rights.

Israel indicates that Gideon was somewhat unique among the less than one hundred cases overruling previous decisions, in that in most the Court has been divided on the result. In Gideon, however, all the justices agreed with the result of the ruling, but were divided on their individual reasons for reaching this position calling for the overruling of Betts.

[19]Gideon v. Wainwright, 372 U.S. 335, 348. See also Spicer, The Supreme Court, 41.

[20]Gideon v. Wainwright, 372 U.S. 335, 349.

Referring to the post-Gideon era, Leonard W. Levy proclaimed that the "operative principle" after this decision "was that there could be no due process, fair trial, or equal justice when the kind of criminal proceeding against a man varied with his bank account."[21] While it is obvious that the Court did not establish a completely equitable method of appointment of counsel for rich and poor,[22] it did take an important step and continued to advance from that point.

The question the Court was forced to pursue next arose on the extent of this right to counsel in minor offenses in light of the statements made by Clark, Black, and others in regard to the "life, liberty, and property" phrase of the due process clause. It was nearly a decade before the Supreme Court would directly confront this issue and extend the Gideon ruling.[23] While occupied primarily with the "critical stage" issue in regard to counsel during the remainder of the 1960's (to be dealt with in the next chapter), the Court dealt with the related issue of jury trials in petty offenses.[24]

It was to the jury trial cases that the Court looked when it took up the issue of counsel in misdemeanor cases. In 1972 the Supreme Court heard Argersinger v. Hamlin, once again rising from the Florida courts. The case involved a charge of carrying a concealed weapon

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[21]Leonard W. Levy, Against the Law: The Nixon Court and Criminal Justice (New York, 1974), 199.

[22]Cf. Swisher, The Supreme Court, 58-59. Swisher is critical of the Court for not ridding the system of all inequity.

[23]Argersinger v. Hamlin, 407 U.S. 25.

[24]In 1967 the Supreme Court handed down the landmark decision guaranteeing the right to counsel at delinquency hearings. In re Gault et al., 387 U.S. 1 (1967).

punishable by six months and/or a $1,000 fine. The petitioner was convicted and given a ninety day sentence. The sentence was appealed on the ground that he had been denied due process of law due to the fact that he was indigent, unable to make an effective defense for himself, and was not granted court appointed counsel.

The Florida Supreme Court, in a close 4-3 decision, held that counsel had only to be extended in cases of "non-petty offenses" punishable by more than six months in prison. As precedent the state supreme court used Duncan v. Louisiana,[25] a case involving the jury trial issue decided by the Supreme Court in 1968. Florida, claiming that the right to counsel had only to be extended in cases that also required a jury, applied Duncan, which set down a distinction between "petty" and serious offenses using the severity of the punishment as a basis.

In the 1968 decision Justice Byron White avoided setting a specific boundary, but said that the possible two year sentence in question surely qualified the crime in question as a serious offense. There is undoubtedly a category where the empaneling of a jury is not necessary, said Justice White. For example, "crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses."[26] He insisted that trial by jury was most certainly a fundamental right and implied that the Fourteenth Amendment guaranteed a jury trial in all cases where, if tried in a federal court, it would be required under the Sixth Amendment. He proceeded to cite the federal rule that defined a petty offense as one punishable by

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[25] 391 U.S. 145 (1968).

[26] Ibid., 159.

imprisonment not to exceed "six months or a fine of not more than $500, or both,"[27] and mentioned the fact that 49 of the 50 states use a jury trial if the crime is punishable by one year imprisonment, less in some states.[28]

Two years later, in a case not mentioned by Florida in Argersinger, Justice White was more willing to set a firm line and indicated that a crime that carried more than a possible six month sentence was not "petty," but a serious crime that had to be tried by jury.[29] The Court at that time had also taken the position that the right to the assistance of counsel was more extensive than that of a jury trial.[30] A defendant surely may receive a fair trial without a jury where his case is argued before a judge alone. Indeed, it may often be preferable, but to receive a fair trial without counsel is almost inconceivable in an adversary judicial proceeding.

The Supreme Court, once again under pressure to take a major step in expanding the right to counsel, and undoubtedly influenced by the fact that many states were already moving in this direction,[31] decided to travel further down the road toward a more absolute application of the Sixth Amendment. Justice Douglas, speaking for the Court, affirmed the distinction, made earlier between the right to counsel and

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[27]United States Code, Title 18, sec. 1.

[28]Duncan v. Louisiana, 391 U.S. 145, 161.

[29]Baldwin v. New York, 399 U.S. 66 (1970).

[30]Beaney, "Right to Counsel," 150.

[31]Ibid., 151. See also Fellman, The Defendant's Rights, 216; Levy, Against the Law, 231.

a jury trial with a historical analysis which concluded that "while there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel."[32] Douglas reflected the inevitability of the Argersinger ruling by pointing out that there was nothing in the Amendment or the decisions of the Court to suggest that the Sixth Amendment right to counsel should not be extended to petty offenses. The Court, through Justice Douglas, pointed out that Powell had emphasized the need for assistance of counsel, and that the language of Gideon had been quite broad. Although Powell and Gideon were felonies, "their rationale has relevance to any criminal trial, where an accused is deprived of his liberty."[33]

Douglas obviously did not accept the argument that the right to counsel could be limited to cases where a jury trial was used as he had rejected restrictions on the latter right in previous concurring opinions.[34] Since complexity was not necessarily any less of a problem in a "minor" offense punishable by less than six months than in major felonies, and might present a number of other serious problems, Justice Douglas concluded for the Court "that the problems associated with misdemeanors and petty offenses often require the presence of counsel to insure the

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[32] Argersinger v. Hamlin, 407 U.S. 25, 30. Justice Douglas cites Baldwin v. New York, 399 U.S. 66, which clearly states that "the right to trial by jury has a different genealogy and is brigaded with a system of trial by a judge alone." Argersinger v. Hamlin, 407 U.S. 25, 29.

[33] Ibid., 32.

[34] Duncan v. Louisiana, 391 U.S. 145, 162 (1968); Baldwin v. New York, 399 U.S. 66, 74, concurrences of Black joined by Justice Douglas.

accused a fair trial."[35] Limiting its opinion to the case at hand, as it had done in Gideon, the Court, speaking through Douglas, held that unless waived, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[36] Douglas left room in his opinion for further expansion if deemed necessary at a later date by carefully wording his opinion so as not to rule out a more liberal application, and by simply saying that the Court in this instance need not decide if the right to counsel should extend to criminal areas with no possibility of a jail sentence. Justice Douglas emphasized the absolute need where "one's liberty is in jeopardy" for the trial judge to determine this at the outset and appoint counsel if the possibility existed that a jail sentence would be imposed.[37]

Though the Court was unanimous, the opinion was accompanied, as in Gideon, by an array of concurring opinions, the most significant of which was written by Justice Lewis F. Powell, joined by Justice William H. Rehnquist.[38] Justice Powell expressed the concern that the Court might be drawing a line that would be too rigid and thus place an undue burden on state officials. He expressed the idea that, while the right

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[35] Argersinger v. Hamlin, 407 U.S. 25, 36-37.

[36] Ibid., 37.

[37] Ibid., 40.

[38] Other concurring opinions by Brennan and Chief Justice Warren E. Burger dealt with what could be done to meet the burden of representation that the states might be forced to confront. The chief justice commented that the "right to counsel has historically been an evolving concept," and he had no doubt that the legal profession could meet this challenge of new burdens that might be forthcoming due to financial strain on the state's judicial system.

to counsel must extend to all jury trials, it was not certain that counsel would always be needed in a case simply because a short jail sentence might be imposed. He advocated, rather, a case-by-case approach to such situations that would allow the Court not only to insure the right to counsel to all that needed assistance from possible loss of "liberty," but would also allow them to invoke the counsel privilege in cases involving loss of "property" if the need were shown.[39] The justice then proceeded to express concern for the possibility that a ruling of this nature might overburden the system, and showed a reluctance to place the trial judge in a position where he would be forced to appoint counsel for the sole purpose of preserving his discretion in sentencing. From these factors, Powell concluded, "I would hold that the right to counsel in petty-offense cases is not absolute but is one to be determined by the trial courts exercising judicial discretion on a case-by-case basis."[40]

However sensible the reasoning in his concurrence seemed to Powell, the majority was not willing to return to what amounted to a Betts special circumstances approach to petty offenses. The majority of the justices seemed to have reached the position that the old fair trial-critical circumstances standard, so long a point of controversy for the Court, had finally been discarded and should not be revived in any form.

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[39] Argersinger v. Hamlin, 407 U.S. 25, 48. "The majority opinion suggests no constitutional basis for distinguishing between deprivation of liberty and property," p. 51. Powell feared possible future implications. Cf. "Argersinger v. Hamlin: For Better or For Worse?" 64 The Journal of Criminal Law and Criminology (September 1973), 290, 292-294.

[40] Ibid., 63.

As Levy said, "Fundamental fairness, fair trial, and special circumstances are concepts that leave judges hopelessly adrift in a sea of imprecision and subjectivity, as history had already and abundantly demonstrated."[41]

While some Court observers have expressed delight with the Argersinger rule,[42] critics still persist who see Argersinger as a liability because it actually does not declare an absolute right to counsel for misdemeanants.[43] However, it is difficult to see Argersinger as anything but an advance from the Gideon rule at this point. The Court's willingness to draw the line between imprisonment and fine seems to have been the logical next step for that time.

As we have seen, Argersinger applied the Gideon rule to all misdemeanors where loss of "liberty" was threatened. Many observers believed the next step would be to interpret Argersinger as applying to all cases where the penalty "authorized" was imprisonment. The decision itself actually left this question unanswered and by the end of the 1970's led to the Court requiring counsel only in those cases that involved "actual" imprisonment.

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[41] Levy, Against the Law, 237.

[42] Beaney, "The Right to Counsel," 151; Fellman, Defendant's Rights, 216.

[43] "Argersinger v. Hamlin," Journal of Criminal Law and Criminology, 292. "In light of the language in Powell, Gideon, Johnson, and Evans, the decision of the Court to settle for less than an absolute right to counsel is difficult to justify." The Court actually justified its position from the standpoint that the Argersinger case did not require a broader rule. In doing this they followed a standard practice used previously in Powell and Gideon.

The decision in Scott v. Illinois,[44] possibly reflecting the more restrained approach now being taken by the Burger Court,[45] restricted the constitutional requirement for appointed counsel to cases where imprisonment was actually imposed. While dissenters criticized this as a backing off from earlier principles, we must conclude that Argersinger could have been taken either way. That opinion is worded in such a way as to leave the trial judge in a position of deciding, regardless of the classification, whether or not he believes a jail sentence possible, and if so, to appoint counsel at the outset for the indigent to preserve his sentencing prerogative.[46]

With the Supreme Court badly divided on a number of issues, Justice Rehnquist wrote the opinion of the Court which held that the "Federal Constitution does not require a state trial court to appoint counsel for a criminal defendant such as petitioner" Scott, who faced a maximum penalty of $500 fine and one year in prison, but was only fined $50.[47] Rehnquist suggested that to further extend the limits of Argersinger would unnecessarily place a financial burden on the state courts that have to handle a much broader "range of human conduct" than that of the federal courts, "particularly on the 'petty' offense part of

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[44] 440 U.S. 367 (1979).

[45] Levy, Against the Law, 202-210.

[46] Scott v. Illinois, 440 U.S. 367, 379. Brennan dissenting: "The question of the right to counsel in cases in which incarceration was authorized but would not be imposed was expressly reserved." The Court was actually testing imprisonment. They submitted that in regard to the appointment of counsel, the trial judge might withhold counsel as long as he did not actually impose a jail term, even if the crime being tried carried a possible (authorized) jail sentence.

[47] Ibid., 369.

the spectrum." "Even were the matter res nova [a new question], we believe that the central premise of Argersinger—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."[48]

In dissent, Justice Brennan called this result "intolerable" and insisted that the natural course of cases decided since Powell [including Argersinger] should lead the Court to a different position.[49] Brennan insisted that Scott's offense of theft should not be considered "petty" simply because of the penalty imposed, and that by implementing the "actual imprisonment standard," the Court "denies the right to counsel in criminal prosecutions to accused who suffer the severe consequences of prosecution other than imprisonment."[50] While, as mentioned above, the majority decision can be viewed as one avenue to follow from Argersinger, it would also seem that at this point in time, the more logical course would have been the "authorized imprisonment" test suggested by Justice Brennan. This may seem even more logical in light of the recent Baldasar v. Illinois decision.[51]

In Baldasar the Court, with four justices (Powell, Burger, White, and Rehnquist) dissenting, held that at a trial for a second

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[48] Ibid., 373.

[49] Ibid., 389. In his dissent Justice Brennan said that the Court's opinion actually "restricts the right to counsel, perhaps the most fundamental Sixth Amendment right, more narrowly than the admittedly less fundamental right to jury trial." See above, 86.

[50] Ibid., 383.

[51] 48 LW 4481.

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[51] 48 LW 4481.

misdemeanor where the prosecution was asking for a jail sentence under a recidivist statute, a prior uncounseled misdemeanor conviction could not be used as evidence. Since the petitioner was not represented by counsel at the first trial where a jail sentence was not imposed, that conviction could not be used by the state to impose a jail sentence here.[52]

It is impossible to determine at this time if Baldasar will create the confusion in the lower courts that the dissent suggested would result. To Justice Powell, this confusion would arise from the fact that the Court had now made unclear what it would have the states do in misdemeanor cases in regard to counsel where a jail sentence was not imposed. Powell insisted that since there was no way for the courts to know whether or not a man would be a recidivist, the decision of the Court to restrict the use of a legally obtained prior conviction under these circumstances was totally illogical. He also suggested that if the Court were to proceed as it had here, it would seem necessary to require counsel whenever a jail sentence is a possibility and not just when it is imposed.[53] However, we can say that the immediate result was, as Justice Marshall said in concurrence, that the "Court declined to extend Argersinger to all cases in which imprisonment was [an] authorized penalty."[54] The end result of this new confusion may well be

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[52] Ibid.

[53] Powell dissenting, 48 LW 4482. Powell's concern in this regard is a legitimate one. The confusion that may be caused by the vague distinction between "authorized" and the imposition of an actual jail sentence, when the court is deciding whether or not to appoint counsel for an indigent, makes it impractical for the Court to hold this line.

[54] Marshall dissenting, 48 LW 4481.

the inevitable adoption of the "authorized" imprisonment test and, thus, a more absolute right to counsel. By using this method of determining the necessity for appointment of indigent counsel, the Court is simply saying that if a judge may by statute impose a jail sentence in a given case, the opportunity for counsel must be made available. This approach would most certainly eliminate some of the grey area in the current right to counsel rule and be a significant expansion of Argersinger. The dissent, however, continued to hold the line at the point where it was drawn in Scott v. Illinois and did not view the Constitution or the Argersinger rule as requiring counsel unless a person's liberty was actually taken away.[55]

After nearly a half-century of progressive change, it seems today that the Constitution is being read in such a way as to guarantee that no indigent person will be sentenced to a jail term, regardless of how short, without having had the benefit of counsel for his defense, unless the record clearly shows this right to have been "knowingly and understandingly waived." In expanding this right of the indigent, the courts must be careful that they do not put the non-indigent person of limited means in a disadvantaged position. The Court may wish to make certain that the standards for determining indigency are not so stiff that they would exclude those who are in, or would be faced with, serious financial difficulty as a result of obtaining their own lawyer.[56]

Regardless of the problems that obviously still exist, progress in making the right to counsel more equitable has become a reality. The

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[55]See above, 91.

[56]See below, 133.

road has been long and often very rough going from the point in 1932 where the right to counsel in the state courts only applied in capital offenses, through the "special circumstances" era of Betts, past Gideon to the Argersinger ruling and beyond. Along the way the Court has decided some issues that broadened the counsel privilege even more than appears here. To this we now turn our attention.

Chapter V

THE "CRITICAL STAGE"

The right to counsel controversy has engulfed a fair portion of the Court's time over the last half century. The mere fact that it has drawn more than considerable attention emphasizes the pervasiveness of this "fundamental" right. The Court has drawn attention to the importance or necessity of counsel, as we have seen, from its very earliest decisions in this area. One author has suggested at least three basic functions that show the need for counsel: "to advise on the substantive law of crime, to explain the intricacies of criminal procedure, and to serve as strategist and tactician in the actual conduct of the trial."[1] These ideas go a long way in explaining why the right to counsel can be said to permeate many other rights. In fact, a defendant will frequently unknowingly forfeit rights and options available to him if he is not given counsel at the earliest possible stage in the proceedings against him.

The mere formal appointment of counsel has been held to be inadequate in fulfilling the right to counsel when counsel was not present in time to provide adequate defense.[2] The appointment must be substantive and not just a mechanical effort to fulfill the procedural requirement of due process. Justice Sutherland began to confront the "critical

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[1] Note, "Effective Assistance of Counsel," 1435.

[2] Powell v. Alabama, 287 U.S. 45, 52.

stage" issue when, in Powell, he said that circumstances showed that the defendants were, for all intents and purposes, denied the right of counsel during the crucial period from arraignment to trial. The Court ruled that in a capital case due process for the accused "requires the guiding hand of counsel at every step in the proceeding against him."[3] In Powell there was no opportunity given to appointed counsel to investigate and thus prepare an adequate defense. As a result, "defendants were not accorded the right to counsel in any substantive sense."[4]

The question of the importance of counsel was addressed during the 1950's by several scholars, two of whom were Neil Schilke and Yale Kamisar. The former emphasized as one reason for the need for counsel the nature of our prosecutorial method which makes a prosecutor look upon a "conviction as a personal victory calculated to enhance [his] prestige."[5] Schilke went on to list several reasons why counsel was essential "even prior to arraignment," including the preservation of evidence, the adjustment and setting of reasonable bail, and to see that crucial witnesses are located and brought into court.[6]

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[3] Ibid., 69.

[4] Ibid., 58.

[5] Schilke, "Right to Counsel," 339.

[6] Ibid., 339-340. "(1) The defendant will be consoled by the assurance of assistance and the fact that he will receive a fair trial. (2) Evidence may be preserved. (3) Charges may be made to conform with facts. (4) Reasonable bail may be obtained or the accused may be released on his own recognizance. (5) Evidence from foreign jurisdictions may be obtained in time for the trial thereby avoiding postponement. (6) Removal from prison for questioning or for police line-up may be avoided. (7) Evidence not presented at the Magistrates hearing could be presented to the Grand Jury with the possibility of having the Bill of Indictment ignored. (8) An early or delayed listing, in accord with the accused's need, could be arranged. (9) Counsel could see that important

Kamisar also proclaimed the need for counsel for both rich and poor, immediately after arrest.[7] He insisted that the protection and advantages that might be derived by the defendant from developments such as the "landmark search-and-seizure" rulings would likely never benefit the uncounseled indigent defendant. This is just one example, according to Kamisar, of how "without the help of a lawyer not only may 'all other safeguards of a fair trial . . . be empty,' but so may legal protections against police misconduct outside the courtroom."[8]

Most modern observers see even more vividly the need for counsel at a very early stage due to the nature of our system of adversary confrontation. Though the original interpretations did not apply the Sixth Amendment right to counsel to proceedings until the trial, with modern police forces and systems of justice, critical confrontation occurs well before the actual trial stage.[9]

Reflecting a position that would soon win a majority on the Court, William O. Douglas, writing an introduction for a series of articles that appeared in the Minnesota Law Review in 1961 on various aspects of the right to counsel, insisted that

> the need for the advice and guidance of counsel is not limited to formal court room proceedings. The need for counsel exists whenever the procedural and substantive rights of a person may fail to be asserted fully because of his ignorance or inexperience.[10]

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witnesses were brought into court. (10) All charges may be consolidated if that suits the needs of the accused. See also Kamisar, "The Right to Counsel," 53-62.

[7] Kamisar, "The Right to Counsel," 9.

[8] Ibid., 38.

[9] Levy, Against the Law, 201, 247.

[10] Douglas, "The Right to Counsel," 694.

Douglas also indicated that the need for counsel might exist even at the stage of interrogation. Actually the minority, including Justices Douglas, Warren, Black and Brennan, had been reflecting this position for several years.

Although the Court held in 1957 that counsel was not necessary at what they considered to be an administrative investigation not part of the criminal proceeding, Justice Black, in dissent, emphasized the need for counsel at every pre-trial stage.[11] The stage in this instance was an investigation conducted by the state fire marshal for the purpose of determining the cause of a fire that occurred on the premises of a corporation owned by appellants. Appellants were subpoenaed to appear as witnesses at the investigation where they were not allowed to have counsel present. The majority accepted the argument of the state that counsel was not necessary since this was merely an investigation and not a criminal trial, and that it would not in any way have as its purpose the implication of the appellants' responsibility for the fire. The dissent disagreed, saying that while this particular procedure was not part of the criminal proceeding, it might have a major impact on possible proceedings later. The appellants were legally obligated to speak at the investigation, and this testimony could be used as a basis for criminal charges that might be brought against them by the prosecution.[12]

The following year, Justice Douglas, dissenting in Crooker v. California, attacked the practice of allowing the courts to try and calculate "the amount of prejudice arising" from the denial of counsel at a

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[11] In re Groban et al., 352 U.S. 330 (1957).

[12] Ibid., 336.

particular pre-trial stage.[13] In this case, where the accused had been denied the right to contact an attorney before the completion of the interrogation, the dissenters insisted that this was a critical stage and that the accused needed a lawyer immediately after arrest as much as at any other time. Justice Douglas insisted that "the demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest."[14] Justice Clark's majority, however, applied what amounted to a circumstances rule to the record of this case to conclude that "prejudice" which would have made the denial of counsel a violation of due process had not been shown by the petitioner. The Court, expressing a concern that to rule otherwise would damage effectiveness of police questioning procedures, rejected the petitioner's claim that the state's failure to allow him to contact an attorney should be viewed as an automatic violation regardless of the circumstances. Defying the logic that would prevail in later cases, the Court ruled that due to the age of the petitioner (31 years) and his level of educational achievement (the petitioner had completed one year of law school), even though the defendant must have a right to a fair opportunity to retain counsel,

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[13] 357 U.S. 433 (1958). Crooker would later be overruled by Escobedo v. Illinois, 378 U.S. 478 (1964). See also, Abernathy, Civil Liberties, 192-193.

[14] Crooker v. California, 357 U.S. 443, 448. The petitioner, arrested on a charge of murder, had requested the opportunity to call an attorney soon after arrest, but was denied access to a phone until after the police had questioned him throughout the night and obtained a complete confession. Petitioner was not allowed to contact an attorney until he had repeated his confession in the district attorney's office the day after his arrest.

Crooker had not been denied due process and the confessions could legitimately be viewed as voluntary.[15]

A change in the Court's opinion on counsel in this area would accompany the changing opinion of the Court on the general right to counsel issue, and shortly after the new decade began, the Court would begin to establish precedent that would protect the right to counsel for all suspects at four specific pre-trial stages. Just a few months after Justice Douglas' Minnesota Law Review article was published, the first of these precedents was announced in Hamilton v. Alabama.[16]

Although Alabama law provided for a guarantee of counsel at arraignment, the petitioner was denied this right and pleaded not guilty to a murder charge. While recognizing his right to counsel, the Alabama Supreme Court refused to overturn the conviction because they found no evidence to show that the petitioner had been "disadvantaged" by counsel's absence when he pleaded not guilty. In reversing the state supreme court decision, the United States Supreme Court, through Justice Douglas, held that the arraignment, in this instance, was a "critical stage in a criminal proceeding."[17] Due to the nature of this stage, where both the defense of insanity and pleas in abatement had to be initiated, the presence of counsel was crucial. According to Douglas, when the

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[15] Ibid., 438.

[16] 368 U.S. 52 (1961). For Justice Douglas' article see above, page 98.

[17] Hamilton v. Alabama, 368 U.S. 52, 53. While the Hamilton ruling was technically limited to this particular type of arraignment, in effect all arraignment proceedings came to be considered critical stages as a result of this decision. Abernathy, Civil Liberties, 192.

arraignment is like that conducted in Alabama courts where the whole trial stage may be effected, it must be considered a "critical stage."[18]

Douglas also began to challenge the whole concept of judging possible prejudice due to irregularity in pre-trial stages by stating that

> where one pleads guilty to capital charges without benefit of counsel, we do not stop to determine whether prejudice resulted . . . as the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.[19]

As a result, the Supreme Court, for the first time, had chosen to overrule a conviction on grounds that counsel had not been provided at the arraignment.[20] Though, as William Beaney said in 1972, there is actually no absolute right to counsel at the arraignment yet declared, "the logic of other right to counsel cases implies that such right exists."[21] We may conclude therefore that, while the Court has not said so in so many words, trial courts must protect the right of the accused to counsel at the arraignment, since it is a crucial stage in the criminal proceedings.

With this important step behind them, the Court moved two years later into the second area and pushed the counsel requirement back one

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[18] Hamilton v. Alabama, 368 U.S. 54.

[19] Ibid., 55.

[20] William J. Hunsaker, "Right to Counsel—Before and After Gideon," 4 Washburn Law Journal (Winter 1964-65), 88.

[21] William M. Beaney, "The Right to Counsel," 154. Beaney cites Coleman v. Alabama and United States v. Wade, considered below at pp. 103 & 113 as justification for this conclusion. He also says that because of procedural moves that could be made, "the arraignment is a 'critical stage' of the criminal process, and counsel should be made available to all indigents before a plea is accepted."

more notch in White v. Maryland.[22] Following the landmark Gideon ruling by one month, White was no less a significant ruling. At the preliminary hearing where the defendant was charged with murder, he pleaded guilty without the assistance of counsel, though he was not required to enter a plea at that time. Later, at what Maryland referred to as an arraignment with counsel for his defense, White pleaded "not guilty" and "not guilty for reason of insanity." At his trial, however, the original guilty plea was entered by the state as evidence and the petitioner was found guilty. On appeal, petitioner asked the courts to apply Hamilton v. Alabama to his case, but the Maryland courts upheld the conviction saying that the hearing in question was not a "critical stage" in the criminal proceeding requiring appointed counsel since a plea was not mandatory. Upon review by the United States Supreme Court, however, the justices disagreed with the state court, holding that the preliminary hearing, where a plea was entered without counsel, was "as 'critical' a stage as arraignment under Alabama law," and that, as in Hamilton, "we do not stop to determine whether prejudice resulted."[23]

While White in itself would not necessarily have extended the right to counsel to all defendants at their preliminary hearing, the Court has since redefined and expanded this decree. In 1970 the Supreme Court handed down a decision in the case of Coleman v. Alabama where it indicated that preliminary hearings were a "critical stage" if counsel

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[22] 373 U.S. 59 (1963).

[23] Ibid., 60. Since a plea was entered at the preliminary hearing, that hearing was automatically considered a "critical stage" and the Court did not have to sit in judgment of the effect on the trial of the guilty plea.

would be beneficial.[24] Since the Court has held that counsel is necessary whenever counsel may render a service that would be beyond the abilities of the layman, it is obvious that the ruling in White leaves the Supreme Court considerable room to operate. It would seem virtually impossible to conceive of a situation where one could say categorically that counsel could not have been a benefit to the uncounseled defendant at a preliminary hearing.

In Coleman, a decision inundated with four separate opinions in addition to the opinion of the Court, the main issue before the justices was the determination of whether this hearing was a "critical stage," as the Alabama arraignment had been labeled some nine years before. Here the preliminary hearing was used for the purpose of determining the sufficiency of the evidence against the accused before turning the case over to a grand jury, and, unless the case was thrown out, to fix bail where appropriate. Both of these functions, at least in some respects, are quite common purposes of the preliminary hearing throughout the several states.[25]

The state of Alabama claimed that since the accused was not required to offer a defense at this stage, and since their practice was not to use anything from the preliminary hearing at the trial if the defendant had not had counsel at that stage, appointed counsel was not necessary. The petitioner, with whom a majority of the Court agreed, indicated otherwise, since counsel could provide valuable services such

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[24] Coleman v. Alabama, 399 U.S. 1 (1970). See also Levy, Against the Law, 229.

[25] Levy, Against the Law, 228.

as the examination of witnesses, the acquiring of helpful testimony, and even influence over the amount of bail set. It might also have been possible for counsel to influence the magistrate not to "bind the accused over" for trial. The Supreme Court held that even though nothing here was admissible evidence at trial under state law, "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent against an erroneous or improper prosecution."[26]

In his dissent Chief Justice Berger admitted that the appointment of counsel at the preliminary hearing was a recommended practice, but insisted that it was not a constitutional mandate since the hearing was not a "criminal prosecution."[27] While something like this, he said, might be socially and legally desirable, this was not grounds for an opinion which must be based on constitutional law. In a separate dissent Justice Potter Stewart also insisted that there was no precedent for insuring a "fair preliminary hearing," and that since no plea was entered and counsel was appointed immediately after indictment, the state had fulfilled its obligation.[28] Stewart insisted that the petitioner had not shown prejudice as a result of not having counsel at the

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[26] Coleman v. Alabama, 339 U.S. 1, 9. See also Beaney, "Right to Counsel," 153.

[27] Cf. Levy, Against the Law, 230. Levy attacks the Burger dissent, saying that its logic "would turn the clock back to the pre-Powell era."

[28] Coleman v. Alabama, 339 U.S. 1, 25-29. Stewart also brings out an interesting line of reasoning related to the problem that now existed, in light of this decision, for the state of Alabama. His point, which is well taken, is that they are now put in a position of deciding what could be done with this case which, according to the Supreme Court, was prejudiced from the earliest stage. How could Alabama do anything but go back to the beginning, order a new preliminary hearing, and begin the entire process anew.

preliminary hearing and rejected the Court's contention that the absence of counsel at the hearing deprived the petitioner of his constitutional rights.

However logical the dissents may seem at first glance, they are ladened with some serious problems. To say that the preliminary hearing is not a part of the criminal proceeding in light of the cases[29] that had by this time pushed the counsel requirement, for those who obtained their own, back to the pre-indictment police interrogation stage seems to be a serious misjudgment, and only works to highlight the inherent difficulties existing between counsel for the indigent and non-indigent.

Before looking at the third stage set by the Supreme Court, one more case, decided in 1977, deserves our attention with regard to the right to counsel at the preliminary hearing. A unanimous Court in Moore v. Illinois[30] held that due to the nature of the preliminary hearing, where the witness made an identification of the accused through a very "suggestive procedure," and the petitioner was then bound over to a grand jury, counsel should have been offered. Relying primarily on the witness identification cases,[31] the Court held that the services of counsel could be invaluable at these proceedings. In effect the Court has, at present, reached a point where it considers the preliminary hearing a "critical stage." The only qualification is that the hearing involve a plea whether required or not, of a nature in which counsel could render a useful service of some type, or involve the testimony of an

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[29] See below at 106-111.

[30] 434 U.S. 220 (1977).

[31] See below at 113.

identifying witness. Since it is difficult to conceive of a preliminary hearing that would not fall under this rather large umbrella, we may safely conclude that the Supreme Court has virtually abandoned the use of case-by-case variables in this area and has permanently established the preliminary hearing as a "critical stage."

The first case in our third "critical stage" came in the 1964 federal case of Massiah v. United States, where the Supreme Court extended the right to counsel, at least for those who could obtain their own attorney, to the interrogation stage of "criminal proceedings."[32] Massiah had been indicted on a violation of a federal narcotics law. He pleaded not guilty, after having obtained counsel, and was released on bail. While the petitioner was free on bail, federal agents obtained incriminating statements against him through the use of listening devices, statements which they introduced into evidence at the trial where Massiah was convicted. On appeal the petitioner claimed violation of his Fourth, Fifth, and Sixth Amendment rights, emphasizing in the last that statements were "deliberately elicited from him after he had been indicted and in the absence of his retained counsel."[33]

The Court of Appeals upheld the conviction, but, through Justice Stewart, the United States Supreme Court held that counsel should be present if the confession was to be used as evidence after indictment. Using Powell as precedent, the Court went on to insist that the basic

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[32] 377 U.S. 201 (1964).

[33] Ibid., 204. With the consent of Colson, an "alleged confederate" in the crime who had decided to cooperate with Federal agents, a radio transmitter was installed in his car which allowed the agents to overhear incriminating statements made by Massiah.

protection of the Sixth Amendment right to counsel had been denied by the use of these statements taken in the absence of counsel. The fact that the statement against Massiah were made without his knowledge, and not at the "jail house," had no bearing on his right to counsel. The other circumstances of confession played a major role in the reversal here also, and the Court insisted it was not questioning the government's contention that it was proper to continue the investigation after the arrest, but simply ruling that statements of the defendant "obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."[34]

In dissent, Justice White, joined by Clark and Harlan, said the decision must be considered carefully due to the far reaching effects it might have. As it would turn out, White rightly predicted that the case had opened up a new issue of the right of counsel to be present for questioning or statements made at other stages. He insisted that this case did not present an "unconstitutional interference with Massiah's right to counsel," and warned that the decision was a move toward the exclusion of all confessions or admissions from evidence.[35] This was the first case, he proclaimed, where the Court had taken the position that "admissions are to be deemed involuntary if made outside the presence of counsel." Expressing a concern that he would repeat frequently thereafter, Justice White insisted that the Court was interfering to too great a degree with the ability of law enforcement agencies to investigate,

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[34] Ibid., 206.

[35] Ibid., 207. See also Hunsaker, "Right to Counsel," 84.

and insisted that absence of counsel in a case like this should not be a hard and fast rule in determining "voluntariness" of confessions.[36]

Just one month later, in Escobedo v. Illinois,[37] the Supreme Court continued to try to find a solution to "one of the problems raised by Gideon v. Wainwright: at which stage of a criminal prosecution does the right to counsel begin?"[38] Massiah had established the right at post-indictment interrogations; Escobedo would extend this to pre-indictment interrogation in certain cases. The essence of this celebrated decision was that when the investigation had ceased to be a "general inquiry" and had focused on one suspect, the refusal by the police to allow consultation with counsel was a violation of the Sixth and Fourteenth Amendment's right to counsel. "The critical question," said Justice Arthur J. Goldburg, was

> whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment' . . . and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.[39]

According to the Court, the fact that the questioning of Escobedo had taken place before indictment did not negate the Massiah rule. Without the "guiding hand of counsel" at this stage, the Gideon rule on the right

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[36]Fellman, The Defendant's Rights Today, 220. The author sums up the dissent as follows: "Three Justices dissented on the ground that a pretrial statement should be admissible in evidence if made voluntarily and that the absence of counsel was only one of several factors to be considered in judging the issue of voluntariness."

[37]378 U.S. 478 (1964).

[38]Walter Murphy, "Deeds Under a Doctrine," 65.

[39]Escobedo v. Illinois, 378 U.S. 478, 479.

to counsel at trial would be of little effect because the petitioner, at the time of his confession, was undoubtedly unaware of the seriousness of confessing complicity in murder. Counsel could have made him aware of this, thus affecting the entire nature of the criminal proceedings. The three dissenters in Escobedo (Harlan, Stewart, and White) focused primarily on the hinderance this rule would be to law enforcement, and Justice White argued that the decision virtually eliminated the possibility of using any type of confession against a defendant at his trial.[40]

An amplification of Escobedo came in 1966 in one of the most far-reaching decisions of modern times, Miranda v. Arizona.[41] The Court there focused on the accused's right to "remain silent" under his Fifth Amendment guarantee and further explained its position on the right to counsel by stating that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[42] In establishing the lauded (and scorned) "Miranda warnings," the Court made clear the need for law enforcement officers to inform the suspect of his right to consult an attorney and that one would be provided him if he could not secure an attorney. Going a long way toward making the system equitable for indigent and non-indigent alike, the Court's majority insisted that the failure to ask for a lawyer at the pre-interrogation stage did not constitute a waiver, and that waiving his right to have counsel at interrogation was "an absolute prerequisite

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[40] Ibid., 496. See also Mitau, Decade of Decision, 1974.

[41] 384 U.S. 436 (1966). See also Mitau, Decade of Decision, 174.

[42] 384 U.S. 436, 469.

to interrogation" without counsel present.[43] The Court clearly indicated that even the indigent has a right to have a lawyer appointed at this early stage, and "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present," and the accused has had opportunity to confer with him.[44] The four dissenters, Clark, Stewart, Harlan, and White, continued to insist that the right to counsel precedent did not justify extension to this early stage and once again expressed the fear that these rulings were hindering law enforcement.

The significance of the Miranda decision, with its emphasis on a definitive waiver of counsel before interrogation could proceed, was made clear in 1969.[45] In Frazier v. Cupp, Justice Thurgood Marshall wrote an opinion for the Court which rested on the fact that Frazier's conviction, while coming after Escobedo, took place prior to the Miranda ruling, a fact that seems to have had great significance since the state did not contend that counsel had been waived. Had the Miranda warnings been in effect, it seems likely that the Court would have upheld Frazier's contention that his reference to counsel, which was interpreted as a passing remark during interrogation, was enough to invoke the Escobedo rule. The Court, however, saw no definite request, as existed in Escobedo,

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[43] Ibid., 471. See also 472. "The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent."

[44] Ibid., 474.

[45] Frazier v. Cupp, 394 U.S. 731 (1969). Cf. Greenwald v. Wisconsin, 390 U.S. 519 (1968). Here the Court held that denial of request for counsel during long interrogation process was one factor that led it to uphold petitioners claim that his confessions were involuntary.

and held that the ruling of that case did not apply under the circumstances.[46] It would seem safe to assume that currently, with Miranda in effect, a simple suggestion or mention by the accused of a possible desire to have counsel present, as existed in Frazier, would be enough to invoke the expanded Escobedo rule through Miranda.

While the Court had been slowly making the right to counsel virtually absolute over the years, Gilbert v. California illustrates that there are still exceptions. The Court ruled in Gilbert that "the taking of a hand-writing exemplar did not violate petitioner's constitutional right."[47] Over the objections of Justices Black, Douglas and Abe Fortas, who saw this as a "critical stage," Justice Brennan announced that since there was "minimal risk" that a session of this nature, in the absence of counsel, would in any way detract from a fair trial, "The taking of the exemplars was not a 'critical' stage of the criminal proceedings entitling the petitioner to the assistance of counsel."[48] Justice Black was adamant in his protest of this decision, and insisted that the Sixth Amendment right to counsel should be considered an absolute right in itself. "The Court," Black insisted, ". . . somehow believes . . . [that it has] the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a 'fair trial.'"[49] Black insisted that

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[46] Frazier v. Cupp, 394 U.S. 731, 737-739.

[47] 388 U.S. 263 (1967). This case will also be discussed below as it relates to line-up identification.

[48] Ibid., 266.

[49] Ibid., 279.

it was time for the Court to abandon the "fair trial" judgment altogether and substitute, once and for all, a clear and specific safeguard.

On the same day it decided Gilbert, the Court ruled on United States v. Wade, the case that would establish the fourth "critical stage."[50] The issue raised here, which was virtually identical to one point raised in Gilbert, was whether or not a post-indictment line-up was a stage in the proceedings against an accused where counsel was necessary. Wade's contention was that "the assistance of counsel at the lineup was indispensable to protect [his] most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined."[51]

Justice Brennan held for the Court that the "critical stage" criteria as applied in modern times by the Court "encompasses counsel's assistance whenever necessary to assure a meaningful 'defense.'" Basically, the Court continued to apply a "fair trial" standard approach in this area, and disagreed with the state that this was merely a "preparatory step" where counsel's presence was irrelevant. The Court insisted, to the contrary, that

> the confrontation compelled by the state between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.[52]

Counsel might help guard against cases of mistaken identity and insure that nothing would be intentionally or unintentionally done by the prosecutor that could be suggestive or in any way conduct the lineup so as to influence the witness in his identification. "[T]he first line of

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[50] 388 U.S. 218 (1967). [51] Ibid., 223-224. [52] Ibid., 228.

defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself."[53] The Court concluded that there was little doubt that this was a "critical stage" in Wade's case since the "presence of counsel itself can often avert prejudice and assure meaningful confrontation at trial."[54]

The Court once again was split on the reasoning in the decision. Justice Clark concurred in part and dissented in part, objecting mostly because he believed the lineup in Wade had violated the Fifth Amendment "privilege against self-incrimination."[55] Justice Fortas, joined by the Chief Justice and Justice Douglas, dissented and concurred. They insisted that the lineup did not violate the Fifth Amendment protection against self-incrimination as long as the accused was not forced to speak, but it was a "critical stage" requiring presence of counsel.[56] Justice White, joined by Justices Harlan and Stewart, dissenting in part and concurring in part, insisted that the Court was going too far in restricting the state's ability to govern its own process of law enforcement. As long as the state had not violated an established constitutional rule, the Court should not have made it mandatory for counsel to be present at the lineup since this could cause unnecessary delay in prosecution.[57]

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[53] Ibid., 235.

[54] Ibid., 236.

[55] Ibid., 243.

[56] Ibid., 259.

[57] Ibid., 251. Justice White believed that in order to avoid unnecessary delay that could be detrimental to both parties in the case, the state must be allowed more freedom in governing its own process of law and also insisted that law officers were being hindered. He also concluded that for "all intents and purposes, court room identifications are barred if pre-trial identifications have occurred without counsel being present," p. 251. He dissented in Gilbert for basically the same reasons.

Although there was considerable dispute on an array of different issues raised, six justices agreed that the lineup was a "critical stage" where counsel was necessary, the point of most concern to us at this time.[58]

While Justice Black agreed with this point, he suggested, somewhat surprisingly, that the conviction of Wade should be upheld because the identifications from the pre-trial lineup where counsel was absent were not used as evidence in the trial. He also, more predictably, criticized the Court again for what seemed to him to be a continued use of a "fair trial" standard in judging the case. He expressed the concern that if this was used, the pre-trial lineup might not always be considered a "critical stage." To the absolutist Justice Black, there was no room for this possibility, and he believed the decision should rest entirely on the Sixth Amendment's right to counsel.[59]

In addition to the "hand writing exemplar" considered above, Gilbert raised the issue of illegal pre-trial identification, which became the point on which he achieved a favorable review. The Court, split nearly the same as it had been in Wade, held that due to the irregular nature of the lineup where counsel was not present, and the fact that several witnesses referred to the lineup identifications at the trial, the state court must determine if in-trial identifications were "tainted by the illegal lineup" identification. Since the record

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[58] Ibid., 259.

[59] It would seem that Justice Black is actually indulging in the "fair trial" exercise himself when he is willing to allow Wade's conviction to stand. I would suggest that this is a contradiction, however justified it might appear from the facts here, to Black's absolutist stance on the right to counsel. It is surprising that Black did not see fit to extend this "absolute protection" to Wade's pre-trial lineup regardless of its use or non-use at the trial.

did not provide an answer, the Court simply vacated the judgment to California Supreme Court for a hearing to determine these questions.[60]

In a third counsel case announced on this same day, the issue raised was one of a proper identification process, but was considerably different than that decided in Wade and Gilbert. Stovall, who was arrested for murder, was taken to a hospital for possible identification by the victim's wife who was also seriously injured. The accused was handcuffed to a police officer and the witness identified him as the assailant, an identification that was used as evidence in the subsequent trial which resulted in Stovall's conviction. After being turned down by the state courts on appeal, the petitioner's case was heard by the Supreme Court on his claim of violations of his Fifth, Sixth, and Fourteenth Amendment rights. The Court affirmed the lower courts.[61]

In making its ruling the Court held that the Wade-Gilbert rule was not to be applied retroactively, and since the murder in question had occurred several years earlier, the rule was inapplicable. In addition, Justice Brennan, for the Court, said "we think also that on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment."[62] The Court justified this position by explaining that the right to counsel had been made retroactive only at stages where its absence would "almost invariably deny a fair

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[60] Gilbert v. California, 388 U.S. 263, 272 (1967).

[61] Stovall v. Denno, 388 U.S. 293 (1967).

[62] Stovall v. Denno, 388 U.S. 293 (1967). See also Foster v. California, 394 U.S. 440 (1969).

trial" as in Gideon, Hamilton, and Douglas v. California.[63] Since they believed that confrontations can be and often had been conducted fairly without the presence of counsel, and that law enforcement agencies had simply been operating as they understood the Court and the Constitution, there was no real need to unnecessarily disrupt the system by declaring the new ruling retroactive.

In separate dissenting opinions Black, Douglas, and Fortas each opposed the decision and called for reversal on the grounds that the identification had violated the petitioner's Fourteenth Amendment right. Black and Douglas also disagreed with the non-retroactive ruling of the majority. Justice White, again joined by Justices Harlan and Stewart, made reference to his other two dissents of that day for justification of his belief that the identification procedure was not "constitutional error." He concurred, however, with the result and the part of the Court's opinion that limited the new Sixth Amendment rule.[64]

The Supreme Court, perhaps due to the partial change in the Court's membership,[65] declined to extend the counsel rule further in 1972 when it held that the post-indictment confrontation of Gilbert and Wade were unlike the "showup after arrest" type confrontation that had occurred in Kirby v. Illinois.[66] Here the robbery suspect was brought

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[63] Douglas v. California, 372 U.S. 353 (1963).

[64] Stovall v. Denno, 388 U.S. 293, 303.

[65] See Levy, Against the Law, 243.

[66] 406 U.S. 682, 684 (1972). In his hearing before the Supreme Court, Kirby asked the Court to extend "the Wade-Gilbert per se exclusionary rule to identification testimony based upon a police station show up that took place before the defendant had been indicted or otherwise formally charged with any criminal offense."

to the police station immediately after arrest and taken into a room with the victims, who identified him as the robber. The Court had to deal with the problem of determining the starting point of the "adversary judicial criminal proceedings,"[67] and the relationship of the right to counsel to that point. Gilbert and Wade, the two central cases cited, definitely involved points after formal judicial proceedings had begun and, therefore, did not apply, according to the majority. The dissenters, quite understandably, could not follow the logic of the majority opinion and insisted that the Wade-Gilbert rule should be applied. To his credit, Justice White, who, as we have seen, was very adamant in his dissent from Wade and Gilbert, filed a separate dissenting opinion in which he simply stated that these two cases logically had to apply since they were so similar to Kirby and the rule of stare decisis compelled reversal in Kirby.[68] While he had not agreed with the precedent set by the two previous rulings, these were none the less precedents that had to be followed or overruled.

As Justice White indicated in his dissent, regardless of how one feels about the 1967 rulings, it is difficult to justify, in light of the normal run of cases during this period, the seemingly ill-conceived notion of the majority that Escobedo was distinctly different from Kirby. The Court held Escobedo and Miranda did not apply in Kirby since they were primarily concerned with "self-incrimination," but it is difficult to see how the Court could so readily draw a distinction between the

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[67] Ibid., 689.

[68] Ibid., 705. Other dissenters were Justices Brennan, Douglas, and Marshall.

pre- and post-indictment confrontations. Gerald Gunther accused the Stewart majority of being inaccurate in its "assertion that previous decisions [had] 'firmly established' that the right to counsel attaches only at or after the initiation of adversary judicial proceedings. . . . Kirby itself is the first case actually to impose that limitation."[69] Gunther, correctly indicating that there is considerable disagreement as to where this process does begin, said that Stewart failed to give a "reasoned interpretation" of this point, and made no attempt to follow the Escobedo method of determining when the right to counsel should commence.

Levy accused the new majority of going contrary to Wade by "twisting and contorting" that opinion, and actually making it ineffectual. However, Levy expressed the belief that it was unlikely that the Court would restrict Wade further and said that the subsequent United States v. Ash ruling was not the "evisceration" of Wade that the minority called it.[70] Ash involved the use of a "post-indictment photographic display" conducted by the government for the purpose of witness identification of the accused.[71] Though Levy indicated his belief that Wade was broad enough to include this procedure, a position taken by the dissent, the decision that the Sixth Amendment did not guarantee the right to counsel here does not seem totally impractical. The majority did not consider this a "critical stage" since no actual confrontation

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[69]Gerald Gunther, "The Supreme Court: 1971 Term," 86 Harvard Law Review (November 1972), 159.

[70]Levy, Against the Law, 244-252.

[71]United States v. Ash, 413 U.S. 300 (1973).

existed where the accused would need the help of counsel in meeting his adversary. The majority position is justifiable from both a constitutional and practical standpoint since it is difficult to see how counsel could be of any real assistance to the accused at this procedure when confrontation was not involved. However, if the defense has reason to believe that the police might not conduct the photo-identification in a completely unprejudicial manner, the presence of counsel could work to insure proper police conduct.[72]

The post-conviction counsel question was also considered by the Court during the 1960's. The initial concern was with the right to counsel on appeal immediately after conviction, and Justice Douglas seems to have expressed the feeling of many when he wrote that the accused must have the "right to counsel at every stage of the proceeding, on appeal as well as in the trial court."[73] The first post-conviction stage that arises, however, is that of sentencing, and the Court implied as early as 1948 that the denial of counsel here was contrary to due process as the attorney might, at the very least, insure that the consideration of the sentence is based on accurate information on the defendant's prior record and other related matters.[74] Indeed, the importance of the sentencing stage, at least where the defendant had pleaded guilty, may also be highlighted by Justice Black's opinion for the Court in Canizio

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[72] Ibid., 333.

[73] Douglas, "Right to Counsel," 693.

[74] Townsend v. Burke, 334 U.S. 736 (1948).

v. New York.[75] Here the accused's right to counsel was protected because counsel, who was not present at pleading, assisted the defendant prior to and during the sentence hearing.

The "leading case construing the right to counsel at the sentencing stage"[76] came more recently in Mempa v. Rhay.[77] The Court held sentencing to be a "critical stage" as the "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[78] In this particular instance, Mempa had been convicted on a charge of "joy riding" and placed on probation. During the period of probation, he was arrested on a burglary charge. The prosecution asked that his probation be revoked and Mempa, who had pleaded guilty to the burglary charge, was sentenced to ten years. The state, on appeal, contended that the sentence had actually been assessed at the hearing on the previous charge where sentencing had been "deferred subject to probation." They contended that the imposition of the sentence, after the revocation of probation at the hearing following the second conviction, was a "mere formality" not requiring the presence of counsel.[79] However, the Court did not agree, and Justice Marshall insisted that the particulars of the case

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[75] Canizio v. New York, 327 U.S. 82 (1946). See above page 58, note 44.

[76] Beaney, "Right to Counsel," 157.

[77] 389 U.S. 128 (1967).

[78] Ibid., 134.

[79] In a later case, Gagnon v. Scarpell, 411 U.S. 778 (1973), the Court held that the right to counsel was not absolute at a probation revocation hearing.

showed that under Washington procedure, the assistance of counsel could have been important at this stage.[80] The absence of counsel might have resulted in loss of the right to appeal, and the defendant's attorney could have exercised the right of advising petitioner to withdraw his guilty plea at this point. The Court had, in essence, extended the absolute right of the indigent to counsel at sentencing in accordance with the Gideon decision on trials, and proceeded to make the Mempa ruling retroactive in McConnell v. Rhay.[81]

The importance of counsel at the various post-trial proceedings was emphasized by William Beaney, who said

> If we are to have a system in which rich and poor are treated equally before the law, a lawyer must be afforded the indigent client in situations in which a legal calculation would be of value. This includes all hearings in which matters of fact or law must be decided upon by the Court.[82]

A landmark ruling in this area was announced in Douglas v. California, the same day Gideon was handed down.[83] Douglas had been convicted of thirteen felonies and on appeal as a matter of right to the California District Court of Appeals, Douglas asked for appointment of counsel. There, the court, after investigating the facts, denied the request and affirmed the conviction. The California Supreme Court denied the petitioner a hearing.

Upon review in the United States Supreme Court, however, Justice Douglas, speaking for the majority of the Court, disagreed.

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[80] Mempa v. Rhay, 389 U.S. 128, 135.

[81] McConnell v. Rhay, 393 U.S. 2 (1968).

[82] Beaney, "Right to Counsel," 163.

[83] 372 U.S. 353 (1963).

> Absolute equality is not required; lines can be and are drawn and we often sustain them. . . . But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor . . . lacking that equality demanded by the Fourteenth Amendment.[84]

The right to appeal for the indigent becomes "a meaningless ritual" if he is forced to proceed without counsel simply because the court does not see merit in his case. A man of means can pursue the appeal with hired counsel regardless of how the court feels about the merits; so the poor defendant should have the same opportunity.

According to Justice Harlan in dissent, the Court in holding to an absolute right to counsel on appeal in this case was leaning heavily on the equal protection clause.[85] It was no secret that Justice Douglas did believe "equal protection" should be used to abolish inequity in the counsel area.[86] Harlan and Stewart believed that the limits of this clause should not be extended into this area, and insisted that the state was not obligated to give the poor whatever the wealthy could afford. They expressed the belief that to do so would be "foreign to many of our basic concepts," and, since California had not denied petitioner's right to appeal, it had fulfilled the requirement. Harlan failed to see how the Court could make a distinction between the "first appeal" and subsequent appeals that could arise.[87] But regardless of Harlan's reservations, the Court had left room in its decision for line drawing, and

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[84] Ibid., 357-358.

[85] Ibid., 360.

[86] Douglas, "Right to Counsel," 694. See also Fellman, Rights of Accused, 224.

[87] Douglas v. California, 372 U.S. 353, 366.

the rule in this decision was limited to those appeals that were a matter of right after conviction.

The Court proceeded to further explain its ruling with regard to counsel on appeal in another California case in 1967.[88] In essence the Court held that the indigent must have the same rights as a rich man on appeal; that the Sixth Amendment requirement for counsel was obligatory on the states; counsel must be an "active advocate" to satisfy this requirement; and the court must appoint counsel to argue the appeal. Justice Clark explained that the Court was

> here concerned with the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal.[89]

As mentioned above, the Court ruled that counsel must be an active advocate, and this role "requires that he support his client's appeal to the best of his ability."[90]

While the Burger Court has slowed the trend toward provision of counsel in a number of other post-trial proceedings, the right to counsel, from arrest through at least the first appeal, has become firmly established.[91] Problems obviously still exist[92] such as the best method

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[88] Anders v. California, 386 U.S. 738 (1967).

[89] Ibid., 739. [90] Ibid., 744.

[91] Gagnon v. Scarpell, 411 U.S. 778. See also Fellman, Rights of Accused, 225, and Beaney, "Right to Counsel," 161.

[92] Sam J. Ervin, Jr., "Uncompensated Counsel: They do not Meet the Constitutional Mandate," 49 ABA Journal (1963), 435. Note, "Requiring an Indigent Defendant to Reimburse the State for Expenses of a Court Appointed Counsel," 20 University of Kansas Law Review (1972), 344-351. Fellman, Defendants' Rights, 238-243. Beaney, "Right to Counsel," 166. See also James v. Strange, 407 U.S. 128 (1972).

to be used to compensate court appointed counsel; the possibility of states being reimbursed for counsel expense by the defendant at a later date; and how to best insure that appointed counsel will offer competent and effective assistance. However, the Supreme Court has moved a long way toward making the system of criminal justice in the country more equitable for all who become involved. Though the Burger Court of the 1970's has been slower to intervene, and some critics have accused it of violating several of the previously established principles of due process,[93] this has had little effect on the right to counsel, and expansion has continued in some areas, most notably that of counsel for misdemeanants as decided in Argersinger.

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[93]Levy, Against the Law, 202.

Chapter VI

CONCLUSION

"The treatment of the right-to-counsel issue in the Supreme Court is a fascinating example of how constitutional doctrine develops there, slowly, deliberately, case by case."[1] Though this evolutionary process may not yet be complete, we have seen the counsel issue arise from its infancy during the colonial period to its modern level of development. While this has been a slow and often deliberate advance, the maturation has been steady and, we might say, in tune with the social and political climate.

Though we could easily argue that the Court should not be influenced by the social and political atmosphere of the times in which it operates, as their decisions are theoretically based on the Constitution and laws of the United States alone, a more realistic attitude would be that its decisions have been, must be, and possibly should be influenced partially by the general trend of societal attitudes on a given issue.[2] While the Supreme Court of the United States is, as it should be, removed, for the most part, from the election politics of our country, it is hardly immune to political pressures, and it would seem unlikely that we would want such a powerful branch of our government so isolated that

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[1] Lewis, Gideon's Trumpet, 105.

[2] The Court must not allow itself to be overly influenced by the majority will in a given situation as this would move them closer to the legislative realm. This issue is discussed in some detail by Kurland, Politics, 170-206.

it could totally ignore the desires and needs of an advancing society. Indeed, the very viability of the system depends not only on the separation of powers among the three branches of the federal government, but on their close cooperation, a fact that was recognized by Chief Justice Marshall in the early 1800's and is just as true today.[3]

In the counsel area the Court had little choice but to accept the traditional theory of federalism after independence and allow the states to adjust their own systems of criminal adjudication with little interference throughout most of the first century-and-a-half of the nation's history. While it may not always have agreed with these systems, and federal practices often differed, the Court, reflecting the accepted political and social attitudes of the period, allowed considerable freedom and flexibility. As mentioned above,[4] the Court, even had it so desired, could not easily have interferred with state procedure as they had little to go on until after the ratification of the Fourteenth Amendment. In addition, the Court had affirmed its belief in the inapplicability of the Bill of Rights to state procedure in Barron v. Baltimore.[5] In Barron Chief Justice Marshall stated categorically that

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[3]During the famous dispute in the case of Marbury v. Madison, 1 Cranch 137, in 1803, an important consideration for the chief justice was the rendering of a decision that would not force a confrontation with the chief executive that Marshall realized he could not win. As a result, realizing that this power rested at least in part on the president's willingness to carry out the Court's orders, not only legal but practical reasoning played a part in the Marshall Court's landmark ruling. See Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 4th ed. (New York, 1970), 226-229. Other instances of a similar nature can be seen throughout the years.

[4]See above page 3.

[5]7 Peters (32 U.S.) 243 (1833). See above pages 2-3.

the Bill of Rights provisions were "not applicable to the legislation of the states." Since the Amendments were not meant as limitations on the individual state governments, the Court could not restrict state practices until after ratification of the Fourteenth Amendment, and was very cautious in its application even after 1868.

Indeed, this same approach can be seen in other areas such as race relations, where, with the exception of the relatively brief intrusion by the national government during the Civil War and Reconstruction period, states were allowed to handle their own particular situations as they saw fit. It was not until the 1950's, after the failure of the Court's original formula,[6] that the nation's increasing awareness of existing problems forced change, which, due to the unwillingness or inability of the other partners in the federal government, was led by the Supreme Court.[7] As Philip Kurland has said, "It is not until one of the other branches of government has faced the problem and exercised or refused to exercise its lawmaking powers that the judiciary is called in to decide a constitutional issue."[8] The same can be said for the counsel cases. Where the states were unwilling to act on their own through judicial or legislative means, the United States Supreme Court has stepped in over the last fifty years to impose various standards.

Beginning with the Powell decision of 1932, the Court has extended the right to counsel in as equitable a fashion as was probably possible to the capital offender, the felon, and, finally, to all

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[6]See Plessy v. Ferguson, 163 U.S. 537 (1896).

[7]Pollak, ed., The Constitution, 201-295.

[8]Kurland, Politics, 177.

accused of crimes where loss of liberty will occur on conviction. In extending this right, the Court has made the right to counsel absolute with regard to counsel at the trial, and has used the "critical stage" rule to determine where appointment is necessary at stages other than the trial. By the end of the 30 year experiment with special circumstances criteria, the need for counsel had become a very widely accepted and recognized right, the absence of which was seen by many as contrary to the societal values of a modern era.[9]

With the Gideon ruling,[10] the Court abandoned the special circumstances-fair trial standard for determining the right to counsel, a practice which had been firmly established in Betts. This rule had been the source of serious conflict and contradiction and thus gave way to Gideon, which spelled out the need for counsel in all serious cases unless properly waived. While at that time the Court should have declared an absolute right to counsel in all criminal cases regardless of the classification, since the Constitution makes no distinction of this kind, it chose not to extend the new ruling beyond felony offenses. A virtual absolute rule for appointment of counsel in all criminal cases where loss of liberty was in question would not be declared until the Argersinger ruling of 1972.[11] The Court has yet to declare an absolute right to appointment of counsel in all criminal cases regardless of their magnitude.

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[9]Schilke, "Right to Counsel," 341. The author proclaimed that "everyone has an interest in recognition of this right inasmuch as restriction of an individual's rights is an equal restriction to everyone's rights." (343.)

[10]See above, page 77.

[11]See above, page 84.

Whether or not this right will be extended beyond the criminal area is impossible to say at this time. We can assume, however, that in light of recent criminal decisions, it is unlikely that the current Supreme Court majority will see fit to initiate that change.[12] However, as the membership of the Court changes, a prospect which is imminent,[13] the justices may see fit to confront the issue of the right to counsel in civil litigation. Indeed, the precedent is available for a majority which would see fit to use it for this purpose and, while these precedents are in the criminal realm, several opinions have emerged that would seem to leave the door open to indigent counsel in civil proceedings.[14] The Constitution, which in Amendment Fourteen says no person shall be deprived of "life, liberty, or property, without due process of law" could also be said to provide this protection, and, at this point, probably should be interpreted in this way. This belief was actually

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[12] Scott v. Illinois, 440 U.S. 367 (1979). As discussed in chapter four, Scott, in effect, limited the Argersinger rule. In light of this decision, it would seem logical for the Court to first establish the right to counsel in all criminal cases, regardless of the classification or possible punishment, before it delves into this new area. See also Leonard W. Levy, Against the Law: The Nixon Court and Criminal Justice (New York, 1974), 202. Levy attacks trends of the "Nixon Court," mostly those reflected in opinions of Justice White, which he sees as violations of several of the previously established principles of due process.

[13] The age of various members of the Court at the present time makes it possible that the next administration will have several appointments. Currently, five justices are over 70 years of age and Justice Rehnquist, at 56, is the only member of the Court not over 60 years old. In light of recent election results, a change on the Court that would bring about this kind of rule is unlikely at this time.

[14] See above note number 102 in chapter three, page 75, in reference to Justice Black's concurrence in Carnley v. Cochran, 369 U.S. 506, 519. See also note number 38 in chapter four, page 88, with reference to Justice Powell's dissenting opinion in Argersinger v. Hamlin, 407 U.S. 25, 48.

expressed by several justices in past cases who saw no due process justification for extending the right to counsel to areas that threatened loss of "life" or "liberty" and not those that might result only in loss of "property." The fact that all three are mentioned equally makes it very difficult to justify a distinction on a purely constitutional basis.[15]

Therefore, the speculation as to problems that may arise should not be a hinderance to the adoption of the extended rule if the Constitution mandates such action.[16] One question that must be answered in determining whether the due process clause would extend the right to counsel to civil litigation is that of state as opposed to private action under the Amendment. The Amendment is clearly a bar against state action only as it says "No state shall" abridge the rights and privileges of its citizens. However, the Court has, in other areas such as the restrictive covenant cases, held that once the state is brought into the matter through its courts, the Fourteenth Amendment is made effective against subsequent court action. This reasoning would seem to apply to

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[15]The various problems related to this issue are quite obvious and, while they possibly can not, or should not, be allowed to play a part in determining the constitutional requirement of due process, they are real issues that have the attention of Supreme Court justices and others. The foremost problems on the minds of many are those of financing such as expanded right and the fear that numerous frivolous suits will be filed if the litigant has nothing to lose and possibly a lot to gain. Justice White, however, has commented that it did not seem that Argersinger had created serious strain. There is little reason to believe that the court systems will not be able to absorb this new financial "burden" if appointment of counsel for civil litigants is mandated. Chief Justice Burger has also commented on his faith in the bar association to meet new challenges. See note 38 in chapter four.

[16]See Brennan's dissenting opinion in Scott v. Illinois, 440 U.S. 367, 382 (1979).

civil actions between individuals where an individual is forced to use the courts as a forum for settling a dispute.

If the Court is to narrow the "gap" which exists between the rights of the poor criminal defendant and the poor civil litigant, it will have to take some bold steps in the direction of providing more equitable treatment throughout the judicial system.[17] As it did with the right to counsel in criminal proceedings, the Supreme Court may choose to begin by gradually moving into this uncharted area. "Political resistance can be softened by a graduated advance, resting temporarily with rules which draw the constitutional line short of an unqualified right to counsel."[18]

The reasons for not taking the steps necessary to narrow this "gap" have long since vanished. Justice Roberts expressed the belief in 1942 that if the Court had held for the petitioner in Betts v. Brady, the appointment of counsel could not be denied regardless of the classification and would also be required in civil cases where "property" was at stake.[19] It would seem then, in light of Gideon, that there is no longer any constitutionally sound argument for not providing indigents civil counsel.

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[17] Note, "The Indigent's Right to Counsel In Civil Cases," 76 Yale Law Journal (1967), 545. "The Court's present caution must rest less on logic than on prudence—fear of burdening government with an intolerable expense, and hence of causing itself unwanted political troubles. But the economic cost of providing full legal services to the poor cannot seriously strain the greatest industrial nation in the world." (547.)

[18] Ibid., 547.

[19] 316 U.S. 455, 473 (1942).

If we are to begin to apply the Equal Protection Clause of the Fourteenth Amendment to the counsel area, as some justices have been ready to do for some time,[20] the "Separate rights to counsel for rich and poor may deny equal protection [of the law] as well as due process."[21] The viability of our adversary system rests on the ability of both parties to argue an effective case. The need for professional representation should be obvious by now, and, due to the nature of our judicial process, "the lawyer's fee is a cost imposed on the citizen by that system."[22] Just as a lesser criminal offense may involve complex legal issues beyond the ability of the layman to comprehend and handle effectively, a civil case where the "trial is conducted under technical rules of evidence and procedure . . . demands skill in marshalling and presenting facts."[23] If this is the case, which it obviously is, it would seem extremely unfair to force a poor man either to operate at a serious disadvantage by handling his own case or simply not initiate what might be just litigation.

While the judicial and legislative branches of government should strive to make the judicial process equitable for all who are "hailed to court" regardless of the nature of the proceeding, it is likely that some disparity will remain between rich and poor in this area. Absolute equality is not only impossible, it is certain that the states are not

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[20] See above chapter four, page 123.

[21] "The Indigent's Right to Counsel in Civil Cases," 550.

[22] Ibid., 551.

[23] Ibid., 548.

obligated to give the poor whatever the wealthy can afford.[24] However, it is important that some middle course between extremes be found, and if there is a future in this area, the Court will undoubtedly have to take a leading role. The Court may choose to set up some kind of process to allow for screening of cases so that frivolous suits are not introduced at public expense to overtax the system unnecessarily.[25] However, in many cases the losses that may be incurred by a civil litigant are very severe and it is difficult to see, in light of decisions in the criminal realm, how the Court can put off this logical step toward protecting the full scope of one's privileges under the Fourteenth Amendment's due process clause.

The extension of the right to counsel to include civil suits would simply be another step in the development of this particular constitutional doctrine. This doctrine has developed gradually and deliberately over the years with limits being set on the scope of the right as much for practical as constitutional reasons. While it has been criticized from all sides, the Supreme Court has served, and will continue to serve, the very important rule of protecting the rights of the individual and the minority in a society that is often led by men

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[24] Douglas v. California, 372 U.S. 353. See the opinion of the Court as written by Justice Douglas (357) and the dissent of Justice Harlan (366).

[25] Note, "The Indigent's Right to Counsel in Civil Cases," 553-561. The author here not only suggests that the Court introduce this requirement on a gradual basis, similar to the manner in which it extended the right to counsel in the criminal area, he also discusses possible methods for deferring expense and insuring that frivolous cases do not become a serious problem.

who owe their position to the majority.[26] While this is as it should be, it is often easy for the politician to lose sight of the needs of those who are a minor part of his electorate.

Regardless of what the future holds in store for the right to counsel issue, the Supreme Court has made some significant advances in the area since the 1930's. After giving the states considerable time to make necessary adjustments themselves, the Court came to the point where it recognized the fallacy of continued application of the "fair trial" standard to this particular area in 1963. Having made the right to counsel absolute for all persons accused of serious criminal offenses, the Court proceeded to make it absolute for all persons, rich or poor, when the individual's liberty was at stake. At present it would seem that due process of law requires that counsel be provided for the indigent defendant at the earliest possible stage in the proceeding against him if the offense is of a nature that could result in loss of the individual's liberty upon conviction. While one can not say so categorically, it would seem that the evolutionary development of this particular constitutional doctrine has not reached its fullest extent. The Supreme Court's role in future right to counsel controversies will undoubtedly be interesting to observe.

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[26] Kurland, Politics, 172-174.

BIBLIOGRAPHY

BIBLIOGRAPHY

Primary Sources

Adams v. United States, 317 U.S. 269 (1942).

Adamson v. California, 332 U.S. 47 (1947).

Aetna Insurance Company v. Kennedy, 301 U.S. 389 (1937).

Anders v. California, 386 U.S. 738 (1967).

Argersinger v. Hamlin, 407 U.S. 25 (1972).

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

Avery v. Alabama, 308 U.S. 444 (1940).

Baldasar v. Illinois, 48 LW 4481 (1979).

Baldwin v. New York, 399 U.S. 66 (1970).

Barron v. Baltimore, 7 Peters (32 U.S.) 243 (1833).

Betts v. Brady, 316 U.S. 455 (1942).

Boyd v. United States, 116 U.S. 616 (1886).

Brooks v. Missouri, 124 U.S. 394 (1888).

Brown v. New Jersey, 175 U.S. 172 (1899).

Bute v. Illinois, 333 U.S. 640 (1948).

Canizio v. New York, 327 U.S. 82 (1946).

Carnley v. Cochran, 369 U.S. 506 (1962).

Carter v. Illinois, 329 U.S. 173 (1946).

Cash v. Culver, 358 U.S. 633 (1959).

Chandler v. Fretag, 348 U.S. 3 (1954).

Chewning v. Cunningham, 368 U.S. 443 (1962).

Coleman v. Alabama, 399 U.S. 1 (1970).

Cooke v. United States, 267 U.S. 517 (1925).

Crooker v. California, 357 U.S. 433 (1958).

DeMeerler v. Michigan, 329 U.S. 663 (1947).

Douglas v. California, 372 U.S. 353 (1963).

Duncan v. Louisiana, 391 U.S. 145 (1968).

Eilenbecker v. Plymouth Company, 134 U.S. 31 (1889).

Entsminger v. Iowa, 386 U.S. 748 (1967).

Escobedo v. Illinois, 378 U.S. 478 (1964).

Foster v. Illinois, 332 U.S. 134 (1947).

Frazier v. Cupp, 394 U.S. 731 (1969).

Gagnon v. Scarpell, 411 U.S. 778 (1973).

Gayes v. New York, 332 U.S. 145 (1947).

Gibbs v. Burke, 337 U.S. 772 (1949).

Gideon v. Wainwright, 372 U.S. 335 (1963).

Gilbert v. California, 388 U.S. 263 (1967).

Glasser v. United States, 315 U.S. 60 (1942).

Greenwald v. Wisconsin, 390 U.S. 519 (1968).

Gryger v. Burke, 334 U.S. 728 (1948).

Hamilton v. Alabama, 368 U.S. 52 (1961).

Harlan v. McGovrin, 218 U.S. 442 (1910).

Herman v. Claudy, 350 U.S. 116 (1956).

Holden v. Hardy, 169 U.S. 366 (1898).

Howard v. Kentucky, 200 U.S. 164 (1906).

Hudson v. North Carolina, 363 U.S. 697 (1960).

Hurtado v. California, 110 U.S. 516 (1884).

In re Gault et al, 387 U.S. 1 (1967).

In re Groban et al, 352 U.S. 330 (1957).

In re Oliver, 333 U.S. 257 (1948).

In re Sawyer, 124 U.S. 300 (1888).

Johnson v. Zerbst, 304 U.S. 458 (1938).

Kirby v. Illinois, 406 U.S. 682 (1972).

Klopfer v. North Carolina, 386 U.S. 213 (1967).

Marino v. Ragen, 332 U.S. 561 (1947).

Massey v. Moore, 348 U.S. 105 (1954).

Massiah v. United States, 377 U.S. 201 (1964).

McNeal v. Culver, 365 U.S. 109 (1961).

Mempa v. Rhay, 389 U.S. 128 (1967).

Miranda v. Arizona, 384 U.S. 436 (1966).

Mooney v. Holohan, 294 U.S. 103 (1935).

Moore v. Dempsey, 261 U.S. 86 (1923).

Moore v. Illinois, 343 U.S. 220 (1977).

Moore v. Michigan, 355 U.S. 155 (1957).

Palko v. Connecticut, 302 U.S. 319 (1937).

Palmer v. Ash, 342 U.S. 134 (1951).

Pickelsiner v. Wainwright, 375 U.S. 2 (1963).

Powell v. Alabama, 287 U.S. 45 (1932).

Quicksall v. Michigan, 339 U.S. 660 (1950).

Rice v. Olson, 324 U.S. 786 (1945).

Scott v. Illinois, 440 U.S. 367 (1979).

Smith v. O'Grady, 312 U.S. 329 (1941).

Spano v. New York, 360 U.S. 315 (1959).

Spies v. Illinois, 123 U.S. 131 (1887).

Stovall v. Denno, 388 U.S. 293 (1967).

Tomkins v. Missouri, 323 U.S. 485 (1945).

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

Twining v. New Jersey, 211 U.S. 78 (1908).

United States v. Ash, 413 U.S. 300 (1973).

United States v. Van Duzee, 140 U.S. 169 (1891).

United States v. Wade, 388 U.S. 218 (1967).

Uveges v. Pennsylvania, 335 U.S. 437 (1948).

Wade v. Mayo, 334 U.S. 672 (1948).

West v. Louisiana, 194 U.S. 258 (1903).

White v. Maryland, 373 U.S. 59 (1963).

Williams v. Kaiser, 323 U.S. 471 (1945).

Other Primary Sources

Hamilton, Alexander. Federalist #84. In The Federalist or The New Constitution. Avon, Connecticut, 1973.

Kurland, Philip B. and Casper, Gerhard, ed. Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. Vols. 27 and 57. Arlington, Virginia, 1975.

U.S. Code. Title 18, Rules of Criminal Procedure.

U.S. Constitution. Amendment VI.

U.S. Constitutiin. Amendment XIV.

U.S. Statutes at Large. I, p. 92, 20 U.S.C., § 35.

U.S. Statutes at Large. I, p. 118, 10 U.S.C., § 29.

U.S. National Commission on Law Observation and Enforcement. Report on Criminal Procedure. George W. Wickersham, Chairman. U.S. Government Printing Office, Washington, D.C., 1931.

Secondary Sources

Books

Abernathy, M. Glenn. Civil Liberties Under the Constitution. New York, 1968

Allen, Francis A. "The Constitution: The Civil War Amendments." An American Primer, ed. Daniel J. Boorstin. Chicago, 1966.

Beaney, William M. "The Right to Counsel." p. 145 of The Rights of the Accused: In Law and Action, ed. Stuart S. Nagel. Beverly Hills, California, 1972.

_____. The Right to Counsel in American Courts. Ann Arbor, Michigan, 1955.

Breckenridge, Adam Carlyle. Congress Against the Court. Lincoln, Nebraska, 1970.

Carpenter, William Seal. Foundations of Modern Jurisprudence. New York, 1958.

Carter, Dan T. Scottsboro: A Tragedy of the American South. Baton Rouge, Louisiana, 1969.

Cox, Archibald. The Warren Court: Constitutional Decision As An Instrument of Reform. Cambridge, Mass., 1968.

Dunne, Geralt T. Hugo Black: And the Judicial Revolution. New York, 1977.

Fellman, David. The Defendant's Rights Today. Madison, Wisconsin, 1976.

_____. The Defendant's Rights Under English Law. London, 1966.

Freund, Paul A. On Law and Justice. Cambridge, Mass., 1968.

Gunther, Gerald, and Dowling, Noel T. Cases and Materials on Constitutional Law. 8th ed. Mineola, New York, 1970.

Hall, Livingston; Kamisar, Yale; Lafave, Wayne R.; Israel, Herold H. Basic Criminal Procedure: Cases, Comments, and Questions. 3rd ed. American Casebook Series. St. Paul, Minnesota, 1969.

Heller, Francis H. The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development. New York, 1951.

Holdsworth, William S. A History of English Law. Vol. IX. London, 1926.

Israel, Jerold H. "Gideon v. Wainwright: The 'Art' of Overruling." p. 211 of The Supreme Court Review, ed. Philip B. Kurland. Chicago, 1963.

Kelly, Alfred H. and Harbison, Winfred A. The American Constitution: Its Origins and Development. 4th ed. New York, 1970.

Kurland, Philip B. Mr. Justice Frankfurter and the Constitution. Chicago, 1971.

_____. Politics: The Constitution and the Warren Court. Chicago, 1970.

Levy, Leonard W. Against the Law: The Nixon Court and Criminal Justice. New York, 1974.

Lewis, Anthony. Gideon's Trumpet. New York, 1964.

Mason, Alpheus T. and Beaney, William M. The Supreme Court in a Free Society. Englewood Cliffs, New Jersey, 1959.

Mitau, G. Theodore. Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964. New York, 1967.

Pfeffer, Leo. This Honorable Court, A History of the United States Supreme Court. Boston, 1965.

Pollak, Louis A., ed. The Constitution and the Supreme Court: A Documentary History. Vol. 2. New York, 1966.

Spicer, George W. The Supreme Court and Fundamental Freedoms. New York, 1959.

Stephen, James F. A History of the Criminal Law of England. Vol. 1. London, 1883.

Swisher, Carl Brent. The Supreme Court in Modern Role. New York, 1965.

Periodicals

"Argersinger v. Hamlin: For Better or For Worse?" 64 The Journal of Criminal Law and Criminology 290 (September 1973).

Beaney, William M. "Right to Counsel Before Arraignment." 45 Minnesota Law Review 771 (April 1961).

Boskey, Bennett. "The Right to Counsel In Appellate Proceedings." 45 Minnesota Law Review 783 (April 1961).

Cellar, Emanuel. "Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime." 45 Minnesota Law Review 697 (April 1961).

Douglas, William O. "The Right to Counsel." 45 Minnesota Law Review 693 (April 1961).

"Effective Assistance of Counsel for the Indigent Defendant." 70 Harvard Law Review 1434 (May 1965).

Ervin, Sam J. "Uncompensated Counsel: They do not meet the Constitutional Mandate." 45 ABA Journal 435 (May 1963).

Frankfurter, Felix. "A Notable Decision. The Supreme Court Writes a Chapter on Man's Rights." The New York Times, 13 November 1932, sec. 2, p. 1.

Gunther, Gerald. "The Supreme Court: 1971 Term." 86 Harvard Law Review 1 (November 1972).

Hunsaker, William J. "Right to Counsel--Before and After Gideon." 4 Washburn Law Journal 78 (Winter 1964-65).

"The Indigent's Right to Counsel In Civil Cases." 76 Yale Law Journal 545 (January 1967).

Kamisar, Yale. "The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused." 30 University of Chicago Law Review 1 (Autumn 1962).

Murphy, Walter. "Deeds Under a Doctrine: Civil Liberties in the 1963 Term." 59 American Political Science Review 64 (1965).

Palmer, Larry I. "Criminal Law: Implementing the Obligation of Advocacy in Review of Criminal Convictions." 65 The Journal of Criminal Law and Criminology 216 (September 1974).

"Requiring an Indigent Defendant to Reimburse the State for Expenses of a Court Appointed Counsel." 20 University of Kansas Law Review 344 (Winter 1972).

Schaefer, Walter V. "Federalism and State Criminal Procedure." 70 Harvard Law Review 1 (November 1956).

Schilke, Neil W. "Right to Counsel--An Unrecognized Right." 2 William and Mary Law Review 318 (Summer 1960).

Sutherland, Arthur. "Crime and Confessions." 79 Harvard Law Review 21 (November 1965).

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." 73 Harvard Law Review 1 (November 1959).