1993

Criminal Justice Reforms in the United States

Paul Marcus

William & Mary Law School, pxmarc@wm.edu

Repository Citation

http://scholarship.law.wm.edu/facpubs/1647

Copyright c 1993 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/facpubs
Enormous changes have taken place in the criminal justice system of the United States over the past thirty years. Entire blocks of the system have been restructured in order to preserve individual rights and liberties and to promote a more fair and effective trial process (1). Few of these changes have resulted from federal legislative (2) or executive initiatives (3) or activities from individual states (4). Instead, most of these reforms have directly resulted from federal judicial rulings, especially cases from the United States Supreme Court.

In this article, I will explore three of the most fundamental rights guaranteed in the American Constitution and consider the manner in which they have been reformed over the past several decades. The emphasis here is on the right to privacy under the Fourth Amendment to the Constitution, the privilege against self-incrimination in the Fifth Amendment, and the accused’s right to be represented by an attorney found in the Sixth Amendment (5).

I. The right to privacy under the fourth amendment.

A. Introduction.

The Fourth Amendment to the United States Constitution provides that the people have the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and such right “shall not be violated, and no warrants shall issue, but upon probable cause,
supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized”.

The Fourth Amendment was intended to curb the search and seizure abuses under the English Colonial system involving general warrants and writs of assistance (6). It represents an implementation of the principle that peoples’ homes are their castles which are not to be invaded by any general authority to search and seize (7). Courts construe the amendment liberally and its protections extend to both the guilty and innocent.

B. The Law Prior to Mapp v. Ohio

In the century after the adoption of the Bill of Rights, the Supreme Court did little to interpret the Fourth Amendment. In 1886, in Boyd v. United States (8), the Court held that the forced disclosure of papers amounting to evidence of crime violated the Fourth Amendment and that such items therefore were inadmissible in the defendant’s trial. Although the Fourth Amendment contained no explicit exclusionary rule, “the seizure of a man’s private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself” (9).

Thirty years later the Court held that the Fourth Amendment itself bars the use of evidence obtained through an unreasonable search and seizure in federal prosecutions. “To sustain unlawful invasion of the sanctity of his home by [federal] officers of the law would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action” (10). This exclusionary rule, however, did not apply to illegally obtained evidence in state courts since the Bill of Rights was designed as a limitation on the federal government only and the “Fourth Amendment is not directed to individual misconduct of [state] officials” (11).

The question, however, was whether the adoption of the Fourteenth Amendment, which forbids the states from “depriving any person of life, liberty, or property, without due process of law,” meant that the protections of the Bill of Rights were to be incorporated into the Fourteenth Amendment and applied to the states. In 1949 the Court found that the exclusionary rule adopted in federal cases did not apply to the states since it was not “derived from the explicit requirements of the Fourth Amendment” (12). In allowing the states to use their own methods to enforce the Fourth Amendment, the Court stated: “Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this court to condemn as falling below the minimal standards assured by the Due Process Clause a State’s reliance upon other methods which, if consistently enforced, would be equally effective” (13). Instead, the Court left it up to the states to provide “remedies of private action and such protection as the internal
discipline of the police, under the eyes of an alert public opinion, may afford” (14).

It was not until 1952 that the Court began to chip away at this doctrine when it fashioned an exception to its earlier holding. In a landmark decision, the Court found that the Due Process Clause required exclusion of evidence obtained by government “conduct that shocks the conscious” (15). In 1960, the Court abolished the “silver platter doctrine.” Under this doctrine, evidence obtained as a result of an unreasonable search and seizure was admissible in federal prosecutions if the search was conducted by state officials and no federal officer participated in the search (16).

C. Mapp v. Ohio.

Mapp v. Ohio (17) is one of the revolutionary criminal justice cases of the twentieth century. There the Court extended its earlier ruling and decided that all evidence obtained by searches and seizures in violation of the Constitution would be inadmissible in both federal and state courts.

Since the Fourth Amendment...has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise...the assurance against unreasonable federal searches and seizures would be a “form of words,” valueless and undeserving of mention in a perpetual charter of estimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty”(18).

The major purposes of the exclusionary rule finalized in Mapp are to promote judicial integrity and provide for the deterrence of illegal police action. In recent years, there has been much debate concerning the deterrent impact of the exclusionary rule (19). However, there is evidence indicating that the doctrine has had important and positive effects. These effects include the “dramatic increase in the use of search warrants where none were used before; stepped up efforts to educate police on Fourth Amendment law where such training had before been virtually non-existent; and the creation and development of better working relationships between police and prosecutors” (20).

D. Changes in the Fourth Amendment.

Opponents argue that the exclusionary rule should be replaced because it penalizes the public for police errors (21). While the rule has not been struck down, it has been narrowed considerably in application. For instance, a defendant may claim the benefits of the exclusionary rule only if her own personal privacy rights have been violated. Under this “standing
doctrine,” she cannot vicariously assert violations of the rights of others (22). The fundamental inquiry to be made in deciding whether the defendant has Fourth Amendment standing is whether the conduct which the defendant wants to put in issue involved an intrusion into her reasonable expectation of privacy (23). In other words, the individual must have exhibited an actual subjective expectation of privacy and society must be prepared to recognize that expectation as reasonable (24).

Emphasis on the reasonable expectation of privacy can shrink dramatically the scope of the exclusionary rule, as in California v. Greenwood (25). The Court there found that the Fourth Amendment does not prohibit the warrantless search and seizure of sealed garbage bags left outside one's home for collection on the driveway. In that case, police officers investigating the defendant searched an opaque trash bag that they had obtained from the defendant's garbage collector. Inside the bag, they found drug paraphernalia which then served as a basis for obtaining a warrant to search the defendant's home. The Court ruled that the trash bags were abandoned and thus not covered by the Fourth Amendment. Even though the defendant may have exhibited a subjective expectation of privacy, such an expectation was not objectively reasonable under the circumstances.

While the Mapp exclusionary rule has survived to the present day, it has been greatly limited. The rule no longer bars the use of evidence obtained by a police officer pursuant to a search warrant, ultimately found to be invalid, if the officer was “acting in reasonable reliance” upon such warrant. In United States v. Leon (26), the Supreme Court balanced the societal costs of preventing the use of inherently trustworthy tangible evidence in the prosecution's case against the vindication of Fourth Amendment violations. A majority of the Justices concluded that suppression was unjustified in such cases where an officer had reasonably relied on the judicial authorization (27).

This good-faith exception does not extend to cases in which the police have no reasonable grounds for believing that the warrant properly issued (28). For instance, the exception will not apply to the case in which the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit (29); the situation in which the magistrate abandoned his judicial role and failed to act in a neutral and detached manner; the case of the warrant being based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and the situation where the warrant was so facially deficient that an officer could not reasonably have believed it to be valid (30).

The impact of the Fourth Amendment has also been limited because of the Supreme court's rulings as to waiver and consent. A person may waive constitutional protections by agreeing to a warrantless search by
the government. A search based upon consent may be undertaken without a warrant or probable cause and allows any evidence discovered during the search to be introduced at trial. The question is whether this consent was given voluntarily. The answer to this question will be upheld on appeal unless the trial court’s finding is “clearly erroneous” (31). The trial judge in making this determination must look to the totality of the circumstances surrounding the defendant’s consent to decide if it was freely and voluntarily given (32).

Many factors are relevant in deciding whether consent is free and voluntary including: knowledge of the right to refuse consent; the youth of the accused; low intelligence; lack of education of the person giving consent; awareness of constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep and other intrusive police behavior. Although each of these factors is relevant, there is no “single controlling criterion” on the issue of voluntariness (33). The circumstances surrounding the police-citizen encounter are especially relevant in determining whether consent is freely and voluntarily given or whether police conduct was so intrusive as to result in an involuntary consent (34).

Generally, any person with a reasonable expectation of privacy in the place being searched can consent to a warrantless search. Therefore, any person with common authority over the place or effects searched can give valid consent, and evidence found during the search may be used against that person and the other owners or occupants (35). Courts find the consent of each person who has such mutual use and access to the property to be binding if it is reasonable to recognize that the person has the right to permit the inspection and that others have assumed the risk that common areas may be searched (36). For example, when two persons share an apartment, either person can consent in the other’s absence to a search of the common areas such as the living room, but not necessarily to private areas such as a closet used entirely by one person.

II. Fifth amendment privilege against self-incrimination.

A. Introduction.

The Fifth Amendment guarantees that “no person shall be compelled in any criminal case to be a witness against himself.” No penalty can be attached to a defendant who asserts his privilege against self-incrimination and a prosecutor cannot comment on the defendant’s failure to testify at trial (37).

The privilege against self-incrimination reflects:
“many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of
self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government in its contest with the individual to shoulder the entire load...; the right of each individual to a private enclave where he may lead a private life...; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent" (38).

Traditionally, three purposes have been cited for the privilege against compulsory self-incrimination. First, it demonstrates concern that confessions obtained under coercion are not the product of the defendant’s free will and may be unreliable evidence. Second, the privilege reflects the fact that the American criminal justice system is adversarial, not inquisitorial and the government should therefore have the burden of proving the defendant’s guilt. In the first of the important Fifth Amendment cases, Malloy v. Hogan (39), the Court wrote:

"The American system of criminal prosecution is accusatorial, not inquisitorial, and... the Fifth Amendment privilege is its essential mainstay... Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth" (40).

Third, like the exclusionary rule in the Fourth Amendment, the bar against the use of compelled self-incrimination provides a deterrent to coercive government conduct (41).

The Supreme Court initially dealt with confessions admitted in criminal proceedings in terms of fundamental fairness required by the Fifth Amendment and Fourteenth Amendment Due Process Clauses. In Brown v. Mississippi (42), the Court held that a confession obtained by brutally beating the defendant was inadmissible because police interrogation was part of the process by which states procure convictions and is therefore subject to the requirements of due process. "The due process clause requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (43).

This due process "voluntariness test" requires examination of "the totality of the circumstances" surrounding each confession to determine whether it was given voluntarily or whether the conduct of the police eliminated the defendant’s free will (44). The relevant factors in determining the voluntariness of a confession include the age, intelligence, and experience of the accused, as well as the conduct of the police in obtaining the statement. Confession cases considered by the Supreme Court have
involved actual or threatened physical brutality such as deprivation of food, water, and sleep (45); keeping the naked defendant in a small cell (46); threatening him with violence (47). When such outrageous government conduct is present, there is no need to weigh or measure its effects on the will of the individual victim because the conduct is so inherently coercive as to violate due process and mandate suppression of the evidence (48).

This due process “voluntariness test,” however, has presented several problems. The vague test left the police with little guidance. Also, trial judges, in resolving confession disputes, had to consider each case on its own particular facts. To resolve this problem, the Supreme Court began to develop more specific standards in dealing with the confession problem.

In Escobedo v. Illinois, (49) the Supreme Court reasoned that in order to give true meaning and substance to constitutional protections, a defendant must be informed of his rights, at least in certain situations. The Court spoke broadly of the matter.

“No system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system (50).

The Court in 1966 decided Miranda v. Arizona (51) and developed far more specific guidelines for law enforcement officials and the judiciary to follow in future confession cases.

B. Miranda v. Arizona.

In its Miranda opinion, the Supreme Court dealt with four separate cases in which defendants had been questioned by the police after having been arrested and taken to a police station. In none of the cases had the defendant been given a full warning of his rights prior to the interrogation. Chief Justice Warren wrote of his concern as to “incommunicado interrogation of individuals in a police-dominated atmosphere resulting in self-incriminating statements without full warnings of constitutional rights” (52). Under such circumstances, the Court concluded, there had been a violation of defendant’s right against self-incrimination, and that constitutional violation required that the defendant’s confession be excluded from evidence.

Where the accused was subjected to “custodial interrogation,” the Court would automatically find that the interrogation violated the suspect’s right against self-incrimination unless the prosecution could establish that the suspect was given a full warning of his rights and he voluntarily waived those rights and agreed to be questioned. The Court fashioned the Miranda rule both
to protect individual rights and to give law enforcement officials guidelines to avoid coercive interrogation. The holding was quite explicit: any person who is “deprived of his freedom of action in a significant way” may not be questioned unless he waives his rights after being informed (1) “that he has the right to remain silent,” (2) “that anything said can and will be used against the individual in court,” (3) “that he has the right to consult with a lawyer and to have the lawyer with him during interrogation,” and (4) “that if he is indigent a lawyer will be appointed to represent him.”

Although no “talismanic incantation” of the Miranda warnings is necessary, (54) the current practice is to read suspects their Miranda warnings from printed cards carried by police officers before talking to suspects. The result is a relatively uniform law enforcement procedure everywhere in the United States. The Miranda decision thus has provided much needed guidance to police officers and greatly simplified judicial review of police interrogation practices.

C. The issues of custody and interrogation.

Custody and interrogation are the two prerequisites that trigger Miranda’s protections. The Court defined custodial interrogation as questioning initiated by law enforcement officials after a person has been deprived of freedom of action in a significant way. Courts look to the totality of the circumstances to determine if an individual is in custody. Whether a suspect is in custody depends on the perception of a reasonable person in the suspect’s position. For example, in one case, the Supreme Court held that a person detained briefly after a routine traffic stop was not in custody for purposes of Miranda (55). In that case, a police officer stopped the defendant’s car to administer a sobriety test after watching it weave in and out of traffic. After the defendant failed the test, the officer asked the defendant if he had been drinking. The defendant responded in the affirmative and the Court held the statements admissible despite the absence of Miranda warnings. The Justices acknowledged that a traffic stop significantly curtails a driver’s freedom of action; still, they found that the coerciveness of the stop is limited by its brief and public nature (56).

Perhaps the most important case exploring the term “custody” is Oregon v. Mathiaison (57). There, a police officer left a note at the defendant’s apartment stating that he wanted to talk with the defendant. When the defendant called the officer, they arranged to meet at the police station a few blocks from the defendant’s apartment. The officer told the defendant that his fingerprints had been found at the scene of a burglary, and the defendant confessed. The Court held the statement admissible since the defendant was deemed not to be in custody during questioning at the police station because he was “free to leave.” “Simply because the questioning takes place in the
[police] station house, or because the questioned person is one who the police suspect, “does not, in itself, constitute custody (58).

Consistent with this view is the case holding that interrogation that occurs at the defendant’s home may still be custodial, despite the familiar surroundings. In Orozco v. Texas (59), the Supreme Court concluded that the defendant was in custody and Miranda therefore applied. There four police officers entered the defendant’s bedroom at 4:00 in the morning, blocked his exit, and then questioned him about a shooting (60).

These cases reflect the need to evaluate each custody claim individually. The courts must consider a multitude of factors such as the extent of the deprivation of the defendant’s action, the suspect’s being told that he is free to leave, any physical restraints, the number of officers present, and the location of the interrogation.

Because Miranda protects against the inherently coercive nature of custodial interrogation, Miranda warnings are not required unless the suspect is both in custody and is being interrogated. In Rhode Island v. Innes (61), the Court defined interrogation as “express questioning or its functional equivalent” (62). The Court refined this definition to include “words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect” (63).

Determining whether interrogation has taken place can be quite difficult. In Arizona v. Mauro (64), the Court wrote that “psychological ploys” by the police to elicit incriminating responses may constitute interrogation for the purposes of Miranda even though no “questions” are asked (65). Comments specifically directed to the accused may constitute interrogation even if not in the form of questions (66). Quite similar comments between officers -overheard by the suspect but not directed at him- may not be interrogation (67). The crucial inquiry is whether the comments were “reasonably likely to elicit an incriminating response”.

D. Limitations on the fifth amendment.

The broad holding of Miranda has been subject to several important limitations. The Supreme Court established the so-called public safety exception to Miranda in New York v. Quarles (68). The police chased a reportedly armed rape suspect into a grocery store and arrested him. A frisk revealed an empty shoulder holster so the officers asked the suspect where his gun was. He pointed to a shelf and said, “The gun is over there,” and the police found a revolver. The Supreme Court wrote that “on these facts there is a public safety exception” to the requirement that Miranda warnings be given before his statement could be used against him. Miranda represents a willingness to impose procedural safeguards “when the primary social cost of those added protections is the possibility of fewer convictions” (69).
However, “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self incrimination” (70).

The other major limitation on the requirements of Miranda is that the government may use statements elicited from the defendant in violation of Miranda to impeach the defendant’s direct testimony if she takes the stand and denies the confession. The pre-trial statement is used to impeach her in court testimony. The jury is instructed that the confession may not be considered as evidence of guilt, but only on the issue of whether the defendant is telling the truth at trial (71). However, this impeachment tool can only be used if the defendant personally testifies. It cannot be used to counter the testimony of other defense witnesses. Otherwise, using illegally obtained evidence to impeach witnesses would chill a defendant’s right to present a defense by precluding the testimony of those who might make statements in sufficient tension with the tainted evidence to permit impeachment (72).

Many questions in recent years have been raised regarding the state of mind of the confessing suspect. Before the prosecution can introduce a defendant’s incriminating statement in its case, it must prove a voluntary, knowing, and intelligent waiver of the accused’s Miranda rights. Although an express waiver is not necessary, courts may not presume a waiver simply from a defendant’s silence or subsequent confession (73). A court in determining voluntariness of the waiver must look to both the suspect’s state of mind and the police officer’s acts of inducement. Because the question is a difficult one, police often obtain a formal waiver, although such an explicit relinquishment of the right to remain silent is neither essential nor necessarily conclusive (74).

The waiver assessment is made by looking to the totality of the circumstances surrounding the interrogation (75). The most important factors in this analysis include the suspect’s age, intelligence and education; his familiarity with the American criminal justice system; his physical and mental condition; and the nature of the government’s activity. No one factor will necessarily be dispositive. Courts will also consider factors such as the explicitness of the waiver, any language barriers, and the length of time between the Miranda warnings and the actual questioning or confession. “A heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to appointed or retained counsel” (76).
III. Six amendment right to counsel

A. Introduction.

Under the Sixth Amendment, “the accused shall enjoy the right ... to have the assistance of Counsel for his defence.” This provision guaranteed a right to privately retained counsel from its inception and, since 1938, has required the appointment of counsel for an indigent defendant in a federal prosecution (77). The Supreme Court has repeatedly stressed the importance of this right.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law... He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence (78).

More than half a century ago, the Supreme Court held that the right to appointed counsel in federal prosecutions for poor people was mandated by the Sixth Amendment. In Johnson v. Zerbst the Court wrote that the Sixth Amendment requires counsel “in all criminal prosecutions.” The amendment therefore “withholds from the federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel” (79).

The issue was far more troubling with state prosecutions. The Supreme Court was quite reluctant to incorporate the counsel mandate of the Sixth Amendment to apply against the states. Rejecting an absolute application of the counsel clause to the states, the courts instead were directed to appoint attorneys only under “special circumstances” (80). The Court’s view was that a refusal to appoint counsel for an indigent defendant did not necessarily violate due process. The state courts were told to consider the “totality of the facts” in individual cases to determine if appointed counsel was necessary to prevent “denial of fundamental fairness, shocking to the universal sense of justice” (81).

B. Gideon v. Wainwright.

In 1963, the Supreme Court rejected the “totality of the facts” test and ruled that the Sixth Amendment right to counsel is “fundamental and essential to a fair trial” and therefore rendered obligatory upon the states by virtue of the Fourteenth Amendment. In the landmark case of Gideon v. Wainwright (82), the Court expressly overruled the earlier holdings. “In our adversary system of criminal justice, any person haled into court, who
is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him” (83).

Today, the Sixth Amendment right to counsel encompasses all federal and state criminal prosecutions that result in imprisonment. The Supreme Court has been unwilling to apply the counsel provision to all cases, or even all cases which involve the potential for imprisonment (84). Instead, the Court has concluded that “incarceration [is] so severe a sanction that it should not be imposed... unless the indigent defendant has been offered appointed counsel” (85). As a practical matter, however, virtually all defendants do receive counsel due to both the large number of public defender officers and an important recent case. In Baldasar v. Illinois (86), the Court held that an uncounseled misdemeanor conviction could not later be used under an enhanced penalty provision to obtain an increased sentence on a subsequent charge. Thus in practice, nearly every defendant is granted appointed counsel, regardless of the possibility that he will not be imprisoned then, because future judges may wish to rely on the earlier conviction to enhance a later conviction.

C. Issues raised by Gideon.

The Supreme Court extended the right to counsel to proceedings beyond simply the trial. “Today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality” (87). The Sixth Amendment’s right to counsel applies to certain “critical stages” of a criminal proceeding when an attorney’s presence is necessary to secure the defendant’s right to a fair trial. One of the most important of these points is the postindictment, pretrial lineup. There the presence of counsel might prevent prejudicial identification procedures and enable counsel to reconstruct and challenge those procedures at trial (88).

The right to counsel at a pre-trial stage attaches only at the formal initiation of adversary judicial proceedings “whether by way of formal charge, preliminary hearing, indictment, information or arraignment” (89). “The initiation of adversary judicial proceedings marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable” (90). The right to counsel does not extend to police lineups conducted prior to the time the accused is indicted or otherwise formally charged with the crime. Furthermore, the right does not apply to procedures that do not require the defendant’s presence. For example, the defendant has no right to counsel at a photographic display (91). A defendant must rely upon due process principles to challenge unnecessarily suggestive procedures that occur at non-critical stages (92).
In some cases, due process may also provide an indigent defendant a right to assistance other than counsel at trial. This assistance may come in the form of an investigator or an expert witness to assist in the preparation or presentation of the defense (93). The Supreme Court noted that it never held that “a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy,” only that due process requires that the indigent defendant be given the “basic tools” necessary to present his defense (94).

Many state jurisdictions give the trial judge discretion to provide assistance other than counsel, such as medical experts, or investigators (95), fingerprint experts (96), or experts on social attitudes (97). In federal court, by statute, the defendant may “obtain investigative, expert, or other services necessary for an adequate defense,” again at the discretion of the trial judge (98).

D. Waiver of the right to counsel.

In Faretta v. California (99) the Supreme Court held that an accused has a Sixth Amendment right to waive assistance of counsel and conduct her own defense in a criminal case. The right cannot be restricted due to the defendant’s lack of experience or legal training. This right to proceed pro se, however, is not absolute. A judge may terminate self-representation if the defendant engages in “serious and obstructionist misconduct” that interferes with the proceeding (100).

To proceed pro se, a defendant must knowingly and intelligently waive the right to counsel. A trial court’s refusal to accept such a waiver is reversible error. To ensure a valid waiver of counsel, the trial judge should inquire into the defendant’s awareness of the disadvantages of self-representation. Although the scope of this inquiry has not been precisely defined, the Supreme Court has imposed rigorous requirements on the information that must be imparted to a defendant, requiring a “searching or formal inquiry” before affirming a waiver of the right to counsel at trial (101). Once again, a valid waiver of counsel need not be express. Still, courts are very hesitant to validate an implied waiver, particularly if doubt exists as to its voluntariness (102).

IV. Conclusion.

Since World War II, dramatic reforms have taken place in the criminal justice system of the United States. The changes discussed above dealing with search and seizure, the privilege against self-incrimination, and the right to counsel have significantly restructured the way in which criminals are prosecuted throughout the nation. While the three areas are still evolving and changing further, it is highly unlikely that there will be enormous
movements to step back from these changes. What is so striking about the changes, however, is that they have been achieved almost entirely as a result of judicial opinions rather than legislative enactments or executive decrees. In terms of reforms in the criminal justice system, the American judicial process reigns supreme.

(1) In very recent times a strong move has occurred to bring about reforms in other aspects of the system, particularly looking to the role of the victim. See, Payne v. Tennessee, 111 S.Ct. 2597 (1991); Maryland v. Craig, 110 S.Ct. 3157 (1990); Michigan v. Lucas, 111 S.Ct. 1743 (1991).

(2) Some important legislation has been passed by the federal Congress such as the Speedy Trial Act, 18 U.S.C. § 3161. Still, the major reforms have not been due to legislative action.

(3) Here, too, the executive branch—at the behest of the President—has brought about some changes, such as in the definitional aspects of crime. The much heralded RICO statute, Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq is the most famous example. Few structural changes, however, come from executive activities.

(4) Several state supreme courts—under state constitutional provisions—have moved beyond limited federal protections for individual defendants and have broadened the scope of protection in a number of important ways. See, for instance, Commonwealth v. Blood, 400 Mass. 61, 507 N.E. 2d 1029 (1987); People v. Sportedere, 666 P.2d 135 (Colo. 1983); State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987), all dealing with privacy concerns.

(5) Certainly many other extremely important areas have changed as a result of Supreme Court actions. See, e.g., reforms under the double jeopardy clause, Grady v. Corbin, 495 U.S. 508 (1990); the rights involved with appeals, Griffin v. California, 380 U.S. 609 (1965); Douglas v. California, 372 U.S. 353 (1963); the confrontation clause, Davis v. Alaska, 415 U.S. 308 (1974); and the punishment provision of the Eighth Amendment, see, these cases setting limits on the death penalty: Bullington v. Missouri, 451 U.S. 430 (1981); California v. Brown, 479 U.S. 538 (1987); Coker v. Georgia, 433 U.S. 584 (1977); Ford v. Wainwright, 477 U.S. 399 (1986); and Penry v. Lynaugh, 109 S.Ct. 2934 (1989). The three areas discussed in this paper, however, have fundamentally reformed the system.

(6) Boyd v. United States, 116 U.S. 616 (1886). ("One of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance.")


(8) 116 U.S. 616 (1886).
(9) Id. at 633.
(11) Id. at 346.
(13) Id. at 31.
(14) Id.
(18) Id. at 655.
(20) Id.
(21) Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Burger C.J. dissenting [suggesting a civil remedy alternative]).
(27) Id. at 926.
(30) 468 U.S. at 988-91. It has been argued that the exception should be expanded to include situations in which the evidence at issue was seized by an officer acting in the good-faith belief that his conduct was in compliance with the Constitution regardless of the existence of a warrant. This expansion has been rejected by the courts.
(32) Id. at 226.
(33) Id.
(36) Id.
(40) Id. at 7-8.
(41) Much of the Miranda decision, infra, relies on this deterrent impact.
(42) 297 U.S. 278 (1936).
(43) Id. at 286.
(47) Brown v. Mississippi, supra.
(48) Brooks v. Florida, supra.
(49) 378 U.S. 478 (1964).
(50) Id. at 490.
(52) Id. at 445.
(53) Id. at 471.
(56) Id. at 421.
(58) Id. at 495.
(60) Id. at 325.
(61) 446 U.S. 291 (1980).
(62) Id. at 301.
(63) Id.
(64) 481 U.S. 520 (1987).
(65) Id. at 530.
(67) Innis, supra
(69) Id. at 657.
(70) Id. at 657.
(74) That is, one person may voluntarily speak with no explicit waiver, while another may, under compulsion, sign a waiver form.
(79) 304 U.S. at 463.
(81) Id.
(82) 372 U.S. 335 (1963)
(83) Id. at 344.
(84) Some statutes give the trial judge the option of whether to impose a penalty instead of imprisonment.
(86) 446 U.S. 222 (1980).
(88) Id.
If a defendant invokes the right to self-representation, the court may appoint advisory standby counsel. The Supreme Court outlined permissible unsolicited trial participation by standby counsel in McKaskle v. Wiggins, 465 U.S. 168 (1984). A pro se defendant, however, has no absolute right to hybrid representation or to advisory counsel. In addition, a pro se defendant may not claim his own ineffectiveness as a ground for reversal or appeal. Faretta, supra.