Right to Counsel - An Unrecognized Right

Neil W. Schilke
RIGHT TO COUNSEL—
AN UNRECOGNIZED RIGHT

NEIL W. SCHILKE

The continual failure of the Supreme Court to recognize the right to counsel as a fundamental right is inimical to the traditional American insistence on personal liberty and equal justice for all. The Court, however, in accordance with its present liberal view toward individual rights has, through a series of decisions, attempted to delineate and define this right. This has only resulted in confusion and uncertainty which has in turn placed the rights of the accused in jeopardy and the state prosecutors in a quandary. It is therefore necessary to examine these decisions in an attempt to determine the extent of the right as recognized at present. To do this effectively it is necessary to examine both the extensions and the restrictions thus far recognized. After the present status of the right is determined, the bases for further extension can be examined in the light of the Court's present arguments and concessions.

Judicial Recognition

The right to counsel has been a frequently recurring question before the Supreme Court. An analysis of the decisions in these instances gives a partial understanding of the extent of the

1 Although not recognized as a fundamental right it has been recognized as a right guaranteed by the sixth amendment and thus essential in federal courts, Johnson v. Zerbst, 304 U. S. 458 (1938). This holding was later codified in the Federal Rules of Criminal Procedure 18 U. S. C. A. Rule 44: "Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

2 This is evinced by the realization that the many right to counsel cases heard by the Supreme Court represent but a fraction of the requests for writs of certiorari.

3 "The substantial body of case law testifies that the counsel problem is more than an academic one. It has vexed the United States Supreme Court more than many of seemingly greater magnitude." BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955), quoted in New York Bar, EQUAL JUSTICE FOR THE ACCUSED (1959), p. 43.
right to counsel today. But, since this right has not been abso-
lutely recognized by the Supreme Court it must be categorized,
for an understanding examination, as follows: (1) right to
obtain counsel; (2) right to appointment of counsel; (3) right
to competent counsel; (4) right to counsel for appeal; (5) right
to waive counsel. Inasmuch as these last three categories are
clearly separable aspects of the problem, and not within the
scope of this paper, they will not be discussed.

Right to Obtain Counsel

The right of the accused to obtain his own counsel is as
ancient as the American concept of due process of law. But
that is the limit of its antiquity; for apparent as the right must
now appear, it was not recognized in England until the passage
of the Trials for Felonies Act in 1836. Nevertheless, the Con-
stitutions of twelve of the original states, as well as the Federal
Constitution, were written with provisions for this right. The
right to obtain counsel, then, presents no problem other
than the inevitable one of whether the accused was actually
afforded the right and the opportunity to exercise it. The right
clearly exists and there are no Supreme Court decisions contra.

---

(1924).

5 & 7 Will. 4, c. 114, §§ I and II; PLUNKNETT, CONCISE HISTORY OF
THE COMMON LAW (2nd Ed. 1936).

6 Virginia was the colony without provision for counsel. An illustrative example of
these early provisions, is found in the Pennsylvania Charter of Privileges
(1701): "That all criminals shall have the same Privileges of Witnesses and
counsel as their Prosecutors." For the other early American Constitutional
doctrines on provisions for the right of counsel see 1 COOLEY, CON-

7 Chandler v. Fretag, 348 U. S. 3 (1954). But a problem closely analogous to right
to appointment of counsel arises on the question of obtaining counsel for pre-
trial aid. Cicenia v. La Gay, 357 U. S. 504 (1958); Crooker v. California, 357
U. S. 453 (1958) (in both of these cases it was held not to be a denial of due
process despite denial of request by the accused to obtain pre-trial counsel,
there were strong dissents in both as indicated by 5-3 and 5-4 votes). A later
case, Spano v. New York, 360 U. S. 328 (1959) held a confession, obtained
after request by accused for his counsel was denied, to be illegally obtained.
But in concurring opinions Justices Douglas, Black, Brennan, and Stewart
emphasize right to counsel, stating "[d]epriving a person, formally charged
with a crime, of counsel during the period prior to trial may be more damaging
than denial of counsel during the trial itself."
Right to Appointment of Counsel

The right to appointment of counsel is the eye of the storm of uncertainty. Here there are numerous arguments both for and against the inclusion of the right within the protection of the Fourteenth Amendment. But the intent at this point is not to present the arguments; rather it is to determine the present scope of the right. This requires practically a case by case examination, since the Court has decided each case primarily upon its own peculiar facts.

The first Supreme Court case holding that in certain instances the state must appoint counsel is Powell v. Alabama, more commonly known as the "Scottsboro Cases". The Court decided with broad language that at least in such an extreme case there was a fundamental right to the aid of counsel. Without the occasional references to the capital nature of the crime and the extreme need for counsel this case would have resolved the question in one sweep. But, in accord with our system of law, the opinion was only precedent to the extent it was necessary to decide the case.

Only ten years later Betts v. Brady severely limited the sweeping statements made in the Powell case. In this case defendant was an ordinarily intelligent man of forty-three who was charged with robbery. He requested counsel but his request was denied. He then conducted his own defense but was convicted and sentenced to eight years imprisonment. The Court found that, historically, appointment of counsel was not mandatory for a fair trial and due process. In this case it was also noted that the defendant had been in court before and was not "wholly unfamiliar with criminal procedure". The test used was succinctly stated by Mr. Justice Roberts:

8 287 U. S. 45 (1932). The defendants, nine young, illiterate, non-resident negroes were charged with the rape of two white girls. They pleaded not guilty, were arraigned, tried, and sentenced to death all in one day without the benefit of counsel.

9 The Court will not "... formulate a rule of constitutional law, broader than is required by the precise facts to which it is to be applied." Liverpool, N. Y. and P. S. S. Co. v. Emigration Commissioners, 113 U. S. 33, 39 (1884).

10 316 U. S. 455 (1942).
As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the 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.\(^\text{11}\)

This sets the standard as one of fundamental fairness. A triumvirate of Justices, Black, Murphy, and Douglas, presented their first of many dissents in this case.\(^\text{12}\)

Since the Brady case the question of right to counsel has been principally decided by the Court twenty-three times, this in a period of 18 years. This alone must corroborate the alleged insufficiency of the Court's "fair trial" test. For were the test definable, prosecutors and state courts would apply it to preclude reversal or, if they did not apply it, the Supreme Court could reverse summarily.\(^\text{13}\)

In 1945 three cases were heard; each was held a denial of due process. In the first of these a denial of request for counsel\(^\text{14}\) and in the second the refusal of a motion for a continuance in order to obtain counsel\(^\text{15}\) were held denials of due process. In the Hawk case the charge was murder; and Mr. Justice Reed in answer to a contention of fairness stated, "... the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect."\(^\text{16}\)

\(^{\text{11}}\) Id. at 473.

\(^{\text{12}}\) Id. at 474. Mr. Justice Rutledge concurred with these three in later dissenting opinions.


\(^{\text{14}}\) House v. Mayo, 324 U. S. 42 (1945). In this case the Florida court had forced defendant to answer charges without counsel despite his request.

\(^{\text{15}}\) Hawk v. Olson, 326 U. S. 271 (1945). Here petitioner was held incommunicado until arraignment, and charge was for a capital offense, thus the Powell case was precedent.

\(^{\text{16}}\) Id. at 278.
The third 1945 right to counsel case, *Rice v. Olson*, held due process was denied as a result of the complexities of the case.

The following year two right to counsel cases were heard, but in neither was there found to be a denial of due process. And neither case added substantially to the definition of the right, because the majority found a presence of counsel in one and a waiver of counsel in the other. Both cases have strong dissenting opinions in which lack of counsel is urged as denial of due process.

In *Foster v. Illinois* Mr. Justice Frankfurter found that the defendants had not been denied due process because they had been sufficiently advised, in view of their ages (34 and 48), to make an adequate defense. The same year a majority of the Court affirmed a similar case on the basis of improper procedure by the appellant. However, the Court in *per curiam* opinions found denials of due process in two later cases in 1947.

Since the 1947 term only three cases have found due process, despite denial of counsel, and in each of these cases the customary strong dissent was present. In these the majority found no exceptional circumstances which required the assis-

---

17 324 U. S. 786 (1945). This involved an Indian charged with burglary; the case was complicated by a problem of jurisdiction relating to Winnebago Indian Reservation.

18 Canizio v. New York, 327 U. S. 82 (1946) (defendant had counsel for long hearings during the two days preceding sentencing).


20 332 U. S. 134 (1947). The court did not advise defendants of their right to counsel; they were convicted and given indeterminate sentences. The dissent by Justices Black, Douglas, Murphy, and Rutledge urges an argument of equal protection as well as due process.


22 Marino v. Ragen, 332 U. S. 561 (1947); De Meerleer v. Michigan, 329 U. S. 663 (1947). In both cases the defendants were under 21, unfamiliar with trial procedure, and the charges were murder.

tance of counsel to insure a fair trial. The accused was over forty years old and of normal intelligence in each instance. The presumption of regularity in the trial was also raised to add strength to the argument for due process. But not with-standing these arguments Quicksall v. Michigan 24 was the last case in which a trial was found sufficiently fair to satisfy due process when counsel was not provided.

Eleven times in the past thirteen years the Supreme Court has held a denial of counsel to be a violation of the Fourteenth Amendment. Of these all but Chandler v. Fretag 25 involved a question of need for counsel in order to obtain fundamental fairness. Two tests were principally employed to find lack of a fair trial in these cases. These were whether (1) the complexity of the trial or (2) the lack of capability in the accused to defend himself made the aid of counsel essential. Of course, the two elements were often somewhat inter-related but one of them was usually recognized as controlling.

Gibbs v. Burke 26 is representative of the "complexity" decisions. 27 In this case the defendant was charged with larceny and had been convicted six times previously in the same court. In spite of his "experience" the Court found he needed counsel because there were grounds upon which counsel could have impeached the testimony of a damaging witness. The doctrine established in Betts v. Brady 28 was followed in this case, but was also expanded by further definition. Justices Black and Douglas, however, in their concurring opinion, advocated over-ruling the Brady case.

25 348 U. S. 3 (1954). In this case a middle-aged negro was denied an opportunity to obtain his own counsel; the Court speaking of the Powell holding stated at page 10: "a necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."
26 337 U. S. 773 (1949).
28 316 U. S. 455 (1942) (established test of fundamental fairness).
The test of the accused's ability to defend himself is illustrated by *Uveges v. Pennsylvania*, in which a seventeen year old boy pleaded guilty to a charge of burglary and was sentenced to twenty to forty years imprisonment. He was neither offered counsel nor advised of his right to obtain counsel. In view of the accused's youth, this was held to be a denial of due process. The Court recognized that the Fourteenth, as well as the Fifth Amendment, requires counsel for all persons charged with a serious offense whenever counsel is necessary for an adequate defense. This test as applied to the accused's ability has been employed, to find lack of fairness, in several subsequent cases.  

A recent case incorporate the two elements. The trial was complex; the accused was young and inexperienced in trial procedure. Consequently, counsel was held a necessary requisite to a fair trial. The present extent of the right as recognized in this latest case was well summarized by Mr. Justice Reed:

> Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defense thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the constitution requires that the accused must have legal assistance at his trial.

From these cases it can be seen that the Court has consistently followed its "fair trial" rule. The difficulty lies in defining "fair trial"; this has led to different results in very

---

29 335 U. S. 437 (1948). Mr. Justice Frankfurter in his dissenting opinion at 442 states, "after all, this is the Nation's ultimate judicial tribunal, not a super-legal-aid bureau." Perhaps Mr. Justice Frankfurter would also object to the simile, "a super-legal-guardian-bureau", but, in accord with the Court's function as interpreters and guarantors of Constitutional rights, the objection would appear unjustified.


similar cases. In general, however, the Court has reversed for a denial of right to counsel whenever the trial proceedings were so complex as to require the aid of counsel. When a defendant without counsel was not assisted by the court or whenever intentional or unintentional deception by the court misled the defendant, then the Court has held the conviction to be void. Where a defendant without counsel was uneducated, ignorant, or mentally unstable his conviction has been held unconstitutional. Young defendants must always be provided counsel and his counsel must be permitted to be present at every stage of the trial.

Despite the recognition by the Supreme Court of these many extensions of the right to counsel in the state courts the majority still refuses to recognize it as fundamental. However they do believe that in federal courts, "[t]he right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the


34 This has never been held sufficient in itself but is a strong influencing factor.


amount of prejudice arising from its denial, but ostensibly this is a chameleon like right which takes on a different color when in the state courts.

Bases for Extension

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. This is all the more evident when it is realized that the majority of these decisions were by 5-4 or 6-3 votes. Continual and consistent uncertainty is indicative of an insufficient state of law. This uncertainty has been notably absent in the federal courts. Rule 44 has codified a Supreme Court decision, which held that right to counsel in the federal courts includes right to appointment of counsel; since this is true for the federal courts it must surely be true for the state courts where right to counsel is recognized but ill-defined. 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. Thus, the possible historical bases for inclusion of right to counsel in the Fourteenth Amendment must be presented as well as the logical bases. And since right to counsel is dependent on the meaning of the Amendment this meaning must be sought first through legislative intent and judicial decision. Then, if this fails, a more practical and specific examination of the right and its exigencies must be made.

44 Glasser v. United States, 315 U. S. 60, 76 (1942).
46 Johnson v. Zerbst, 304 U. S. 458 (1938). Another problem, that of competence of counsel, is present in the federal courts to some extent. This is largely due to the absence of any method of compensating appointed counsel, while this is a collateral problem it is one of recognizable significance. See, Johnson v. United States, 11 F. 2nd 562 (D. C. Cir. 1940); Baldwin v. United States, 141 F. Supp. 310 (E.D.S.C. 1956).
Intent of the Framers

Any question of constitutional interpretation must begin with a search for the intent of the framers. In this instance the question must be what was intended by Congress when the draft of the Fourteenth Amendment was first presented in December, 1865, and when passed by Congress on July 16, 1866. The best source of this intent may be found in the debates over passage of the Amendment. From the debates it is clear that even then the Amendment meant different things to different persons both among its proponents and its opponents. To Senator Jacob Howard it carried broad meaning, in presenting the joint resolution proposing adoption of the Amendment he pointed out that the citizens of each of the states had long enjoyed "a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution . . . , some by the first eight amendments of the Constitution;" but that these privileges, immunities, and rights were protected only from legislation by Congress and not from legislation by the several states. The Senator continued:

The great object of the first section of this amendment is, therefore, to restrain the power of the states and compel them at all times to respect these great fundamental guarantees . . . disable a state from depriving not merely a citizen of the United States, but any person, whoever they may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the state. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . It establishes equality before the law, and it gives to the humblest, the poorest, and most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty . . . 48

Fifteen days earlier on May 8, 1866, Representative Thaddeus Stevens had said:

48 142 Congressional Globe 2803 (May 23, 1866).
The first section [of the Amendment] prohibits the States from abridging the privileges and immunities of citizens of the United States or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.\(^4\)

These statements of Senator Howard and Mr. Stevens unquestionably represented the official attitude of the Republican majority in Congress, and were substantially repeated by other Republicans in speeches and debates. But this reveals little. Because of the broad terms used, the Amendment is scarcely further defined.

Others among the legislators restricted their statements of intent almost exclusively to problems of the Negro. Carl Schurz stated that the Amendment was "intended to engraft the main provisions of the Civil Rights Act upon the Constitution" and this formed "a necessary complement of the abolition of slavery."\(^5\)

Other editorial and judicial comments spoke to the same effect. Mr. Justice Miller, in delivering the opinion of the Court in the *Slaughter House Cases*, said:

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments [the thirteenth, fourteenth, and fifteenth], no one can fail to be impressed with the one pervading purpose found in them.

\(^4\) 142 Congressional Globe 2460 (May 8, 1866).

\(^5\) 19 Atlantic Monthly 221 (March, 1867).
all, lying at the foundation of each, and without which none of them would have been even suggested; we mean freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.  

The foregoing summary, while by no means extensive, is sufficient to establish that the one undisputed purpose of the framers of the Fourteenth Amendment was to complete the work of emancipation and that a large majority of its supporters and opponents believed that its principal, and to some its only, effect would be to confer additional rights and immunities on members of the Negro race.

Judicial Interpretation

Since passage of the Amendment it has been defined by the Court in far over a thousand decisions. A look at a sampling of these decisions will readily reveal that the Court has never precisely determined the meaning. Thus, the amendment protected Wong Kim Ark, the American-born son of Chinese subjects, when he was refused permission to land at San Francisco on returning to this country from a visit to China,  but not John Elk, an American Indian, when he was denied the right to register as a voter in the Fifth Ward of Omaha;  the Indianapolis Water Company against the water rates fixed by the Public Service Commission,  but not Knoxville Water Company against the water rates fixed by the City of Knoxville;  August Bartels against the penalties imposed upon him by an Iowa statute for teaching German to children in a parochial school,  but not Albert W. Hamilton against a regulation of the University of California requiring him to take

51 16 Wallace 36, 71 (1873).
53 Elk v. Wilkins, 112 U. S. 94 (1884).
a course in military science and tactics; 57 Yick Wo, a subject of the Emperor of China, when he was imprisoned in San Francisco for engaging in the laundry business in a frame building, 58 but not Soon Hing, also a Chinese subject, when he was imprisoned in the same city for engaging in the laundry business between the hours of ten p.m. and six a.m.; 59 L. A. Nixon, a Negro, when he was prohibited by a Texas statute from voting in a primary election in that state, 60 but not R. R. Grovey, also a Negro, when he was prohibited by the resolution of a party convention from voting in a similar election in the same state; 61 Joseph Tipaldo when he was indicted for failing to comply with the provisions of the New York Minimum Wage Act, 62 but not West Coast Hotel Company when it was sued by Elsie Parrish, a chambermaid in its employ, for the difference between the wages which she had actually received and the amount to which she was entitled under the provisions of the Washington Minimum Wage Act; 63 Yetta Stromberg when she directed the children in a summer camp in a ritual which consisted of raising a red flag and pledging allegiance to the cause for which the flag stood, 64 but not Benjamin Gitlow when he arranged for the publication of a manifesto advocating the forcible overthrow of the established political system of the United States; 65 and L. D. Harris, an illiterate Negro, against a confession obtained by extensive and uninterrupted interrogation, 66 but not Agapita Gallegos, a Mexican boy, who spoke no English and was illegally detained until he confessed. 67

57 Hamilton v. University of California, 293 U. S. 245 (1934).
59 Soon Hing v. Crowley, 113 U. S. 703 (1885).
63 West Coast Hotel v. Parrish, 300 U. S. 379 (1937).
64 Stromberg v. California, 283 U. S. 359 (1931).
These illustrations are not given to show any supposed or real conflict in the Court's decisions nor to criticize the Court, but to emphasize three clear and undeniable conclusions: (1) in many instances the Amendment does not mean what its proponents intended; (2) in even more instances it does mean what its proponents never intended; (3) no distinct and exclusive meaning has yet been given to the Amendment.

The foregoing discussion is not intended to imply in any way that the Court has erred or that it has attempted or should attempt to precisely define the Fourteenth Amendment. It does, however, lead to the conclusion that it is unproductive and in fact impolitic to look either to the intent of the framers or to judicial decisions for a precise definition of either the Fourteenth Amendment or the Due Process Clause included therein. But this is what the Court has in many instances done. As Mr. Justice Roberts expressed it in seeking an answer to a question of the scope of the Amendment:

Relevant data on the subject are afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights, in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date. These constitute the most authoritative sources for ascertaining the considered judgment of the citizens of the States upon the question.

It is not questioned that these sources should be looked to but it does border on absurdity for the Court to become tied slavishly to them after they have repeatedly failed to give an adequate answer. The insufficiency of the answer found in such sources is indicated by the decisive split in the Court's interpretation of these sources and in the arguments (now chiefly


70 For a fairly representative example of this see, Adamson v. California, 332 U. S. 46 (1947) and Mr. Justice Black's dissent at 68.
academic) of legal writers.\textsuperscript{71} Such background alone cannot justify either the inclusion or exclusion of the right to counsel under the Fourteenth Amendment.

\textit{Law of the Land}

All law, even constitutional law, is not static but progressive and is to be construed with respect to social conditions and enlightened public policy.\textsuperscript{72} This necessitates considering the rights and needs of society as well as those of the individual in determining whether right to counsel is a protected right. Some may still throw up their hands aghast at such a procedure, but the reality of this consideration has long permeated the judiciary and is commonly accepted today. Mr. Justice Holmes recognized it eighty years ago:

\begin{quote}
The very considerations which judges most rarely mention, and always with an apology, are all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. \textsuperscript{73}
\end{quote}

In determining what is “expedient for the community concerned” it is necessary to recognize the extent to which the individual states have themselves recognized their needs and rights. And by determining this present need for the right and current recognition of the right, in effect, the “law of the land” is defined; but courts have generally been in agreement with the statement that “[d]ue process of law is process due according to the law of the land.”\textsuperscript{74} This establishes the synonymity of “due process” and “law of the land.”\textsuperscript{75} The latter is the older of the two phrases dating back to the Magna Charta; for this reason it is often held to apply only to the basic rights recognized in 1215.\textsuperscript{76} This is fallacious; “law of the land”, even then,

\begin{footnotes}
\item[71] No attempt will be made here to further belabor this point but see, Fairman, “Does the Fourteenth Amendment Incorporate the Bill of Rights,” 2 Stanford L. Rev. 5 (1949); Charles Warren, “The New Liberty Under the Fourteenth Amendment,” 39 Harv. L. Rev. 431-65 (1926).
\item[72] 16 C. J. S. \textit{Con. Law}, § 17 (1956).
\item[73] HOLMES, THE COMMON LAW, p. 35 (1881).
\item[74] Walkerv. Sanniner, 92 U. S. 90, 93 (1875).
\item[76] MOTT, DUE PROCESS OF LAW, (1926).
\end{footnotes}
applied not to the formalities of common law but to principles of justice and reasonableness. This was recognized in *Hurtado v. California*:

> There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms . . .

The phrase itself precludes the contention that its definition can be totally restricted to the law as it existed in 1215, in 1866, or at any other time prior to the present. The law of the land must be a current and evolving thing, to argue conversely is to compel the conclusion that a great body of our present “law of the land” is unconstitutional. Coerced confessions, deprivation of the right to vote, deprivation of freedom of speech, as well as numerous other examples of arbitrary state action should then have been upheld, since they were neither recognized as the law of the land in 1215 nor by the framers in 1866. Or, would anyone seriously contend that it is not the law of the land that states may not subject the accused to double jeopardy? Yet there would be no historical basis or judicial precedent for such a holding; that this would be a question of first impression was recognized by Mr. Justice Cardozo in *Palko v. Connecticut* “[w]hat the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider.” This point has never been considered; but, if it

77 110 U. S. 516, 531 (1884).
82 This is not to be confused with the Constitutional challenge to successive state and federal prosecutions based upon the same transaction or conduct. *Bartkus v. Illinois*, 359 U. S. 121 (1959).
were to come before the Supreme Court, the most expedient tests of inclusion would appear to be: (1) is the right now a part of the law of the land (i.e. is it now generally accepted as a necessary aspect of due process) and (2) aside from social policy, is it a necessary and fundamental right. These are also the most feasible tests for the vexatious right to counsel problem. 83

Right to counsel is presently recognized to some degree by every state. 84 Among these the extent of the recognition varies greatly as to time of appointment, manner of appointment, and as to the type of crime requiring counsel. But generally, only seven states appoint counsel exclusively for capital crimes; 86 seven appoint counsel only for felonies; 86 and seven states provide for counsel in most or all crimes, but only at the discretion of the court. 87 Of the remaining twenty-seven who require appointment of counsel for essentially all crimes, twenty have mandatory appointment upon the request of the accused, 88 while the remaining seven require appointment of

83 Although this discussion may appear to border on a venture in semantics it must be recognized that no synonyms have precisely the same meaning and since law deals largely with shades and degrees these nice variations can be of some importance.

84 Alaska and Hawaii provisions are not considered in this analysis.


counsel with or without the request of the accused. \[89\] Summarized, only fourteen states (those appointing only for capital crimes and those appointing only at the court's discretion) do not require appointment of counsel in any but the most grievous instances. In addition to this general legislative recognition of the right to appointment of counsel, \[90\] four states have also made provision for this right in their constitutions. \[91\] These statutory provisions by the states must be accepted as at least indicia of acceptance of the right as an integral part of the needs and policy of the community.

State case law indicates that right to counsel is generally included in the phrase "law of the land". As stated in a Virginia case:

The phrase "law of the land" as used above [in a constitutional provision for the type of trial] has been construed to mean that no person in a criminal case shall be denied the right to the assistance of counsel of his own selection and that no person indicted for an infamous offense who is financially unable to engage counsel shall be denied the aid of counsel if this fact is brought to the attention of the trial judge. \[92\]

This broad statement does not stand as an exception to the general rule but is widely accepted as a proper meaning of "law of the land" as it pertains to this right. \[93\] There is, of course, no unanimity among the states but if this were a pre-requisite to


\[90\] Further evidence of state recognition of right to counsel is given by the states' position on the collateral problem of right to counsel on appeal. The Council of State Governments in 1957 and again in 1959 urged that the states re-evaluate their statutes pertaining to this. SUGGESTED STATE LEGISLATION, 1959, p. 134.


\[93\] "The 'law of the land' guarantees one a lawful trial and benefit of counsel regardless of the crime he commits." Peterson v. State, 145 Fla. 466, 199 So. 753 (1941); Accord, People v. Hoffman, 379 Ill. 518, 40 N. E. 2d 515, 518 (1942).
acceptance as law then our law would be forever static, unadaptive or, if carried to the extreme, almost non-existent. In fact, it is this very lack of unanimity which results in a lack of uniformity that is contrary to constitutional guarantees. It is obviously contrary to our constitutional principles for right to counsel as recognized by the Supreme Court to have different meanings in different states, but this has been a result of the fair trial test. This lack of uniformity tends to depreciate and to rot away at national citizenship, a right of the people. The Constitution, including its prohibitions on state action, exists for the benefit of the whole people of the United States. Its interpretation, including the interpretation of its guarantees against state action concerns the whole people of the United States.94 The Supreme Court, as the body charged with the duty to interpret must, therefore, look to the law of the people as well as to historical and judicial precedent. As John Marshall's famous statement phrased it, "we must never forget that it is a constitution we are expounding."95 If this is a proper admonition then the Supreme Court has erred in failing to recognize the right to counsel as it has been developed and accepted into the mores of the people. This failure adversely affects every person within the protection of the Constitution, for no one's individual rights to counsel can be restricted without everyone's rights also being restricted to the same degree. This reaches the inevitable conclusion that a small minority of persons, who choose not to extend individual rights beyond 1789 or 1866 limits, can preclude extension to all other persons. This obviously was not the framer's intent, thus the Court, by limiting its interpretation to the intent of the framers, achieves a result which obviates the framer's intent.

There is still another reason why society has an interest in the enforced protection of the right to counsel. Representation by counsel is a recognized factor in the control of crime.96 A realistic discussion of the plight of the accused, not from the viewpoint of morals but from the calculated requirements of the

94 Admittedly this involves metaphysical problems concerned with Rousseau's "will of the people" and similar concepts but it is only necessary here to recognize the abstract right.
95 McCulloch v. Maryland, 4 Wheat. 415, 422 (1819); Cited in Julliard v. Greenman ("Legal Tender Cases"), 110 U. S. 421, 439 (1884).
law is as important to the community as to the accused. When represented, the accused develops a respect for the law and a sense of gratification in his assurance of a fair trial. But when tried without counsel, the accused develops a sense of persecution by the State, which leads to disrespect for the law and, if guilty, to a continued life of crime or, if innocent, to the inception of a life of crime.

The social policy and law of the land taken alone would tend to dictate the inclusion of right to counsel under the Fourteenth Amendment. This may entail the oft criticized so-called sociological approach to constitutional interpretation, that is, the abandonment of what the Framers actually intended for what the Court now believes the Framers would have intended in the light of current social conditions and developments. This approach is neither startling nor new but is at least as old as the Court.

Mr. Justice Holmes (considered, by as great a man as Mr. Justice Cardozo, to be the greatest legal intellect in the history of the English speaking judiciary) believes that "[t]he first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the society." By this test recognition of the right to counsel, in accord with the mores of the people, is essential.

Fundamental Rights

An examination of the legal precedent for right to counsel failed to show that it is a right to be either included or excluded from the protection of the Fourteenth Amendment. The law of the people apparently includes the right and condones a liberal interpretation of the right. Admittedly this establishes only tenous grounds upon which to invoke the Amendment.


99 HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, (1947). His acumen was also recognized by Justice Frankfurter, who considered Holmes the greatest intellect ever to serve on the Supreme Court. FRANKFURTER, OF LAW AND MEN, (1956).

100 HOLMES, THE COMMON LAW, p. 41 (1881).
But something more compelling than legal technicality can be presented. The myriad of points to be considered by the Court does not exclude its responsibility to consider the needs of the individual as they exist in respect to his personal quest for justice.

At this point the ambiguities of another glib phrase come into the discussion. "Fundamental rights", a term of many meanings to many persons, the Court recognizes and protects such rights\textsuperscript{101} but cannot or will not adequately define them. If the Court persists in adjudging the right to counsel by an 1866 criteria, then, as previously shown, nothing is to be gained by further elaboration. But by the very nature of a constitution it must not be limited to the circumstances at the time of its framing. Herbert Spencer defined life as "the continuous adjustment of internal relations to external relations." When the adjustment ceases to exist, the man is dead. When a constitution can no longer be adjusted to meet the needs of a changing society, the constitution is dead. Consequently, it should be safe to assume that the Court may, as they have in the past,\textsuperscript{102} extend the rights guaranteed by the Fourteenth Amendment beyond the scope of the framers. With this assumption it remains necessary that right to counsel be examined and found to be so imperative to the individual and our society as to be a necessary and fundamental right.

It must be apparent to anyone who has had any experience with criminal courts that an untrained individual without counsel is at the mercy of the court or, as is too often the fact, at the mercy of the prosecuting attorney. While the prosecutor may have the interests of justice foremost in his mind, it is at least equally possible that he may have his approaching re-election there instead. Without making any claim to generalization, it may be stated as common knowledge that the prosecuting technique in the United States is purposed so as to regard a


conviction as a personal victory calculated to enhance the prestige of the prosecutor. Except for occasional instances, this is not the fault of the prosecutor but is symptomatic of his environment with its undiscriminating clamor for rapid conviction of suspects. This often serves to induce the prosecutor, who will later campaign on his conviction record, to unquestioningly assume guilt and unrelentingly prosecute the person accused. Under such conditions a prosecutor, with anything less than the highest ideals, must assume that the end (not necessarily law of justice, but conviction) is justified by any means. Many extra-legal and illegal practices have been developed by prosecutors in accord with this deluded dogma that the end will sanctify the means. This makes it readily apparent that the accused needs counsel during and even before the trial. In conjunction with guarding against over-zealous prosecutors (and their distorted Napoleonic tenet—guilty and not to be proven innocent) and third degree police methods, counsel can aid the accused in certain concrete respects. There are at least ten specific rights and advantages that the accused can gain from counsel even prior to arraignment, these are:

(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.

---

103 See, 76th Cong., 3rd Session 45 (1940) (Hearing before Senate Committee on Judiciary).


105 "It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction." People v. Wells, 100 Cal. 459, 465, 34 P. 1078 (1893); quoted in DOUGLAS, WE THE JUDGES, p. 373 (1956).

(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 witnesses were brought into court.

(10) All charges may be consolidated if that suits the needs of the accused.

In view of these necessary details requiring action even prior to trial, it is difficult to see how anyone could logically contend that the right to counsel is not a necessary and fundamental right. The fact that the accused who cannot obtain counsel (usually an indigent) is nearly always imprisoned prior to trial makes the need greater. Absence of counsel in such an instance leaves no one free to seek evidence to establish, corroborate, or refute contended facts, or to seek additional witnesses. This places the accused at a decided disadvantage in regard to the prosecutor, and thereby handicaps law and justice.

Once the accused reaches the trial stage in the judicial process his problems increase and the need for counsel becomes even more imperative. The deliberative steps to be taken here are so intricate and consequential that it is inconceivable that an untrained person could effectively defend himself. Could an untrained defendant intelligently decide whether to waive a jury trial, and if he should choose not to, could he intelligently select a jury? Could he intelligently examine and cross-examine witnesses; could he intelligently ascertain the need for additional witnesses; and assuming, arguendo, that he could, could...

107 It is so recognized in the federal courts, supra note 1; in the U. S. Military Courts it is also recognized as a fundamental right, U. S. v. Kantner, 11 USCMA 201, 204, 29 CMR 17 (1960); and in Scotland it is also so recognized, Chalmers v. H. M. Advocate, (1954) Sess. Cas. 66, 78. And in England an accused person is entitled to counsel before he talks to the police, he is advised of this fact and given an opportunity to either obtain counsel or if unable to do so, to have counsel appointed. Allison, "He Needs a Lawyer Now," 42 J. Am. Jud. Soc'y 113 (1958).
he then procure the necessary witnesses? Even if the defendant realized and admitted that he had committed a crime, could he perceive of, or effectually plead mitigating circumstances, such as provocation, necessity, absence of specific intent, etc.? Could he understand the requisites for a plea of self defense, and would he realize that this would be justification and thus raised by a plea of not guilty rather than a plea of guilty? Could he recognize hearsay evidence or any other violation of the rules of evidence? Would he apprehend and would he be capable of effectuating the diverse motions necessary to set aside the verdict, seek an appeal, or request a new trial; could he discriminately select the proper motion even if he were aware of the existence of these motions? It would be utterly irrational to answer any of these questions other than in the negative.

But the die-hards, unwilling to concede that strict construction is as dead as Cato the Elder, will present the sophistical contention that the judge will guide and assist the accused in his defense. If this is to be done then our adversary system must be cast aside and the prosecuting attorney withdrawn from the case. For what type of legal system is it that would have adversary proceedings on one side and a non-partial judge advising the other side, ruling on his own advice, and eventually giving the decision? This, in its inception, would clearly result in a farcical proceeding and as it evolved would lead to a proceeding atypical of our society but quite typical of police states.

Even in the instances where the judge does attempt to serve in such a schizoid manner it is still impossible for the accused to receive adequate assistance without counsel. For, in spite of such guidance, there is at least one instance in which even the most ulteriorly motivated prosecuting attorney and judge could be of no assistance to the accused. This would result in the unjust conviction of an accused who had an absolute defense of insanity. Few persons can recognize their own insanity much less prove it. A judge, irrespective of his acumen in law, would be wholly incapable of recognizing the unexposed defense of insanity. There are many types of insanity, many of which leave the afflicted with periods (often extended) of normalcy. Therefore, only counsel, by probing
into the facts of the crime and the background of the accused, would find symptoms of insanity. Once the issue was raised the trial would become so technical as to hopelessly preclude a defendant from conducting his own defense.\textsuperscript{108}

If it is assumed, hypothetically, that the accused is guilty, with no defenses or mitigating circumstances, and he willingly admits his guilt (an almost inconceivable situation), does he then need counsel? The answer must be yes, as a result of the general progress being made in our criminal law an increasing number of states, by substituting the ideal of rehabilitative treatment for the old ideal of retribution, have radically changed the sentencing function of the judge. These changes have resulted in indeterminate sentences and increased discretion in the judge. Such procedures make it essential that the defendant have some one to present facts and speak for him.

The need of the layman for counsel is summed up by Mr. Justice Sutherland, with these trenchant words:

\begin{quote}
Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defenses, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.\textsuperscript{109}
\end{quote}


In discussing the right to counsel it is important to remain cognizant of the fact that, in accord with our belief in the innocence of the accused until proven guilty, these are not criminals but innocent persons who are being denied counsel. The danger of denying counsel, in the light of this realization, is poignantly pointed out by Professor Borchard in his analysis of sixty-five criminal prosecutions and convictions of totally innocent people. Professor Borchard found that in the majority of these cases the accused was provided with either no counsel or inadequate counsel. This revealing fact makes the denial of counsel substantially inconsistent with the often professed abhorrence that an innocent person should ever be convicted.

The importance of the right to counsel to the individual should be unquestioned. And, as previously expounded, everyone has an interest in recognition of this right inasmuch as restriction of an individual's rights is an equal restriction of everyone's rights. The need is also vital to society and has consequently been recognized by the majority of the states.

More compelling reasons for the inclusion of right to counsel under the Fourteenth Amendment would be difficult to find. It is certainly a fundamental right, as recognized by Mr. Justice Douglas in Williams v. Kaiser:

A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.

These are the reasons why the right to counsel is "fundamental." In view of the statement it would appear that the court has recognized right to counsel as a fundamental right and, consequently, protected by the Fourteenth Amendment. This is not the fact; the right is still dependent on the "fair

110 BORCHARD, CONVICTING THE INNOCENT, p. XX (1932).
111  323 U. S. 471, 476 (1945).
trial” test as defined by the decisions previously examined. This test is inherently weak inasmuch as the only evidence the appeal court has with which to determine the fairness of the trial is contained in the record.\textsuperscript{112} As has been pointed out, many aspects of the accused’s defense would not appear on the record. The reviewing court could not hope to ascertain whether there was a pertinent witness, document, or other piece of evidence that remained unknown, but which counsel could have presented at the trial. And without counsel who is to determine for the accused that a correct and complete record is taken and later presented on appeal? Thus, in the fair trial test there are an excessive number of unknown variables which may operate to destroy the validity of the result and which \textit{will} operate to destroy the reliability of the test. The essential result is no test whatsoever.

It is equally mystifying that the Court discards the fair trial test and unreservedly requires counsel in capital cases while not requiring it in other cases. This distinction is absurd. Anthropologists have long realized that many of the crimes recognized by the people as most abhorrent and socially dangerous—incest and dope peddling, for examples—do not exact the death penalty.\textsuperscript{113} And psychologists tell us that for many, a lengthy imprisonment is a much more severe punishment than death; to still others the imagined or real social ostracism accompanying conviction is a more severe castigation than death.\textsuperscript{114} Other evidence of the illogical capital crime distinction is found in the Fourteenth Amendment itself. No distinction is made there between life and liberty. The distinction made by the Court is wholly arbitrary from an interpretive standpoint. For the framers never expressed orally or in writing such a distinction but rather life and liberty were written into the Amendment as equals. Thus, the distinction between capital and non-capital cases is also without logic or merit.

\textsuperscript{112} It is recognized that on writs of habeas corpus as well as on writs of certiorari the Court may consider questions outside of the record. But in the great majority of all right to counsel cases a period of 10 to 20 years has elapsed since the trial, in such cases the record is usually all that is available.

\textsuperscript{113} WEIHOFEN, THE URGE TO PUNISH (1956).

\textsuperscript{114} VAUGHAN, SOCIAL PSYCHOLOGY (1948).
The refusal to recognize the value and need of legal counsel is particularly anomalous since occasioned by some of the more erudite members of the legal profession. It would be incredible to conceive of a group of highly trained doctors deciding that an untrained person could adequately diagnose and cure his personal maladies. Yet in law the same person is held to be sufficiently capable of understanding and employing the intricacies of substantive and procedural law to defend himself. Such a holding will not meet the test advocated by James C. Carter in his authoritative writings of the past century:

This is what I have so often insisted upon as the sole function both of law and legislation, namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty of all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgement of it demands an excuse and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong.\(^{115}\)

After balancing the exigencies of the right to counsel and the exiguous reasons for the exclusion of the right from the protection of the Fourteenth Amendment it patently appears that the Court has been guilty of utter apostasy in denying protection of the right.

**Equal Protection**

There is another basis, apart from the Due Process Clause, on which the right to counsel should be recognized and protected. The Fourteenth Amendment enjoins the States from denying their citizens equal protection of the laws. Here also the right is not without its difficulties. There has been great inconsistency as to whether the protection of this right is coterminous with that of due process and if not what its protection is. Chief Justice Taft recognized its purpose thus,

\(^{115}\) CARTER, LAW: IT'S ORIGIN, GROWTH AND FUNCTION (1907), quoted by ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY (1930).
"[i]t sought an equality of treatment of all persons, even though all enjoyed the protection of due process." 116

In this light, it is surprising that the question has not yet been decided in regard to right to counsel and, in fact, there is a surprising dearth of case law on the entire question of poverty and equal protection. Our nation is, however, dedicated to the proposition that all men are created equal. This is not to be construed as the jejune proposition that men are created equal in ability but rather that they are equal before the law, the state and nation exist for them not they for the state and nation. And no special peculiarity should prevent any American from the full enjoyment of constitutional privileges, immunities, due process and equal protection of the laws. 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 117 but this fallacious reasoning has long since been completely over-ruled 118.

Although the Court has never decided the question of right to counsel as related to equal protection, it has decided a closely analogous case on this issue. In Griffin v. Illinois, 119 the Court declared that a state denies both equal protection and due process under the Fourteenth Amendment by administering appellate review so as to discriminate against indigents by denying him recourse to appeal. In the circumstances of this case Griffin needed a transcript as a prerequisite to appeal, if he had had the money he could have bought it; or if he had been sentenced to death, or had claimed constitutional error in his trial, or had claimed error on the face of the record he would have received his transcript free. But Griffin met none of these situations, consequently, his appeal was precluded by his lack of funds. The Court here laid down the clear and simple rule that poverty alone cannot bar the right of appeal from a criminal conviction.

117 City of New York v. Miln, 11 Pet. 102, 142 (1837).
The similarity between the Griffin case and the right to counsel cases is striking; it is difficult to see why the following statements of the Court should not apply equally to the right to counsel cases:

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.\(^{121}\)

and:

In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.\(^{122}\)

Thus, it would seem that the denial of counsel, even if equal denial, is no protection at all and accordingly a denial of equal protection.\(^{123}\) The requirement of equal protection cannot be met unless protection is given, this was clearly the purpose of the framers of the Fourteenth Amendment, some men had been denied protection prior to its passage and this occasioned the choice of the word equal, full would have served the same.

But at present a latter day Anatole France would be justified in the repetition of his satirical statement, "[t]he law in its magnificent equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread." In at least this respect the Court's holdings must be adverse to the intent of the framers as well as to fundamental principles of decency.

**Projection of the Right**

There is at least a strong probability that the right to counsel will be recognized and protected in the near future. This should be inevitable to a system of justice which has as its fundamental philosophy a protection of all its citizens from false or unfair conviction. But there are grounds for this optimistic belief that

---

121 *Id.* at 19.
122 *Id.* at 17.
123 Justice Matthews defined the equal protection clause as "a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U. S. 356, 369 (1886).
go beyond the basic need for the right. The Griffin case, if analogous, has already established precedent for the inclusion of the right, at least under the equal protection clause. At least one judge has arrived at this conclusion:

The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer. Since indigence is constitutionally an irrelevance, it would seem that a successful argument might be based upon the proposition that the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it.

Failure to provide an adequate hearing, like the failure to provide for appeal must now be recognized as contrary to both due process and equal protection. The number of criminal cases appealed is relatively small, therefore, the injustice done by failing to provide for appeal was small but the injustice done by not providing trial counsel is very great. Can the Court condemn the former but condone the latter? To do so would require a retrogression to legal fiction which no honest, realistic judge would be willing to recognize. This would be the too long recognized fiction that due process is unconcerned with the condition in which a defendant is brought to court so long as he is brought there at all.

The General Assembly of Georgia unwittingly supplied the reason why extension of this right must be recognized. In explaining a resolution condemning the majority Justices of the Supreme Court for their decisions in a series of individual rights cases they stated:

The effect of this decision [the Griffin case] is to place upon each of the states the duty of guaranteeing the financial ability of every communist and felon to exercise constitutional rights.

---

125 Schaefer, "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 10 (1956).
126 A resolution Requesting Impeachment of Six Members of the United States Supreme Court, adopted February 22, 1957.
If this is truly the effect, then the case does indeed fulfill the constitutional guarantee that everyone, including communists and felons, have equal protection of the laws.

Another bright spot in the hope for recognition of the right lies in the consistent striving, by a minority of the Court, for unqualified recognition of the right to counsel. This minority may have gained strength in the present Court. While Mr. Justice Frankfurter continues to be the polestar of those Justices whose judicial lodestone is an ultra-conservative doctrine of judicial-restraint, the adherents of Mr. Justice Black's view continue to consider the protection of individual rights as the Court's highest function. This schism in the Court presently has Justices Clark and Harlan firmly aligned with Justice Frankfurter; Justices Douglas, Brennan and Chief Justice Warren vote with Justice Black.\textsuperscript{127} Justices Whittaker and Stewart cannot accurately be placed in either camp; but it may be significant that neither Justice Whittaker nor Justice Stewart have ever voted against the defendant in a right to counsel case.\textsuperscript{128} This would appear to offer hope that the balance of the Court may now be sufficiently reversed to hold the right to counsel a guaranteed right.

In the present Court it seems apparent that there is at least a willingness to apply the test laid down in the \textit{Betts} case\textsuperscript{129} in a manner favorable to the defendant. Thus, in \textit{Cash v. Culver},\textsuperscript{130} the denial of counsel was held improper due to questions of the admissibility of evidence and impeachment of prosecution witnesses which were "beyond the ken of a layman."\textsuperscript{131} And in the \textit{Spano} case\textsuperscript{132} the concurring opinions\textsuperscript{133} urged that

\begin{itemize}
\item \textsuperscript{127} Only Justices Black and Douglas continue to insist that the Fourteenth Amendment incorporates the Bill of Rights.
\item \textsuperscript{128} Mr. Justice Whittaker did vote against the defendant in Crooker v. California, 357 U. S. 433 (1958), but the holding of this case was that due process does not always require the immediate honoring of a request to obtain one's own counsel immediately following arrest.
\item \textsuperscript{129} Betts v. Brady, 316 U. S. 455 (1942).
\item \textsuperscript{130} 358 U. S. 633 (1959).
\item \textsuperscript{131} \textit{Id.} at 638.
\item \textsuperscript{132} Spano v. New York, 360 U. S. 315 (1959). The deciding opinion reversed on the grounds of a coerced confession.
\item \textsuperscript{133} \textit{Id.} at 324, 326. These were by Justice Douglas joined by Justices Black and Brennan and by Justice Stewart joined by Justices Douglas and Brennan.
\end{itemize}
counsel must be present during police interrogation prior to trial. This, the concurring Justices felt, was necessary to guard against a "kangaroo court" type of midnight inquisition. These liberal views raise the question whether the Court will not now say the same thing in any case where an accused is without counsel. And if this is now the inevitable result it is enigmatic that the Court should not finally settle the issue with a holding parallel to that of the Johnson case.\textsuperscript{134} Perhaps the Court fears the deluge of appeals which would result if such a decision were given retro-active effect.\textsuperscript{135} There may be basis for this fear but it is inadequate to deny the protection of constitutional rights.

**Conclusion**

The present "fair trial" test for the right to counsel is grossly inadequate and illogical. Despite liberal application of the test the Court is still not stating the law as it must exist. The Court can resolve the doubts of many and protect the rights of all by definitively stating the law through one of two modes.

First, Betts v. Brady\textsuperscript{136} may be expressly over-ruled.\textsuperscript{137} Admittedly stare decisis has great merit in adding certainty and consistency to our law but it is not an absolutely binding principle, as Chief Justice Taney stated the doctrine:

\begin{quote}
I ... am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority shall hereafter depend altogether on the force of the reasoning by which it is supported.\textsuperscript{138}
\end{quote}

\textsuperscript{134} Johnson v. Zerbst, 304 U. S. 455 (1942).


\textsuperscript{136} 316 U. S. 455 (1942).

\textsuperscript{137} It is unnecessary for the Court to accept the view of Justices Black and Douglas that the Bill of Rights is incorporated in the Fourteenth Amendment. A basic tenet of both philosophy and logic is that no more is to be accepted than is necessary to achieve the desired result. Hence, it appears these Justices may be committing a tactical error in this respect.

\textsuperscript{138} The Passenger Cases, 7 Howard's Reports 283, 470 (1849).
Mr. Justice Breyer, in 1932, stated the matter with more explicitness:

The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.\(^{139}\)

If the Court chooses not to over-rule precedent they may then employ a type of fiction and find that "fair trial" must include presence of counsel (unless waived), thereby giving lip service to the fair trial test. This type of reasoning is well illustrated by the efforts of Tom Sawyer and Huck Finn in attempting to rescue Jim. To the uninformed mind of Huck some picks the boys had found were the proper tools to use but Tom knew better. From his reading he knew that only case-knives were used in such instances. So, in deference to proprieties, the boys began work with the case-knives but after digging till almost midnight they were tired, their hands were blistered, and they had made little progress. Then Tom's legal mind perceived an idea, he dropped his case-knife and firmly told Huck to give him a case-knife. As Huck tells the rest:

He had his own by him, but I handed him mine. He flung it down and says, "Gimme a case-knife."

I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pick-axe and give it to him, and he took it and went to work and never said a word.

He was always just that particular. Full of Principle.

Here, Tom had re-emphasized one of the oldest discoveries of law. The Court may now adhere to principle—but use the pickaxe.\(^{140}\) They may adhere to the "fair trial" test but recognize that counsel is essential to a fair trial.

\(^{139}\) Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, dissenting opinion at 407-408 (1932).

By either method a desired result will be obtained, at present the Court is tending toward the latter method but there is hope that they may soon "call a spade a spade" and attain the more desirable result by over-ruling the earlier decisions and recognizing the right to counsel.

Such a restatement of the inviolable nature of our fundamental rights will aid in assuring the bright future of our democratic way of life. For, as Nietzsche observed:

Our destiny exercises its influence over us even when, as yet, we have not learned its nature; it is our future that lays down the law of our today.¹⁴¹

¹⁴¹ NIETZSCHE, HUMAN ALL TOO HUMAN, (1878).