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Jerold H. Israel
University of Michigan Law School

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Publication Information & Recommended Citation
Israel, Jerold H. "Gideon v. Wainwright: The Art of Overruling." In The Supreme Court and the Judicial Functions, edited by P. B. Kurland, 73-134. Chicago: Univ. of Chicago Press, 1971.

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THE SUPREME COURT
AND THE
Judicial Function

Edited by

PHILIP B. KURLAND

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO AND LONDON

JEROLD H. ISRAEL

GIDEON v. WAINWRIGHT: THE "ART" OF OVERRULING

During the 1962 Term, the Supreme Court, on a single Monday, announced six decisions concerned with constitutional limitations upon state criminal procedure.[1] The most publicized of these,[2] though probably not the most important in terms of legal theory or practical effect, was *Gideon v. Wainwright.*[3] In an era of constantly expanding federal restrictions on state criminal processes,[4]

Jerold H. Israel is Assistant Professor of Law, University of Michigan.

[1] Four of the decisions dealt directly with the procedure in state criminal cases. See Draper v. Washington, 372 U.S. 487 (1963) (concerning the nature of the record that must be furnished an indigent to afford him an equal opportunity to utilize the state appellate process); Lane v. Brown, 372 U.S. 477 (1963) (rejecting an Indiana law requiring a public defender's approval before an indigent defendant can obtain a free transcript of his trial record which is a prerequisite to an appeal from a denial of a writ of error *coram nobis*); Douglas v. California, 372 U.S. 353 (1963) (requiring the appointment of counsel to assist an indigent in prosecuting a nondiscretionary appeal); and Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring the appointment of counsel for indigent defendants in state noncapital criminal cases). The other two decisions concerned federal habeas corpus for state prisoners. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[2] See, *e.g.*, TIME 17–18 (March 29, 1963); Editorial, Washington Post, March 21, 1963, p. A-22, col. 1.

[3] 372 U.S. 335 (1963).

[4] See Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 192–96 (1958); Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213 (1959); Morris, *The End of an Experiment in Federalism–A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407 (1961).

the holding of *Gideon*—that an indigent defendant in a state criminal prosecution has an unqualified right to the appointment of counsel[5]—was hardly startling.[6] And while *Gideon* will obviously have an important effect in the handful of states that still fail to appoint counsel at the trial level,[7] it has probably caused far less alarm among prosecutors than its sister decisions that relaxed the

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[5] Although the Court had before it only the case of an indigent accused of a felony, there are indications that this holding is designed to extend to "all criminal cases" as does the Sixth Amendment. See note 337 *infra.* The suggestion has been made, however, that the "petty offense" exception that the Court has found applicable to the Sixth Amendment right to jury trial may be applied here. Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values,* 61 MICH. L. REV. 219, 268–70 (1962). But the right to appointed counsel would seem more analogous to other Sixth Amendment rights, such as the right of confrontation, that surely are applicable to all criminal cases. In any event, whether *Gideon* is applied to all misdemeanors or only some, it will require a major extension of the appointment practice in the vast majority of states. See Note, 48 CALIF. L. REV. 501 (1960). See note 7 *infra.*

[6] See Kamisar, note 5 *supra,* at 219–60; Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused,* 30 U. CHI. L. REV. 1, 2–42 (1962); *cf., e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963); Douglas v. California, 372 U.S. 353 (1963); Alcorta v. Texas, 355 U.S. 28 (1957). The impending overruling was so obvious that it was predicted by computers (with only two mistakes as to the position of individual Justices). See Lawlor, *What Computors Can Do: Analysis and Prediction of Judicial Decisions,* 49 A.B.A.J. 337, 343 (1963). See also Pollock, *Equal Justice in Practice,* 45 MINN. L. REV. 737 (1961); Boskey, *The Right to Counsel in Appellate Proceedings,* 45 MINN. L. REV. 783, 787 (1961); *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 54, 116 (1962); and Note, 14 W. RES. L. REV. 370 (1963).

[7] See Ann Arbor News, Aug. 6, 1963, p. 18, col. 4 (4,000 Florida convicts have petitioned for release on the basis of *Gideon*). Kamisar, *supra* note 6, at 17–20, lists Alabama, Florida, Mississippi, and North and South Carolina as the only states in which appointment of counsel in felony cases is neither a legal requirement nor an "almost invariable" court practice. Of course, *Gideon* will affect many more states if it is extended to misdemeanor as well as felony cases. See note 5 *supra.* The retrospective application of *Gideon*—which seems likely, *cf.* Eskridge v. Washington, 357 U.S. 214 (1958)—would also increase the decision's practical significance, although here the impact would be substantially muted by the fact that at least thirty states regularly appointed counsel in felony cases as far back as 1942. See Kamisar, *supra* note 6, at 17. Despite both of these possibilities, twenty-two states presented an *amicus curiae* brief in *Gideon* urging the overruling of Betts v. Brady, 316 U.S. 455 (1942). See 372 U.S. at 336. Included in this group were a few states that had only recently adopted provisions requiring the appointment of counsel. See, *e.g.,* Massachusetts (1958), Colorado (1961).

prerequisites for obtaining a federal writ of habeas corpus[8] and imposed a requirement that states also provide counsel on appeals.[9] What distinguished *Gideon*—and what attracted the attention of the press—was that the result there reached overruled an important prior decision of the Court.[10] *Betts v. Brady*,[11] decided in 1942, had held that the Due Process Clause of the Fourteenth Amendment did not impose upon the states, as the Sixth Amendment imposed upon the federal government, an absolute requirement to appoint counsel for all indigent defendents in criminal cases. It required the states to provide an attorney only where the particular circumstances of a case indicated that the absence of counsel would result in a trial lacking "fundamental fairness."[12] In *Gideon*, the Court explicitly rejected the *Betts* rule and held that the "Sixth Amendment's [unqualified] guarantee of counsel for all indigent defendants" is a "fundamental right . . . made obligatory upon the States by the Fourteenth Amendment."[13] *Gideon* thus joined the ranks of a rather select group of cases. For, despite its widespread reputation as a Court most ready to "disregard precedent and overrule its own earlier decisions,"[14] the Supreme Court in fact has directly overruled prior decisions on no more than a hundred occasions in over

[8] See Fay v. Noia, 372 U.S. 391 (1963); see generally the authorities cited in Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 n.1, 1350 n.120 (1961).

[9] Douglas v. California, 372 U.S. 353 (1963). Only a handful of states, if that many, follow a practice that meets the requirements of *Douglas*. See People v. Brown, 55 Cal.2d 64, 69 n.1, (1960) (concurring opinion of Justice Traynor citing the various state practices). See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 97–111 (1959). Of course, the retrospective application of *Douglas* will require only that the state grant the indigent a new appeal, not a new trial as in *Gideon*.

[10] In Fay v. Noia, 372 U.S. 391 (1963), the Court also overruled a prior decision but not one nearly so renowned.

[11] 316 U.S. 455 (1942). [12] *Id.* at 473. [13] 372 U.S. at 340, 342.

[14] Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55 (1948). See also AUERBACH, GARRISON, HURST & MERMIN, THE LEGAL PROCESS 172 (1961); Catlett, *Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 21 WASH. L. REV. 158, 163 (1946); Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A.J. 961, 962 (1953); 103 CONG. REC. 2935 (1957).

a century and a half of judicial review.[15] And only about half of these instances involved cases, like *Gideon*, in which the Court was dealing with a constitutional question.[16]

Gideon v. Wainwright, moreover, is unique even among this small group of "constitutional" overruling decisions. Division among the Justices has not been uncommon in such cases, but the

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[15] "Direct overruling," as used here, refers only to these instances where (1) the Court's opinion has expressly overruled a prior decision, or (2) subsequent opinions have expressly recognized that the particular decision overruled a prior case, or (3) the occasional case in which the Court has made no effort effectively to distinguish a prior decision and commentators have universally recognized the case as overruling that decision. *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896). A case is not considered directly overruled where its applicability has been sharply limited by subsequent "distinguishing" decisions. See, *e.g.*, Nelson v. County of Los Angeles, 362 U.S. 1 (1960), distinguishing Slochower v. Board of Education, 350 U.S. 551 (1956); and Rutkin v. United States, 343 U.S. 130 (1952), limiting to its facts Commissioner v. Wilcox, 327 U.S. 404 (1946).

Various compilations of overruling opinions are listed in Ulmer, *An Empirical Analyses of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414 n.1 (1959). The most thorough list, that in Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 184–94 (1958), cites eighty-one overruling decisions (excluding rehearings) in the period from 1803 to 1958. Seven cases, cited in Ulmer, *supra*, should, perhaps, be added to this list. Darr v. Burford, 339 U.S. 200 (1950); Graves v. Schmidlapp, 315 U.S. 657 (1942); United States v. Hastings, 296 U.S. 188 (1935); Eisner v. Macomber, 252 U.S. 189 (1920); Thompson v. Whitman, 18 Wall. 457 (1873), Mason v. Eldred, 6 Wall. 231 (1867); United States v. Percheman, 7 Pet. 51 (1833). In addition, there are at least eight overruling cases decided since 1958: Fay v. Noia, 372 U.S. 391 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950); Gideon v. Wainwright, 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1942); Ferguson v. Skrupa, 372 U.S. 726 (1963), overruling Adams v. Tanner, 244 U.S. 590 (1917); AFL-CIO v. Curry, 371 U.S. 542 (1963), overruling Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952); Smith v. Evening News Assn., 371 U.S. 195 (1962), overruling Assn. of Westinghouse Salaried Employees v. Westinghouse Corp., 348 U.S. 437 (1955); Mapp v. Ohio, 367 U.S. 643 (1961), overruling Wolf v. Colorado, 338 U.S. 25 (1949); James v. United States, 366 U.S. 213 (1961), overruling Comm'r v. Wilcox, 327 U.S. 404 (1946); United States v. Raines, 362 U.S. 17 (1960), overruling United States v. Reese, 92 U.S. 214 (1875), and Barney v. City of New York, 193 U.S. 430 (1904). This makes a grand total of 96 "direct overrulings."

[16] Approximately fifty-two of the overruling cases fit this category. Bernhardt, *supra* note 14, at 56–59, cites twenty-nine such decisions (excluding those that either involved rehearings or were based on non-constitutional grounds). To this group should be added twenty-three decisions either in Blaustein & Field, *supra* note 15 or in note 15.

argument in the past always has centered on whether a decision should be overruled.[17] In *Gideon* the Court divided simply over what should be said in overturning a prior decision that every Justice agreed should be rejected. Though Justice Black's opinion for the Court was concurred in by six of his brethren, both Justices Clark and Harlan found it necessary to write separate opinions concurring only in the Court's judgment. Justice Clark did not mention the Court's opinion, but Justice Harlan's objection to that opinion was clearly stated in the first sentence of his concurrence. "I agree," he said, "that *Betts* should be overruled, but consider it entitled to a more respectful burial than has been accorded [by the Court]."[18]

This unique expression of concern over the Court's manner of overruling a past decision raises some basic questions concerning judicial craftsmanship in overruling opinions. What special functions, if any, should the Court seek to accomplish with an overruling opinion? What techniques of opinion writing have been used in the past to fulfill these functions? Did the majority opinion in *Gideon* fail to perform the proper function of an overruling opinion? Would it have done so by giving *Betts* a "more respectful burial"? These are, of course, questions concerning method, not result. Admittedly, as Dean Rostow recently pointed out in answering current criticisms of the Court's craftsmanship, "opinion writing is only one phase of the judicial craft . . . not the whole of it nor even its most important feature."[19] Yet, as even the Dean acknowledged, opinion writing remains a "vital phase" of the judicial process.[20] It is, moreover, a phase which, if the frequency of separate opinions are any indication, causes great concern within the Court itself.

I. The "Art" of Overruling

A. THE TASK OF THE OVERRULING OPINION

The Supreme Court long has recognized that the doctrine of *stare decisis* has only "a limited application in the field of constitu-

[17] The Court has been divided in approximately one-half of the "constitutional" overruling decisions. See Blaustein & Field, *supra* note 15, at 184–94; Bernhardt, *supra* note 14, at 56–59.

[18] 372 U.S. at 349.

[19] Rostow, The Sovereign Prerogative 36 (1962).

[20] *Ibid.* See also Llewellyn, The Common Law Tradition 288–309 (1960).

tional law."[21] The classic explanation of this position was presented by Justice Brandeis in one of his oft-quoted dissents:[22]

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Although persuasive, this explanation speaks only to part of the problem that the Court encounters in overruling constitutional decisions. For the very factor that Brandeis advances to justify abandoning constitutional precedents—the impracticality of "correction through legislative action"—creates certain difficulties of its own, that make the task of overruling a particularly delicate one.

In a nation that prides itself on being a democracy, the absence of any practical legislative process for correcting the Court's constitutional decisions always presents a potential barrier to the complete acceptance of judicial review.[23] To overcome this obstacle, the Court must operate within a framework that maintains

[21] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (concurring opinion of Justices Cardozo and Stone). See also Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962); Passenger Cases, 7 How. 282, 470 (1849) (dissenting opinion of Chief Justice Taney); Jackson, *supra* note 14, at 693. Some commentators have suggested that the principles of *stare decisis* should not be given any consideration in constitutional adjudication. See Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U.L.Q. 589, 601–02 (1931); *cf.* Chamberlin, *Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125 (1890).

[22] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932). In referring to the practical impossibility of correction through legislative action, Brandeis noted that on only two occasions had "the process of constitutional amendment been successfully resorted to, to nullify decisions of this Court." Moreover, even there, it had taken eighteen years to procure one of the amendments. *Id.* at 409 n.5. See also Commissioner v. Estate of Church, 335 U.S. 632, 677 (1949) (dissenting opinion of Justice Frankfurter). But *cf.* Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L. Q. 175, 193 (1962).

[23] See BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962); Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283 (1957). Of course, whether the judicial review is actually characterized as a "democratic institution" will depend to a large degree upon one's definition of democracy. *Compare* ROSTOW, *supra* note 19, at 117–21, 148–56, *with* Dahl, *supra*, at 6.

its image as a disinterested decision-maker applying those fundamental values reflected in the Constitution.[24] A general willingness to adhere to precedent has always been an important aspect of this framework. Certainly, the Court could not have maintained its role as the interpreter of a document that symbolizes continuity if its decisions had, as Justice Jackson once claimed, "a mortality rate almost as high as their authors."[25] Decisions can hardly gain acceptance as based upon the enduring principles of the Constitution without the prospect that they will live an "indefinite while," at least beyond the life expectancy of the Justices deciding them.[26] So too, the view of the Court as an impersonal adjudicator has depended to some degree on the assumption that the judge, unlike the legislator, is sharply restricted in relying upon his personal predilections by the necessity of following the decisions of his predecessors.[27]

The importance of *stare decisis* in promoting an acceptable image of judicial review thus imposes a special burden upon the Court in overruling its prior decision. On one hand, constitutional law, even more than other areas of the law, must be subject to judicial change.[28] And while this often can be achieved by distinguishing or even ignoring inconsistent precedents, there are times when intellectual honesty and proper application of the new rule by the

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[24] See McCloskey, *Foreword, The Reapportionment Case*, 76 HARV. L. REV. 54, 67 (1962); Bickel, *supra* note 23, at 23–29. This, of course, attempts to justify judicial review, not as a majoritarian institution, but rather as an institution performing an essential governmental function which other institutions cannot perform. *Cf.* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92–93 (1953).

[25] Jackson, *The Task of Maintaining Our Liberties: The Role of The Judiciary*, 39 A.B.A.J. 961, 962 (1953). In one sense Jackson was accurate. There have been fewer Justices than there have been opinions overruled. See also Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). For a discussion of the symbolism of the Constitution, see GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 396–407 (1940); Bickel, note 23 *supra*, at 29–31.

[26] See Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 660 (1961).

[27] See WASSERSTROM, THE JUDICIAL DECISION 75–79 (1961); *cf.* Henkin, note 26 *supra*, at 656.

[28] See FREUND, THE SUPREME COURT OF THE UNITED STATES 26 (1961); LEVI, AN INTRODUCTION TO LEGAL REASONING 41–44 (1949).

lower courts require that a prior decision be directly overruled.[29] On the other hand, the overruling decision represents a source of danger to both professional and popular acceptance of the Court as the disinterested interpreter of the Constitution. Even where the end result in a particular case meets with general approval, the rejection of *stare decisis* may well raise doubts both as to the Court's impersonality and as to the principled foundations of its decisions, as evidenced by their lack of "staying power."[30] The overruling decision generally will tend to emphasize the subjective elements in judicial review by focusing attention on the background and personal philosophies of the various justices. This is especially true when the change in the law has occurred over a comparatively short period of time marked by a significant alteration in the Court's personnel.[31] Of course, not every overruling decision will have this effect. And even those that do will not cause the Court to lose overnight the "public faith in its objectivity and detachment" that is the ultimate basis of its authority.[32] Nevertheless, some danger is inherent in almost every overruling decision, and each case that does emphasize the personal and temporary

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[29] See generally Traynor, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 54–55 (Paulsen ed. 1959); LLEWELLYN, THE COMMON LAW TRADITION 257 (1960). In many instances, the Court has been forced to overrule cases explicitly because lower courts had refused to recognize that the case had lost all its vitality. See, *e.g.*, California v. Thompson, 313 U.S. 109 (1941); and Olsen v. Nebraska, 313 U.S. 236 (1941). The technique of direct overruling may also be preferred because it generally insures that a "dead" case will stay buried. *Cf.* Adkins v. Children's Hospital, 261 U.S. 525, 562, 564, 570 (1923) (dissenting opinions of Chief Justice Taft and Justice Holmes commenting upon the revival of *Lochner v. New York*).

[30] See HART & SACHS, THE LEGAL PROCESS 612, 613 (mimeo. 1958); The Legal Tender Cases, 12 Wall. 457 (1870); Boudin, *supra* note 21, at 613–15; note 93 *infra*.

[31] Approximately three-quarters of all overruling cases have reversed cases decided within the previous twenty-five years, Bernhardt, *supra* note 14, at 56–59, and have occurred within a five-year period after significant changes (3 to 6 Justices) in the Court's composition. Ulmer, *supra* note 15 at 434. See also Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia*, 37 TEXAS L. REV. 133, 154–55. Douglas, *supra* note 25, at 736.

[32] Kurland, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457, 466 (1959). In this regard, it is the confidence of the bar that is particularly important. See Shapiro, *The Supreme Court and Constitutional Adjudication of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 605 (1963). Yet it is the bar that most frequently has been critical of departures from precedent.

quality of a judicial rule further tarnishes the image that is necessary to maintain judicial review in a democracy.

Although only occasional opinions by individual Justices have expressly recognized this special problem of the overruling case,[33] an examination of the opinions for the Court in these cases suggests that it has not been overlooked. The Court over the years has employed certain "techniques" in overruling opinions that, as a general pattern, tend to preserve the impersonal qualities of the judicial process by emphasizing factors other than the vicissitudes of changing personnel.

B. THE TECHNIQUES OF OVERRULING

1. *Changing conditions.*—Even those Justices most opposed to overruling constitutional decisions have acknowledged that the "law may grow to meet changing conditions" and that the doctrine of *stare decisis* should not require a "slavish adherence to authority where new conditions require new rules of conduct."[34] It is not surprising therefore that overruling opinions in several cases have emphasized the changed circumstances brought about by the passage of time.[35] Indeed, this technique was employed in one of the earliest overruling decisions, *The Genesee Chief*,[36] which rejected a unanimous holding of the Court decided only twenty-four years earlier in *The Thomas Jefferson*.[37] Chief Justice Taney's opinion for the Court in *The Genesee Chief* refused to follow the prior ruling that the national admiralty jurisdiction was limited, in accord with English common law, to waters that "ebbed and flowed."[38] After stressing that the "great and growing commerce"

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[33] See Pollock v. Farmers' Loan & Trust Co. 157 U.S. 429, 652 (1895) (dissenting opinion); Brown v. Allen, 344 U.S. 443, 535 (1953) (concurring opinion of Justice Jackson); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 487 (1939) (concurring opinion of Justice Frankfurter).

[34] Roberts, J., dissenting, in Mahnich v. Southern S.S. Co., 321 U.S. 96, 113 (1944).

[35] See, *e.g.*, Brown v. Board of Education, 347 U.S. 483, 493–94 (1954); Burstyn v. Wilson, 343 U.S. 495, 502 n.12 (1952); Tigner v. Texas, 310 U.S. 141, 145–46 (1940); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937). This approach has also been employed in non-constitutional cases. See, *e.g.*, United States v. Percheman, 7 Pet. 50, 88–89 (1833).

[36] 12 How. 443 (1851).

[37] 10 Wheat. 428 (1825).

[38] 12 How. at 459.

on inland waters had made the extension of admiralty jurisdiction to non-tidewater areas a practical necessity, he noted that *The Thomas Jefferson* had been decided "when the great importance of the question as it now presents itself could not be foreseen."[39] The earlier decision had been rendered in 1825, "when the commerce on the rivers of the west and on the lakes was in its infancy, and, of little importance, and but little regarded compared with that of the present day."[40] Accordingly, while the Court was "sensible of the great weight" to which its prior decision was entitled, it nevertheless could rightfully overrule *The Thomas Jefferson,* since the reasoning there was clearly inapplicable to the contemporary situation.[41]

Subsequent overruling opinions relying upon changed conditions have emphasized new developments in areas far less pragmatic than the commercial traffic involved in *The Genesee Chief.* In *Brown v. Board of Education,*[42] for example, the Court cited the change in the status of public schools since *Plessy v. Ferguson,* as well as the present state of scientific knowledge about psychological developments of children.[43] Indeed, the growth of knowledge concerning various aspects of economic and social development has been a fairly common point of emphasis in those opinions that have rejected prior precedent on the ground that "time and circumstances had drained [the overruled] case of vitality."[44]

Reliance upon the "changed conditions" argument logically should permit an overruling opinion both to reject a precedent and at the same time acknowledge its correctness when originally decided.[45] The Court has never gone quite this far, however, al-

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[39] *Id.* at 453. Taney also noted that the English common law, on which *The Thomas Jefferson* was based, had developed before the advent of the steamboat.

[40] *Id.* at 456. [41] *Ibid.* [42] 347 U.S. 483 (1954).

[43] *Id.* at 492–94. The Court did not make a specific reference to a change in scientific knowledge since *Plessy,* but did state that "whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson,*" the present findings were "amply supported by modern authority."

[44] Tigner v. Texas, 310 U.S. 141, 144 (1940). See also, *e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937); *cf.* Edwards v. California, 314 U.S. 160, 177 (1941).

[45] "In refusing to follow a precedent a court must not always assert that its predecessor erred. Yesterday's wise decisions were commands for yesterday, but only

though at least one opinion intimated that the writer might have accepted the overruled case under the circumstances applying at the time of its decision.[46] More often, the Court simply has taken no position as to the validity of the rejected case.[47] But even where the Court does suggest that the overruled decision was incorrect, an opinion emphasizing the changed circumstances naturally will contain the countersuggestion that, in any event, the former Court might well have decided differently if confronted with today's conditions.[48] Thus, with the change-in-circumstances rationale, the Court may obtain the best of both worlds. Not only is the prior decision overruled, but the adverse emphasis upon differences in the Court's personnel that normally attends such action is eliminated, or at least diluted, by relying upon grounds consistent with that concept of impersonal decision-making ordinarily supported by *stare decisis.*

2. *The lessons of experience.*—Closely related to the change-in-circumstances rationale is the argument that a prior precedent may be rejected when it has failed to pass the "test of experience."[49] The Court has frequently acknowledged that "the process of trial and error, so fruitful in the physical sciences is appropriate also in the judicial function."[50] This willingness to make adjustments in the light of the "lesson of experience"[51] has been cited as at least a partial ground for overruling precedent on several occasions.[52] In

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instructions for today." Moore & Oglebay, *The Supreme Court, Stare Decisis, and Law of the Case*, 21 TEX. L. REV. 514, 523 (1943).

[46] See Glidden Co. v. Zdanock, 370 U.S. 530, 543 (1962).

[47] See, *e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Edwards v. California, 314 U.S. 160 (1941); Tigner v. Texas, 310 U.S. 141 (1940).

[48] See, *e.g.*, *The Genesee Chief*, 12 How. 443 (1851).

[49] Barden v. Northern Pacific Railroad, 154 U.S. 288, 322 (1894).

[50] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (dissenting opinion). See also Helvering v. Hallock, 309 U.S. 106, 122 (1940); Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957) (concurring opinion); Green v. United States, 356 U.S. 165, 195 (1958) (dissenting opinion); Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A.J. 961, 962 (1953): ". . . the years [have] brought about a doctrine that [constitutional] decisions must be tentative and subject to judicial cancellation if experience fails to verify them."

[51] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (dissenting opinion).

[52] See, *e.g.*, Helvering v. Producers Corp., 303 U.S. 376, 384–85 (1938); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 209 (1930); National Ins. Co. v. Tide-

most cases, the overruling opinion based the rejection of the earlier decision upon the administrative difficulties and uneven results revealed by its application.[53] In other instances, however, experience in the application of a rule has been used to show the erroneous nature of the factual or policy assumption upon which it was based. In *Mapp v. Ohio*,[54] for example, the Court noted that the experience of various states had revealed the error in the supposition that remedies other than the exclusionary rule could effectively deter unreasonable searches and seizures.

In relying upon the "lesson of experience," the Court has once again tended to depreciate changes in its personnel as the cause of the change in the law by either the outright suggestion or, at least, the insinuation that the present result was one that its predecessors might well have reached if they had had the same information, derived from experience under the rule first promulgated.[55] This role of the "experience" rationale may be accentuated by the reminder that "courts are not omniscient"[56] and that "judicial opinions must yield to facts unforeseen."[57] On occasion, it may be further implemented by the conclusion that the result of applying a particular doctrine has been exactly the opposite of that intended by the earlier Court and that the achievement of this original objective can in fact be accomplished only through reversal of the original deci-

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water Co., 337 U.S. 582, 618 (1949) (concurring opinion of Justice Rutledge); and Washington v. W. C. Dawson & Co., 264 U.S. 219, 237 (1924) (dissenting opinion of Justice Brandeis). *Cf.* Helvering v. Hallock, 309 U.S. 106, 110 (1940) (overruling on non-constitutional grounds). See also Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 747 (1949); and Green, *Stare Decisis and the Supreme Court of the United States*, 4 NAT'L B.J. 191, 201 (1946), discussing United States v. Darby, 312 U.S. 100 (1941), which overruled Hammer v. Dagenhart, 247 U.S. 251 (1918).

[53] See, *e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 209 (1930); Helvering v. Producers Corp., 303 U.S. 376, 384–85 (1938). See also the non-constitutional overrulings in New England R.R. v. Conroy, 175 U.S. 323, 341 (1899); Helvering v. Hallock, 309 U.S. 106, 110 (1940).

[54] 367 U.S. 643, 651–52, (1961), overruling Wolf v. Colorado, 338 U.S. 25 (1949); *cf.* Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938).

[55] See Washington v. W. C. Dawson & Co., 264 U.S. 219, 237 (1924) (dissenting opinion of Justice Brandeis).

[56] Green v. United States, 356 U.S. 165, 195 (1958) (dissenting opinion).

[57] Jaybird Mining Co. v. Weir, 271 U.S. 609, 619 (1926) (Justice Brandeis dissenting).

sion itself.[58] Of course, reliance upon difficulties experienced in the application of the overruled case will lose much of its effectiveness in de-emphasizing shifts in the Court's composition when such difficulties were readily foreseeable at the time the problem was first decided. Yet, even here, there remains the remote possibility that problems that may not have seemed very serious when contemplated in the abstract might well have caused a reversal of position when faced as a matter of practical reality.

3. *The requirements of later precedent.*—In the majority of overrulings, the opinions have been based upon neither changing conditions nor the lessons of experience. They have relied simply upon the "error" of the earlier decision.[59] Only a small number of these opinions, however, have relied solely upon the force of reasoning now considered superior to the rationale of the overruled case.[60] The Court generally has attempted to buttress its position by showing that the rejection of the overruled case was required, or at least suggested, by other, later decisions basically inconsistent with its earlier ruling.[61] Examples of the use of this technique in overruling opinions are extremely varied. While most of the "inconsistent precedent" has been found in cases dealing with the same problem as the overruled decision, the Court occasionally has relied upon rulings in related areas that, while not directly questioning the overruled case, could be treated as having "impaired its authority."[62] In *Mapp v. Ohio*, for example, the majority opinion pointed to the basic inconsistency between the Court's refusal to exclude unconstitutionally seized evidence and the required exclusion of

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[58] See Fay v. Noia, 372 U.S. 391, 437 (1963) (non-constitutional overruling).

[59] See, *e.g.*, United States v. Raines, 362 U.S. 17, 25–26 (1960); State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937).

[60] The Court has based its decision solely on the ground that the overruled case was wrong in only about a half-dozen cases. See United States v. Rabinowitz, 339 U.S. 56, 64–66 (1950); Board of Education v. Barnette, 319 U.S. 624 (1943); Madden v. Kentucky, 309 U.S. 83, 93 (1940); O'Malley v. Woodrough, 307 U.S. 277, 281 (1939); Fox Film Corp. v. Doyal, 286 U.S. 123, 131 (1932); The Legal Tender Cases, 12 Wall. 457 (1870).

[61] See, *e.g.*, cases cited note 59 *supra*.

[62] Gore v. United States, 357 U.S. 386, 388 (1958). See Smith v. Allwright, 321 U.S. 649, 659–62 (1944); Mapp v. Ohio, 367 U.S. 643, 656 (1961).

all coerced confessions, irrespective of their reliability.[63] Similarly, in *Smith v. Allwright*,[64] the Court found that its decision in *United States v. Classic*[65] holding that a party primary could be an integral part of the election machinery subject to congressional regulation under Article I, §4 "call[ed] for a re-examination" of its holding in *Grovey v. Townsend*[66] that the action of a political party convention in excluding Negroes from a primary election did not constitute state action.[67]

Overruling opinions also have differed in their treatment of the inconsistency between the earlier ruling and the later precedent. In some cases the Court has acknowledged that the decisions could be reconciled, but found it necessary to overrule the earlier decision because the basis of distinction between the cases was not justifiable in terms of the function of the legal principle involved.[68] More often, the Court has maintained, sometimes in the face of obvious distinctions,[69] that it has no choice but to overrule the earlier decision, since that ruling is totally irreconcilable with subsequent cases.[70] A variation of this approach has been employed in those opinions overruling a principle that had been sharply limited by a long series of cases creating numerous exceptions to its application.[71] In such instances, the overruling opinions, after noting that the later decisions already had "stricken the foundation" from the original case,[72] have asserted the result as merely "a

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63 367 U.S. 643 (1961).

64 321 U.S. 649 (1944).

65 313 U.S. 299 (1941).

66 295 U.S. 45 (1935).

67 321 U.S. at 661.

68 See, *e.g.*, State Tax Comm'n v. Aldrich, 316 U.S. 174, 179 (1942); Sherrer v. Sherrer, 334 U.S. 343, 353 (1948); Helvering v. Mountain Producers Corp., 303 U.S. 376, 383 (1940).

69 See, *e.g.*, United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592 (1941); California v. Thompson, 313 U.S. 109 (1941).

70 See, *e.g.*, the cases cited note 69 *supra;* Graves v. Schmidlapp, 315 U.S. 657, 665 (1942); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937).

71 See, *e.g.*, Graves v. Schmidlapp, 315 U.S. 657 (1942); Graves v. N.Y. *ex rel.* O'Keefe, 306 U.S. 466 (1939); Pennsylvania R.R. v. Towers, 245 U.S. 6 (1917). See also Gordon v. Ogden, 3 Pet. 33 (1830).

72 Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 352 (1949).

logical culmination of a gradual process of erosion."[73] On occasion, the Court has even gone so far as to declare that its previous decision already had been overruled *sub silentio* by the "tide" of later cases.[74]

No matter which of these variations is utilized, the mere presence of these previous decisions indicates that the Court's ruling is not the result of a sudden shift. On the contrary, particularly where the authority of the overruled case was gradually undermined by a series of decisions, the Court may properly emphasize that the downfall of the overruled case was not the product of a "little coterie of like minded justices" recently appointed to the bench,[75] but of a long line of judges who, over the years, participated in the various undermining decisions.[76] This quality of borrowing support from the past also provides what is probably the primary value of the "inconsistent precedent" rationale: a court can overrule a decision while purporting to follow the principles of *stare decisis*. In pointing to subsequent decisions basically at odds with the case to be overruled, the Court places itself in a position where it must choose between two lines of authority. It must either overrule a precedent or "disregard a contrary philosophy expressed in a later case."[77] Moreover, where the inconsistent precedent consists of a group of later cases showing a continuous trend away from the original decision, the Court has suggested that it really has no choice but to follow the path of subsequent decisions and overrule

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[73] Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia,* 37 TEX. L. REV. 133, 155 (1958).

[74] See, *e.g.,* Ferguson v. Skrupa, 372 U.S. 726 (1963); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 187 (1941); Leisy v. Hardin, 135 U.S. 100, 118 (1890).

[75] Allen, *The Supreme Court and State Criminal Justice,* 4 WAYNE L. REV. 191, 192 (1958).

[76] An interesting variation of this approach was employed in Louisville R.R. v. Letson, 2 How. 497, 555 (1844). The opinion there noted: "By no one was the correctness [of the overruled decisions] more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made. . . ." See also United States v. Raines, 362 U.S. 17, 25–26 (1960); Graves v. N.Y. *ex rel.* O'Keefe, 306 U.S. 466, 480–85 (1939); *In re* Ayers, 123 U.S. 443, 487–89 (1887).

[77] Blaustein & Field, *"Overruling" Opinions in the Supreme Court,* 57 MICH. L. REV. 151, 174 (1958).

the original case.[78] As one opinion put it: "No interest which could be served by . . . rigid adherence to *stare decisis* is superior to the demands of a system based on a consistent application of the Constitution."[79] In fact, carried to its limits, the argument based upon the force of subsequent decisions has permitted the Court to disclaim the responsibility for anything more than the formalistic burial of a case already dead.[80]

4. *The place of the overruling art.*—Changing conditions, lessons of experience, and inconsistent later cases clearly have been the basic grounds of overruling decisions. There are very few such cases in which the Court has not employed one or the other.[81] A description of the rationale of overruling opinions would not be complete, however, without mentioning certain other factors commonly emphasized by the Court. Overruling opinions, particularly those relying upon the inconsistency of later decisions, frequently have attempted to depreciate the precedent value of the overruled case even as of the time it was decided.[82] Thus, the opinions often have noted, and sometimes stressed, that the overruled case was decided by a divided Court.[83] Similarly, attention has been focused on the fact that the particular context in which an issue was originally presented had prevented the Court from giving to it the "deliberate consideration" normally afforded significant constitutional issues.[84] Still another point emphasized in overruling opinions

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[78] See, *e.g.*, Scherrer v. Scherrer, 334 U.S. 343 (1948); State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); Graves v. Schmidlapp, 315 U.S. 657 (1942).

[79] Graves v. Schmidlapp, 315 U.S. 657, 665 (1942). See also Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Justice Brandeis dissenting).

[80] See, *e.g.*, Leisy v. Hardin, 135 U.S. 100, 118 (1890); Olsen v. Nebraska, 313 U.S. 236, 244 (1941); Ferguson v. Skrupa, 373 U.S. 726 (1963).

[81] See note 60 *supra*.

[82] See, *e.g.*, East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465, 471–72 (1931); California v. Thompson, 313 U.S. 109, 116 (1941); Thompson v. Whitman, 18 Wall. 457, 464 (1873); see also O'Malley v. Woodrough, 307 U.S. 277, 298 (1939) (noting academic criticism and professional opinion in opposition to the overruled decision).

[83] See, *e.g.*, United States v. Darby, 312 U.S. 100, 115 (1941); United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592, 578 (1941); Gordon v. Ogden, 3 Pet. 33, 34 (1830).

[84] See, *e.g.*, Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 568 (1886); Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 668, n.1 (1944); and Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 480–85 (1939); *cf.* Monroe v. Pape, 365 U.S. 167, 218 (1961) (Frankfurter, J., dissenting).

—with two very notable exceptions[85]—has been the unavailability of a lesser ground that would permit the Court to reach the correct result without overruling its prior decision.[86] Although these factors do not themselves furnish an independent ground for reversing prior decisions, they may effectively supplement the primary arguments based upon changed conditions, experience, or the effect of later cases. The image of the overruling process presented in the Court's opinion still rests, however, essentially upon the use of these basic rationales.

In this regard it should be emphasized that while these arguments obviously improve that image by minimizing the importance of alterations in the Court's composition, they are not mere façades put forth as a matter of good public relations.[87] Differences in viewpoints between present and past members of the Court obviously are important,[88] but changed conditions, the lesson of experience, and the course of later decisions are relevant factors that do and should have considerable bearing upon the Court's determination to overrule a prior decision.[89] As the Court has frequently recognized, the principles of *stare decisis* still have some applicability in the area of constitutional law.[90] There remains, at the least, a

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[85] Mapp v. Ohio, 367 U.S. 643 (1961); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[86] See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 387–88 (1937); Chicago & E. Ill. R.R. v. Industrial Comm'n, 284 U.S. 296, 298 (1932); Williams v. North Carolina, 317 U.S. 287, 292 (1942).

[87] But *cf.* Kadish, *supra* note 73, at 153, suggesting that various attacks upon the "Court's free and easy ways with stare decisis . . . center principally upon the political consideration of adverse public reaction to a too slight regard by the court for its own pronouncements, rather than upon the integrity of the legal principle"; Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 740 (1949); see also Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1310 (1960).

[88] See FRANKFURTER, LAW AND POLITICS 113 (1939); and ROSTOW, THE SOVEREIGN PREROGATIVE 37 (1962). See also Douglas, *supra* note 87, at 736–37.

[89] *Cf.* Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 654–55 (1961); JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM 79–80 (1955).

[90] See, *e.g.*, Green v. United States, 355 U.S. 184, 192 (1957); Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (dissenting opinion of Brandeis, J.): "It is usually more important that a rule of law be settled, than that it be settled right. . . . Often this is true although the question is a constitutional one."

Several examples of constitutional cases in which Justices voted against the position they would ordinarily have taken because of the weight of *stare decisis* are

presumption of validity that attaches to the conclusions expressed in prior opinions.[91] Of course, this may be overcome by a finding that the opposite result is clearly the correct one, but the assumption that the later Court thus has obtained "a knowledge and wisdom . . . denied to its predecessors"[92] naturally carries with it a certain uneasiness. Any doubts of this sort, however, may be substantially lessened if, in addition to the arguments supporting its position, the Court can depreciate the views of its predecessor by showing either that they concerned conditions far different from those of today, that they were made without the information gained through experience in their application, or even that they stand against the tide of the views expressed by other courts over the years. Thus, in relying upon these factors, the Court has merely followed the standard policy of attempting to present the strongest case for the result it has reached, which, in this instance, involves showing not only the reasonableness of its own views but also the inappropriateness of following the contrary views expressed by its predecessor.

The basic patterns of reasoning traditionally employed in overruling cases, therefore, are consistent in all respects with the proper objectives of the judicial opinion. Of course, this is not to suggest that these rationales are suited to every case. There have been overruling decisions, like *The Legal Tender Cases*[93] and *Rabinowitz v. United States*,[94] so patently based on the changes in personnel that no explanation for the overruling other than the difference in the

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cited in Reed, *Stare Decisis and Constitutional Law*, 35 PA. B.A.Q. 131, 137 (1938). *But see* Kadish, *supra* note 73, at 153 n.84.

[91] See cases cited *supra* note 90; *but see* Douglas, *supra* note 87, at 736. This is particularly true where a ruling has been adhered to in a number of subsequent decisions. See, *e.g.*, Green v. United States, 355 U.S. 184, 192 (1957); Gore v. United States, 357 U.S. 386, 392 (1958); Galvan v. Press, 347 U.S. 522, 531–32 (1954); Ullman v. United States, 350 U.S. 422, 437–38 (1956); see also United States v. Rabinowitz, 339 U.S. 56, 85 (1950) (dissenting opinion); Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 630–33 (1895).

[92] Smith v. Allwright, 321 U.S. 649, 667 (1944) (dissenting opinion); see also Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 519–20 (argument of James C. Carter).

[93] 12 Wall. 457 (1870). See Boudin, *Stare Decisis in Our Constitutional Theory*, 8 N.Y.U.L.Q. 588, 612 (1931).

[94] 339 U.S. 56 (1950).

views of the Justices originally in the majority and their successors could reasonably be offered.[95] (It might be noted in passing that neither of these sudden shifts in position did much to enhance the Court's reputation among the bar,[96] and *The Legal Tender Cases* actually "shook popular respect for the Court."[97]) But where these justifications for disregarding precedent are applicable, they should be employed in the interests of both the logical persuasiveness of the Court's position and the maintenance of the profession's confidence–and through it the public's confidence–in the impersonal and principled qualities of the judicial process. It is with this standard in mind that the Court's opinion in *Gideon v. Wainwright* will be analyzed.

II. The Overruling Technique of Gideon v. Wainwright

A. THE TWO OPINIONS

An analysis of the overruling technique employed in *Gideon* must properly begin with the opinion in *Betts v. Brady*.[98] Smith Betts, charged with robbery in a Maryland court, had requested the appointment of counsel to represent him. When the trial court denied the request, Betts pleaded not guilty, waived his right to a jury, and conducted his own defense. Found guilty and sentenced to prison, Betts filed a habeas corpus petition with Chief Judge Bond of the Maryland Court of Appeals alleging that the trial judge's failure to appoint counsel violated the federal Constitution. Judge Bond rejected this claim, and the Supreme Court, on writ of certiorari, affirmed by a vote of six to three. The majority opinion, written by Justice Roberts and concurred in by Chief Justice Stone, and Justices Reed, Frankfurter, Byrnes, and Jackson, was modeled to a large extent upon the opinion of Judge Bond below.[99] The Court's opinion noted at the outset that since the Sixth Amendment applied only to federal courts, Betts's rights would be

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[95] See also Jones v. Opelika, 319 U.S. 103 (1943). For a discussion of that case see Kadish, *supra* note 73, at 154 n.97.

[96] On *The Legal Tender Cases*, see 5 Am. L. Rev. 366 (1870). On *Rabinowitz*, see Note, 49 Mich. L. Rev. 128 (1950).

[97] Hughes, The Supreme Court of the United States 52 (1928).

[98] 316 U.S. 455 (1942).

[99] Record, pp. 29–30 (opinion of Judge Bond).

determined under the Due Process Clause of the Fourteenth Amendment, which was "less rigid and more fluid" than the specific provisions of the Bill of Rights.[100] The question posed by petitioner's argument accordingly was viewed as "whether due process of law demands that in every case, whatever the circumstances, a State must furnish counsel to an indigent defendant."[101] Justice Roberts found that this precise question had never been "squarely adjudicated," though language in some clearly distinguishable opinions did "lend color" to petitioner's contentions.[102]

Turning to the merits of the question, he noted that the Due Process Clause encompassed only those rights that were "fundamental and essential to a fair trial." Whether the absolute right to appointed counsel fell within this category would be determined in the light of the "common understanding of those who lived under Anglo-American system of law."[103] After examining past and present state practices in appointing counsel, Roberts found that, in most states, the "considered judgment" of the people, their representatives and the courts was that "appointment of counsel [was] not a fundamental right . . . essential to a fair trial" but merely a matter of "legislative policy."[104] This judgment, he noted, was sustained by the practice in Maryland. For example, Judge Bond, in his opinion below, had stated that his experience presiding over more than 2,000 cases "had demonstrated . . . that there are fair trials without counsel employed for prisoners."[105] Justice Roberts concluded that "while want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness," the Court could not "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."[106] Due process only requires that counsel be

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[100] 316 U.S. at 462. [101] *Id.* at 464; see also *id.* at 462.

[102] *Id.* at 462–63. [103] *Id.* at 464, 465. [104] *Id.* at 471.

[105] *Id.* at 472 n.31. This statement was cited to supplement the Court's argument, also advanced by Judge Bond below, that non-jury trials in Maryland were conducted on a more informal basis and the trial judge was "in a better position to see impartial justice done than when the formalities of a jury trial are involved." *Id.* at 472.

[106] *Id.* at 473. The Court also stressed that acceptance of such a position would require appointment of counsel in all types of cases, including small crimes tried

provided where the special circumstances of the individual case indicate that the absence of legal representation would deprive the defendant of a fair trial. Justice Roberts found no evidence that the case before him fell within this category. His opinion emphasized that Betts had had a non-jury trial, which left the judge more leeway to "see impartial justice done," and that the case had presented only the "simple issue" of veracity of conflicting testimony that an adult with Betts's background could adequately handle himself.[107]

Justice Black wrote a dissenting opinion in *Betts* that was joined by Justices Murphy and Douglas. He argued that the Fourteenth Amendment automatically made the Sixth Amendment "applicable to the States,"[108] but that the right to appointment of counsel was constitutionally protected even under the majority's view of the Due Process Clause, since it was a "fundamental right." In support of this conclusion the dissent quoted from various cases recognizing the importance of counsel, including Justice Sutherland's opinion for the Court in *Powell v. Alabama.*[109] Justice Black also emphasized that most of the states, thirty-five by his count, had recognized the fundamental nature of the right to counsel by "constitutional provisions, statutes, or established practice judicially approved, which assure that no man shall be deprived of counsel merely because of his poverty."[110] The dissent also mentioned that Betts was "a farm hand . . . out of a job and on relief," and that he had "little education," but no attempt was made to cite specific instances at the trial where Betts might have been prejudiced by the absence of counsel.[111]

Justice Black wrote again in *Gideon v. Wainwright,*[112] but this time it was an opinion for the Court joined by Justice Douglas, a fellow dissenter in *Betts,* and five Justices appointed in the twenty-

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before justices of the peace and "presumably" even offenses tried in traffic court. In fact, the Court argued, "the logic of the petitioners' position would even require appointment of counsel in civil cases." *Ibid.*

[107] *Id.* at 472, 473.

[108] *Id.* at 474. This was the position he later developed more fully in Adamson v. California, 332 U.S. 46, 71–72 (1947).

[109] 287 U.S. 45 (1932).

[110] *Id.* at 477. See note 318 *infra.*

[111] *Id.* at 474.

[112] 372 U.S. 335.

two-year interim since *Betts*.[113] Clarence Gideon, like Smith Betts, was an indigent convicted of a felony (breaking and entering with intent to commit a misdemeanor) in a state (Florida) court. Like Betts he had made a request for the assignment of counsel that had been rejected. Again like Betts, Gideon had pleaded not guilty and had conducted his own defense; but his trial was before a jury. Found guilty and sentenced to five years' imprisonment, he filed a writ of habeas corpus in the Florida Supreme Court that was rejected. The United States Supreme Court then granted certiorari, its order directing counsel "to discuss in their briefs and oral arguments the following: Should this Court's holding in *Betts* v. *Brady* . . . be reconsidered."[114]

Justice Black's opinion in *Gideon* started out by employing one of the common techniques of overruling opinions. Noting the various similarities in the fact situations of *Betts* and *Gideon*, he found the two cases "so nearly indistinguishable" that "the *Betts* v. *Brady* holding if left standing would require [the Court] . . . to reject Gideon's claim."[115] Accordingly, the Court was compelled to reconsider the validity of the *Betts* decision. On this score, the opinion accepted "the *Betts* v. *Brady* assumption, based as it was on . . . prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon States by the Fourteenth Amendment."[116] It disagreed, however, with the conclusion "that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights." Support for this disagreement was found primarily in pre-*Betts* precedents. Justice Black pointed out that, ten years before *Betts*, in *Powell v. Alabama*, "[the] Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that the 'right to the aid of counsel is of this fundamental character.' "[117] He also noted that seven years later in *Grosjean v. American Press Co.*,[118] the "right of the accused to the aid of counsel in a criminal prosecution" had been

[113] Chief Justice Warren, and Justices Brennan, Stewart, White, and Goldberg.

[114] 370 U.S. 908. *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961).

[115] 372 U.S. at 339. The Court did not mention the difference between the jury trial in *Gideon* and the non-jury trial in *Betts*, although the *Betts* Court had stressed that factor. See 316 U.S. at 474.

[116] 372 U.S. at 342. [117] *Id.* at 342–43. [118] 297 U.S. 233 (1936).

listed as one of those fundamental rights of the first eight Amendments that were "safeguarded against state actions by the due process clause of the Fourteenth Amendment."[119] Similar support was found in *Johnson v. Zerbst*,[120] *Avery v. Alabama*,[121] and *Smith v. O'Grady*,[122] other cases decided before *Betts*. The opinion concluded that "the Court in *Betts* v. *Brady* [had] made an abrupt break with its own well considered precedents." "In returning to these old precedents" the present Court was merely "restor[ing] constitutional principles established to achieve a fair system of justice."[123]

Justice Black's opinion went on to find that the rejection of the *Betts* rule was supported "not only" by these pre-*Betts* precedents but also by "reason and reflection." The absolute necessity of the assistance of counsel in order to obtain a fair trial was, he stated, "an obvious truth," evidenced by the fact "that government hires lawyers to prosecute and defendants who have money hire lawyers to defend."[124] As a further illustration of this absolute need for counsel, Justice Black quoted with approval the following passage from Justice Sutherland's opinion in *Powell* (which had also been cited in his *Betts* dissent):[125]

> 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. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

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[119] 372 U.S. at 343, quoting from 297 U.S. 233, 243–44.

[120] 304 U.S. 458 (1938).

[121] 308 U.S. 444 (1940).

[122] 312 U.S. 329 (1941).

[123] 372 U.S. at 344.

[124] *Id.* at 344.

[125] *Id.* at 344–45, quoting 287 U.S. at 68–69.

Justice Black concluded by noting that *Betts v. Brady*, having "departed from the sound wisdom" of *Powell*, had been "an anachronism when handed down"[126] and was now properly overruled.

Although the decision to overrule *Betts* was unanimous, there were three separate opinions by individual Justices. A short concurring opinion by Justice Douglas was concerned solely with the general relationship of the Bill of Rights and the Fourteenth Amendment.[127] The opinions of the other two Justices, however, dealt with the indigent's right to counsel and the overruling of *Betts.* Justice Clark concurred in the final judgment on the grounds that the Court should no longer distinguish between defendants in non-capital cases like *Gideon* and those in capital cases, where the right to appointment of counsel was absolute.[128] Justice Harlan's concurrence, as previously mentioned, was critical of the Court's treatment of the *Betts* decision, particularly the charge that it had departed from prior precedent. Justice Harlan would have overruled *Betts* on the ground that the rule of that case "was no longer a reality," having been eaten away by exceptions, and that its formal rejection was necessary to clarify lower court appreciation of the actual state of the law.[129]

B. BETTS AS A DEPARTURE FROM PRECEDENT

Justice Black's opinion in *Gideon* relied essentially on two points: Betts was clearly erroneous as a matter of reason and *Betts* itself had been an "abrupt" departure from well-established prior decisions. The first point represents, of course, the basic argument of most overruling cases.[130] It could, perhaps, have been stated more persuasively,[131] but, in any event, it expresses no more than the dis-

[126] 372 U.S. at 345. Justice Black noted that this characterization of *Betts* was suggested by the twenty-two states that argued *amicus curiae* for the overrule of that case. The language was used in the states' brief in describing the relation of *Betts* to the state practices at the time that case was decided.

[127] *Id.* at 345.

[128] *Id.* at 347–49.

[129] *Id.* at 350–52.

[130] See text at note 39 *supra.*

[131] In particular, the state's customary employment of a lawyer as prosecutor hardly seems the most compelling argument for the proposition that "the accused cannot be assured a fair trial unless counsel is provided for him." *But see* Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court,* 46 MICH. L. REV. 869, 883 (1948).

agreement of the present members of the Court with the logic of their predecessors. The dominant characteristic of overruling opinions has been, however, the Court's consistent reliance upon more than just the alleged superiority of the views of its present membership as the basis for rejecting a precedent. In *Gideon*, this supplementary support for overruling obviously must come, if at all, from the second point of the Court's opinion.

The contention that "the Court in *Betts* v. *Brady* made an abrupt break with its own well considered precedents"[132] represents another form of the common practice of depreciating the original significance of the rejected case. It has been used infrequently before.[133] Overruled cases have been characterized previously as a "sport in the law,"[134] an "arbitrary break with the past,"[135] and simply as a "departure" from well-accepted principles.[136] The objective of this emphasis upon inconsistency with earlier decisions is much the same as that rationale based upon inconsistency with later decisions. The Court is placed in a position to reject a precedent and at the same time claim adherence to *stare decisis*. As one opinion put it, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."[137] Accordingly, though the tactic of emphasizing the abrupt departure of the overruled decision from prior precedent may not provide the "more respectful

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132 372 U.S. at 344.

133 See United States v. Darby, 312 U.S. 100 (1941); California v. Thompson, 313 U.S. 109, 115-16 (1941); State Tax Comm'n v. Aldrich, 316 U.S. 174, 179 (1942); see also Helvering v. Hallock, 309 U.S. 106, 114-15 (1940) (non-constitutional overruling); *cf.* United States v. Rabinowitz, 339 U.S. 56, 64-65 (1950). The criticism on this level is likely to be much more severe in a concurring opinion than in the Court's opinion. *Compare* Williams v. North Carolina, 317 U.S. 287, 297 (1942), *with id.* at 307 (Frankfurter, J., concurring), and State Tax Comm'n v. Aldrich, 316 U.S. 174, 179 *with id.* at 183 (1942) (Frankfurter, J., concurring).

134 Screws v. United States, 325 U.S. 91, 112-13 (1945).

135 Williams v. North Carolina, 317 U.S. at 307 (concurring opinion).

136 California v. Thompson, 313 U.S. at 116.

137 Helvering v. Hallock, 309 U.S. at 119; see State Tax Comm'n v. Aldrich, 316 U.S. at 183.

burial" that Justice Harlan requested,[138] it serves to characterize the Court's decision as an automatic correction of a rare judicial freak independently of any change in the Court's personnel.

While the "departure-from-precedent" rationale employed in *Gideon* is thus an effective overruling technique, its applicability to the *Gideon* situation is highly questionable. *Betts v. Brady*, whatever its other defects, is not a very likely candidate for the role of an eccentric among precedents. The Court's opinion in *Gideon* stressed particularly the inconsistency between *Betts* and *Powell v. Alabama*, but a close reading of *Powell* seems to support Justice Harlan's view that *Betts* fell well within the basic pattern cut by the *Powell* opinion.[139] Justice Black's analysis seems to ignore the fact that *Powell* dealt primarily with the historically separate right of the individual to employ his own counsel,[140] and it was only in the last few pages of Justice Sutherland's lengthy opinion that he considered the state's duty to appoint counsel.[141] Thus, Justice Black stresses that *Powell*, after examining the same history as *Betts*, had declared that the right to counsel was "fundamental,"[142] but both the historical analysis and the cited declaration were made concerning the right to employ counsel.[143] When the *Powell* opinion turned to the state's duty to appoint counsel, it carefully restricted its ruling to the type of situation presented by the case before the Court: "a capital case . . . where the defendant . . . is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like."[144] Justice Black

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138 372 U.S. at 349. See text at note 18 *supra.*

139 *Id.* at 341–43, 349–50.

140 Allen, *The Supreme Court, Federalism, and State Criminal Justice*, 8 De Paul L. Rev. 213, 224 (1959); *cf.* Freund, The United States Supreme Court 50–58 (1961).

141 287 U.S. at 71–73.

142 372 U.S. at 343, citing 287 U.S. at 68.

143 287 U.S. at 60–68. See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L. J. 319, 329 (1957). *But cf.* Green, *supra* note 131, at 879. It should be noted that several of the state cases cited by Justice Sutherland as "recogniz[ing] the right to the aid of counsel as fundamental" did involve appointed counsel, although the issue usually concerned matters such as failure to grant counsel sufficient time to prepare his case. See, *e.g.*, State v. Ferris, 16 La. Ann. 424 (1862); Sheppard v. State, 165 Ga. 460, 464 (1928); and State v. Moore, 61 Kan. 732, 734 (1900). The Court later described the right to appointment of counsel under the particular facts of the *Powell* case as fundamental. 287 U.S. at 73.

144 287 U.S. at 71.

discounted this restriction as an example of the Court's customary practice of formally limiting its holdings,[145] a factor that did not detract from the opinion's conclusion concerning the fundamental nature of the right to counsel. Leaving aside the question how readily such a standardized restriction should be disregarded,[146] the fact is that the discussion of the state's duty to appoint counsel in *Powell* was not limited merely by the usual incidental remark at the end of the opinion concerning the scope of Court's ruling (as was the case with respect to the Court's discussion of the right to employ counsel). The restriction of the duty to appoint counsel to circumstances involving illiterate or otherwise incapable defendants was repeated throughout the Court's discussion.[147] Surely, the Court in *Powell* would not have so continuously emphasized these factors if a broader rule had been intended.[148]

This reading of *Powell* is supported by the context in which that case arose as well as by the language of the opinion. *Powell* was, after all, one of the first, if not the first, of the "modern" procedural due process cases.[149] The duty to appoint counsel involved a previously unconsidered area, unmentioned in petitioners' excellent brief,[150] and obviously containing various unforeseen possibilities as to scope and application. Under these circumstances, it would have been unusual for the Court even to suggest establishing a flat rule requiring appointment in all cases.[151] In keeping with the traditional appellate function in a case of first impression,[152] Justice Sutherland obviously sought to decide the particular question be-

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[145] 372 U.S. at 343.

[146] *Cf.* Allen, *supra* note 140, at 224, on the importance of such limitation to "the operation of the judicial process in a Fourteenth Amendment case."

[147] 287 U.S. at 71–73. Within the space of a few pages, the Court made over a half-dozen references to the special circumstances that entitled defendants to appointed counsel.

[148] *Cf., e.g.,* Johnson v. Zerbst, 304 U.S. 458 (1937).

[149] Allen, *supra* note 140, at 223.

[150] Brief for Petitioners, pp. 48–60. The brief relied on many grounds in addition to the counsel problem.

[151] This is particularly true when one considers that Sutherland was author of the opinion. See Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15, 19 (1951).

[152] LLEWELLYN, THE COMMON LAW TRADITION 306–10 (1960).

fore him while at the same time allowing for such future growth as the Court might later find desirable.[153] Thus, the emphasis upon the right to a fair hearing rather than the specific terms of the Sixth Amendment provided for the possibility of a flexible expansion of the right to appointed counsel in keeping with the Court's view of due process.[154] This cautious approach was taken even in the opinion's eloquent description of the defendant's need for counsel that Justice Black quoted at length in *Gideon*.[155] Justice Sutherland's statement was carefully limited by its first sentence:[156] "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." *Powell v. Alabama* provided a steppingstone to either a *Betts* or a *Gideon*, depending upon how far and how fast the Court utilized the opinion's potential for expansion.[157] Certainly, neither would have been an "abrupt break" from the precedent, or even the "wisdom," of the *Powell* decision.[158]

The other pre-*Betts* cases cited in *Gideon* scarcely furnish any more support for the Court's characterization of *Betts* as an "abrupt break" from precedent. Admittedly, the portion of the *Grosjean* opinion quoted by Justice Black did describe *Powell* as holding

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[153] Thus, the *Powell* opinion has been described as a "model" of the traditional due process approach of deciding the case at hand while providing for expansion. Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 192 (1958). See also Fellman, *supra* note 151; BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 155 (1955).

[154] See Allen, *supra* note 153, and Fellman, *supra* note 151.

[155] See BEANEY, *op. cit. supra* note 153, at 155. This section of Justice Sutherland's opinion has been quoted often in later opinions. See, *e.g.*, Williams v. Kaiser, 323 U.S. 471, 475 (1945); Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Bute v. Illinois, 333 U.S. 640, 680 (1948) (Douglas, J., dissenting).

[156] 287 U.S. at 68–69. (Emphasis added.)

[157] Allen, *supra* note 140, at 225.

[158] "Commentators were rather cautious in estimating (Powell's) effect." BEANEY, *op. cit. supra* note 153, at 156. The possible extension of the *Powell* reasoning to all felony cases was not always recognized. See Ireton, *Due Process in Criminal Trials*, 67 U.S.L. REV. 83 (1933); Nutting, *The Supreme Court, the Fourteenth Amendment and State Capital Cases*, 3 U. CHI. L. REV. 244 (1936). Where it was anticipated, such an extension was usually treated as something less than a foregone conclusion. Comment, *Constitutional Law–Due Process and Equal Protection–The Right to Counsel*, 31 MICH. L. REV. 245 (1932); Note, 17 MINN. L. REV. 415 (1933); Note, 22 VA. L. REV. 957 (1936); 18 IA. L. REV. 383 (1933); 81 U. PA. L. REV. 337 (1933); 18 ST. LOUIS L. REV. 161 (1933).

that "the right of an accused to the aid of counsel" was "fundamental,"[159] but here again the reference was probably to the right to employ counsel.[160] In any event, a short statement in a free-speech case attempting to illustrate the relationship between the Bill of Rights and the Fourteenth Amendment can hardly be taken as a significant authority on the scope of the indigent's right to appointed counsel.[161] The ambiguous nature of the *Grosjean* type of statement is well illustrated by a similar discussion of the scope of the Fourteenth Amendment in *Palko v. Connecticut*,[162] a pre-*Betts* decision which Justice Black did not cite. In *Palko*, Justice Cardozo described *Powell* in almost the same terms as *Grosjean* when he listed the various rights protected by the Fourteenth Amendment,[163] but, at another point, he recognized, and indeed stressed, that *Powell* "had turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."[164] *Smith v. O'Grady*[165] and *Avery v. Alabama*,[166] other cases cited in *Gideon*, have essentially the same weakness in terms of their precedental significance as does *Grosjean*.[167] In *Avery* there was an ambiguous suggestion that the refusal to appoint counsel would have been a denial of due

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159 "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." Grosjean v. American Press Co., 297 U.S. 233, 243–44 (1936).

160 *But see* Note, *Betts v. Brady*, 21 CHI.–KENT L. REV. 107 (1942). It is interesting to note that Justice Roberts, who wrote *Betts*, described *Powell* in approximately the same terms in his dissent in Snyder v. Massachusetts, 291 U.S. 97, 133 (1934).

161 The Court there held that a privilege tax levied on a publisher violated the freedom of the press protected under the Due Process Clause of the Fourteenth Amendment. 297 U.S. at 244–45.

162 302 U.S. 319, 324 (1937).

163 *Id.* at 324–25.

164 *Id.* at 327. See Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869, 873 n.24 (1948), suggesting that this difference in description was "apparently intended to distinguish between the right to representation by counsel, with its corollaries, and the right of appointment of counsel for the indigent accused."

165 312 U.S. 329 (1941).

166 308 U.S. 444 (1940).

167 "[*Smith and Avery*] did not significantly expand or clarify the law as it had been left by the decision of *Powell*." Allen, *supra* note 140, at 225.

process, but this was only an offhand remark of an opinion concerned solely with the denial of appointed counsel's request for a continuance.[168] Similarly, in *Smith,* the failure to appoint counsel was only one of numerous allegations held to add up to a denial of due process in a fact situation similar to that in *Powell.*[169]

The remaining case cited by Justice Black, *Johnson v. Zerbst,*[170] provides his strongest support, but hardly goes so far as to make *Betts* an aberration. The Court in *Johnson* specifically characterized the indigent's right to appointment of counsel as a "fundamental human right" based upon the "obvious truth that the average defendant does not have the professional legal skill to protect himself."[171] *Johnson,* however, dealt with the federal courts, and the Court there spoke solely in terms of the right to appointment under the Sixth Amendment.[172] *Powell,* and later cases like *Palko,* on the other hand, repeatedly had emphasized the limited relevance of the specific terms of the Bill of Rights in determining standards applicable to state courts under the Fourteenth Amendment.[173] So, while *Johnson* might have had the force of a persuasive analogy, it was hardly a binding precedent insofar as the right to appointed counsel under the Due Process Clause was concerned.[174]

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168 Although counsel had been appointed, the opinion (by Justice Black) noted that "[h]ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required a reversal of his conviction." 308 U.S. at 445. The Court cited *Powell v. Alabama* as direct authority for this statement. *Avery* like *Powell* was a capital case, but the opinion did not recite any special disabilities of the defendants as found in *Powell.*

169 The petitioner there charged that "he had been denied any real notice of the true nature of the charge against him . . . that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years life imprisonment; that his request for the benefit and advice of counsel had been denied by the court and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel. . . ." 312 U.S. at 334.

170 304 U.S. 458 (1938).

171 *Id.* at 462–63.

172 *Ibid. But cf.* Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values,* 61 MICH. L. REV. 219, 245 (1962).

173 See Palko v. Connecticut, 302 U.S. 319, 323–28 (1937); Brown v. Mississippi, 297 U.S. 278, 285 (1936); Powell v. Alabama, 287 U.S. 45, 66–68 (1932); see also Snyder v. Massachusetts, 291 U.S. 97, 105–06 (1934).

174 Justice Black also referred to "many other prior decisions," but did not mention which ones he had in mind. There were only a few other decisions that

In sum, even with *Johnson*, Justice Roberts' description of the pre-*Betts* decisions as only "lend[ing] color" to the argument for an unqualified constitutional right to appointed counsel would seem more accurate than Justice Black's position that these decisions logically and as precedents compelled enunciation of such a right in *Betts*.[175] Certainly, one might well have predicted, as some commentators did,[176] that the Court would impose the same requirement for the appointment of counsel upon the states as it had imposed upon the federal government. On the other hand, the great significance which the Court had attached to the *Palko* doctrine constituted a clear warning that any such assumption was highly speculative.[177] This uncertainty in the law prior to *Betts* was perhaps best reflected by the split in the several lower court decisions dealing with the right to appointed counsel during the period between *Johnson* and *Betts*.[178] If there was a clear precedent from which *Betts* could depart, it certainly was not recognized by these decisions, most of which adopted the *Betts* analysis.[179]

Finally, even if *Betts* had been an aberration when decided, Justice Black's emphasis upon this "abrupt break" with precedent could hardly achieve the usual objective of that overruling technique in the context of the *Gideon* situation. The effectiveness of this argument in depicting the overruling decision as part of a natural process of eliminating occasional "sports" in the law necessarily requires that the overruled decision fit within the concept of

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cited *Powell* and they added nothing. See, *e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); Glasser v. United States, 315 U.S. 60, 70 (1942). Other cases like Walker v. Johnson, 312 U.S. 275 (1940), dealt solely with the Sixth Amendment.

[175] *Cf.* Allen, *supra* note 140; Comment, 23 TEXAS L. REV. 66 (1944); Note, 31 ILL. B.J. 139 (1942). *But see* Note, 21 CHI.-KENT L. REV. 107 (1942).

[176] See BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 170 (1955); Note, *The Indigents Right to Counsel and the Rule of Prejudicial Error*, 97 U. PA. L. REV. 855 (1949); ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 811 (1939).

[177] Consider also Adamson v. California, 332 U.S. 46 (1947), and Ward v. Texas, 316 U.S. 547 (1942).

[178] *Compare* Commonwealth *ex rel.* Shaw v. Smith, 147 Pa. Super. 423 (1942); Wilson v. Lanagan, 99 F.2d 544 (1st Cir. 1938), affirming 19 F. Supp. 870 (D. Mass. 1937), *cert. denied,* 306 U.S. 634 (1939); Gall v. Brady, 39 F. Supp. 504 (D. Md. 1941); and Coates v. State, 180 Md. 502 (1942), *with* Boyd v. O'Grady, 121 F.2d 146 (8th Cir. 1941), and Carey v. Brady, 125 F.2d 253 (4th Cir. 1942).

[179] See the first group of cases cited *supra* note 178; see also Lyons v. State, 77 Okla. Cr. 197 (1943); House v. State, 130 Fla. 400 (1937).

a judicial oddity. The development of the law since *Betts* was decided, however, made it impossible in 1963 to treat *Betts* as an "isolated deviation from the strong current of precedents."[180] During the twenty-two years of its existence, the *Betts* rule had frequently been acknowledged by the Court, once after a "full scale re-examination"[181] and often over vigorous dissents.[182] It was hardly the "derelict on the waters of the law"[183] that customarily has been the subject of the "departure-from-precedent" reasoning. Thus, if Justice Black had desired to offer some support for rejecting *Betts* beyond the alleged superiority of the Court's present reasoning, he would have best looked to the traditional overruling rationale based upon changed circumstances, the lessons of experience, or the requirements of later precedent.

III. THE ALTERNATIVES AVAILABLE IN GIDEON

A. THE FORCE OF SUBSEQUENT DECISIONS

The overruling rationale most clearly applicable in *Gideon* was that based upon the force of inconsistent later decisions. There were abundant instances where *Betts* had been undermined by subsequent decisions dealing either with the right to appointed counsel itself or with related problems.

1. *The unqualified right to hire counsel.*—In a series of post-*Betts* decisions, most notably *Chandler v. Fretag*,[184] the Court had clearly established prior to *Gideon* an "unqualified" right of the individual to retain counsel at his own expense.[185] Unlike the right

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[180] Lambert v. California, 355 U.S. 225, 232 (1957).

[181] Allen, *supra* note 140, at 227, referring to Bute v. Illinois, 333 U.S. 640 (1948), which affirmed the *Betts* doctrine.

[182] See, *e.g.*, Foster v. Illinois, 332 U.S. 134 (1947); Bute v. Illinois, *supra* note 181; Gryger v. Burke, 334 U.S. 736 (1947); see also Gayes v. New York, 332 U.S. 145 (1947). The failure of the Court to "squarely cite *Betts* as a constitutional precedent" for the first few years of its life had suggested that it might indeed become a "sport in the law." See Allen, *supra* note 140, at 227; see also Mayo v. Wade, 158 F.2d 614 (5th Cir. 1946). But this possibility was eliminated by a series of later decisions, including *Bute*. See Allen, *id.* at 226–32; see also Carter v. Illinois, 329 U.S. 173 (1946).

[183] Lambert v. California, 355 U.S. at 232.

[184] 348 U.S. 3 (1954); see also Ferguson v. Georgia, 365 U.S. 570 (1960); Reynolds v. Cochran, 365 U.S. 525 (1961); Hawk v. Olson, 326 U.S 271 (1945); House v. Mayo, 324 U.S. 42 (1945).

[185] 348 U.S. at 9–10.

to appointed counsel under *Betts*, the defendant's right here did not depend on his showing that the lack of legal assistance would deprive him of a fair trial. Three years before *Gideon*, two members of the Court had already suggested that the decisions establishing this uniqualified right to employ counsel had removed any logical basis for the qualified right to the appointment of counsel under *Betts*.[186] The potential difficulty with this argument, however, lies in its assumption that both rights are based on the same policy.

Any rule governing the right to appointed counsel will necessarily be aimed at achieving that objective of procedural due process that Professor Kadish has characterized as "insuring the reliability of the guilt-determining process" by "reducing to a minimum the possibility that an innocent individual will be punished."[187] *Betts* accepted this goal, but assumed that counsel was not always needed to achieve the "fair trial" that it demands. The right to retain counsel obviously is designed to achieve this same objective,[188] and, if that were its only function, then the unqualified nature of this right clearly would be inconsistent with the premise of *Betts*. For, if the use of one's own counsel is always necessary to insure a fair trial, then certainly the use of appointed counsel must fall in the same category—a defendant's need for counsel does not vary directly with his ability to afford one.[189]

The right to employ one's own counsel, however, is also based upon an additional value quite different from insuring reliability of the guilt-determining process and not involved in the right to appointed counsel. In cases like *Chandler* the Court is dealing not merely with the state's duty to insure the fairness of the trial but also with the state's interference with the individual's desire to defend himself in whatever manner he deems best, using any legiti-

[186] McNeal v. Culver, 365 U.S. 109, 117 (1960); see also Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 244 (1962); *cf. The Supreme Court, 1961 Term*, 76 HARV. L. REV. 115 (1962).

[187] Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957); see also Carter v. Illinois, 329 U.S. 173, 174 (1946); and Kamisar, *supra* note 186, at 219, 230.

[188] Kamisar, *supra* note 186, at 228–30. See Ferguson v. Georgia, 365 U.S. 570 (1960); Reynolds v. Cochran, 365 U.S. 525 (1961).

[189] In fact, it may be argued that the indigent has a greater need for counsel. See Kamisar, *supra* note 186, at 227.

mate means within his resources.[190] In other words, what is involved here is a principle that fits within that category of procedural due process rights designed to insure "respect for the dignity of the individual."[191] The presence of this separate interest as a basis for the defendant's right to retain counsel is suggested in some of the earlier state constitutional guarantees that are phrased in terms of the individual's right to represent himself.[192] It is more clearly illustrated by the situation in which an accused refuses either to hire counsel or accept an appointed counsel and insists upon conducting his own defense.[193] The Court here must consider not only the need for a lawyer in order to preserve the reliability of the guilt-determining process but also the possibly conflicting interest of the individual in determining the means of his own defense.

This dual basis for the individual's right to retain counsel could completely undermine the argument for rejecting *Betts* as inconsistent with later cases like *Chandler*. If the unqualified nature of the right were founded upon this second due process value rather than upon the objective of insuring a reliable guilt-determining process, then the different rules for the right to employ counsel and the right to appointed counsel could be easily reconciled. Language in the cases following *Chandler*, however, indicates that the absolute nature of the right to retain counsel probably has been grounded solely upon the need to insure a reliable guilt-determining process.[194] The opinions in these cases particularly have stressed the importance of counsel to assure the defendant a fair trial. In the light of this emphasis, the decisions establishing an absolute right to retain counsel certainly provided as strong a basis for reconsidering and overruling *Betts* as *Classic* provided with respect

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[190] *Cf. id.* at 228.

[191] Kadish, *supra* note 187, at 347. As to the "hybrid" quality of the values served by many procedural rights, see Kamisar, *supra* note 186, at 238–39.

[192] BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18–22 (1955).

[193] People v. Mattson, 51 Cal.2d 777 (1959); Linden v. Dickson, 278 F.2d 755 (9th Cir. 1960); Reynolds v. United States, 267 F.2d 235 (9th Cir. 1959); *cf.* Cannon v. Gladden, 203 F. Supp. 504 (D. Ore. 1962).

[194] See, *e.g.*, Reynolds v. Cochran, 365 U.S. 525, 532–33 (1961); Ferguson v. Georgia, 365 U.S. 570, 594–95 (1961); see also Chandler v. Fretag, 348 U.S. 3, 9–10 (1954).

to *Grovey v. Townsend*, or the coerced confession cases with respect to *Wolf v. Colorado*.[195]

2. *Betts and Equal Protection*.–If *Chandler v. Fretag* and its progeny had not "removed the underpinnings" from the *Betts* rule by themselves, they certainly did so when added to *Griffin v. Illinois*,[196] and its offspring.[197] Briefly stated, *Griffin* held that where state law conditioned appellate review upon the availability of a stenographic transcript or report of the trial proceedings, the Equal Protection Clause of the Fourteenth Amendment demanded that the state make the same review available to defendants who were financially unable to submit the transcript or report. Various commentators,[198] including two of our most distinguished judges,[199] have suggested that the general philosophy underlying *Griffin* may well make the appointment of counsel to represent indigents an essential requirement of equal protection. Certainly, Justice Black's opinion for four members of the *Griffin* majority went beyond the limited problem of providing transcripts when it stressed the broad objective of affording equal opportunity to the indigent and pecunious defendant. In particular, the opinion contained the sweeping statement that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[200] The relationship between this central theme of the *Griffin* case and *Betts v. Brady* has been succinctly stated by Justice Walter V. Schaefer:[201]

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195 Here, also, there had been a valid ground for distinction until the Court indicated that the exclusion of confessions was not aimed merely at elimination of unreliable evidence but also at deterring illegal police practices. See Allen, *Due Process and State Criminal Procedures: Another Look*, 48 Nw. L. Rev. 16, 17–21, 25–28 (1953).

196 351 U.S. 12, 18 (1956).

197 See Douglas v. California, 372 U.S. 353 (1963); see also Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington, 357 U.S. 214 (1958); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. Greene, 363 U.S. 192 (1960). See Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. Chi. L. Rev. 151 (1957).

198 See articles cited in Holly v. Smyth, 280 F.2d 536, 541–42 n.8 (4th Cir. 1960). See also Comment, *Appointment of Counsel for Indigent Defendents in Criminal Appeals*, [1959] Duke L. J. 484, 488; Allen, *supra* note 197, at 156–57.

199 Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 10 (1956); Traynor, J., in People v. Brown, 55 Cal. 2d 64 (1960); *cf*. People v. Breslin, 4 N.Y. 2d 73 (1958).

200 351 U.S. at 19.

201 Schaefer, *supra* note 199, at 10.

> 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.

Though the analogy described by Justice Schaefer is indeed "close," it is far from perfect. Some significant criticisms have been leveled against the position that the decision in *Griffin* required the overruling of *Betts*.[202] When the broad language of Justice Black's opinion is limited to the context of the *Griffin* fact situation,[203] various grounds can be advanced for distinguishing between the problem of appointing counsel and that of providing a trial transcript. One factor frequently stressed is the difference in the nature of the state action in the two situations.[204] In *Griffin*, the appeal was an integral part of the state's process for determining criminal liability.[205] In making a transcript or report the prerequisite for appeal, the state effectively denied the indigent access to a major portion of this process. In *Betts*, on the other hand, the Court dealt not with the defendant's access to the criminal process but with the separate problem of insuring the efficacy of the process—a problem that is more properly analyzed in terms of fairness than equality.[206] *Betts* could only be compared to *Griffin*, so the argument goes, if a state conditioned the right to a criminal trial upon the presence of counsel.

This criticism of the *Griffin* analogy is supplemented by the contention that a view of equal protection that necessitates over-

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202 See Comment, *Post-Conviction Due Process—Right of Indigent to Review of Nonconstitutional Trial Errors*, 55 MICH. L. REV. 413 (1957); Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 150 (1957); and Kamisar, *supra* note 186, at 244–45.

203 See Comment, *The Effect of Griffin v. Illinois on the State's Administration of Criminal Law*, 25 U. CHI. L. REV. 161, 170 (1957); Kamisar, *supra* note 186, at 244–45.

204 See Comment, *supra* note 202; Comment, *supra* note 198.

205 Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 194 (1958).

206 Kamisar, *supra* note 186, at 247–48.

ruling *Betts* would lack any "limiting principles."[207] If constitutionally required equality of treatment includes the appointment of counsel, then it may also include the provision of funds for psychiatrists, investigators, reimbursement of witnesses' expenses, and more.[208] The accused may insist that equal protection requires not just those resources that are ordinarily necessary to insure the accuracy of the guilt-determining process but the same resources that may offer the more affluent individual a better chance of gaining acquittal even when guilty. Furthermore, this view of equal protection could easily be extended beyond the criminal proceeding to encompass habeas corpus and even ordinary civil proceedings[209] (although a distinction between the civil and criminal process might be based on the ground that the latter is initiated by the government for the achievement of a governmental purpose and entails the imposition of severe sanctions). Such an almost unrestricted scope of applicability, it is argued, reveals the fundamental weakness in a concept of equal protection that ignores the basic distinctions between the *Griffin* and *Betts* situations.

In view of the substantial nature of these criticisms, the refusal of a Court to employ the *Griffin* analogy in overruling *Betts* ordinarily would be both justified and understandable. In the particular circumstances surrounding *Gideon*, however, the Court's failure to rely on this ground was merely puzzling. For, on the very same day that *Gideon* was decided, the Court necessarily faced and rejected each of these criticisms in reaching its decision in a companion case, *Douglas v. California*.[210] The Court there held invalid on equal protection grounds the California practice of refusing to appoint counsel on an appeal by an indigent when the appellate court, after reviewing the trial record, concluded that "no good whatever could be served" by the appointment.[211] Justice Douglas' opinion for a six-member majority[212] found no difference between

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[207] Allen, *supra* note 205, at 198.

[208] See United States *ex rel.* Smith v. Bald, 192 F.2d 540 (3d Cir. 1951); see also Kamisar, *supra* note 186, at 250–51.

[209] *Cf.* Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940, 942–44 (1940).

[210] 372 U.S. 353 (1963). [211] *Id.* at 355.

[212] Justices Clark, Harlan, and Stewart dissented. Of these only Justice Stewart joined the Court's opinion in *Gideon*.

the state's refusal to give the indigent a transcript in *Griffin* and its refusal to provide counsel on appeal. In either case, the opinion noted, there was "discrimination against the indigent . . . for there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has."[213] This conclusion seems clearly to deny the relevance of those factors that might have distinguished *Betts* from *Griffin.* Once the Court has found that *Griffin* requires equality in the *quality* as well as the right of appeal, it necessarily follows that the same type of equality is required at the trial level.[214] As one of the dissenting opinions in *Douglas* noted, the Court's decision in that case made the *Gideon* analysis of the right to appointed counsel under the Due Process Clause "wholly unnecessary."[215] The decision in *Douglas* on equal protection grounds provided the Court with an *a fortiori* basis for overruling *Betts.* It presented a far stronger example of the subsequent development of a principle in a related area that had undermined the overruled case than those situations in which the Court previously had used that line of reasoning.[216] Nevertheless, the Court carefully avoided any mention of the Equal Protection Clause in *Gideon.* In fact, there is some indication that the *Douglas* case, originally argued during the 1961 Term, was set over for reargument during the 1962 Term so as to avoid an earlier decision that would have effectively foreclosed the full-scale re-examination of *Betts* on due process grounds.[217]

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213 372 U.S. 355 (1963), quoting 351 U.S. 12, at 19.

214 See Hamley, *The Impact of Griffin v. Illinois on State Court–Federal Court Relationships,* 24 F.R.D. 75, 79 (1959); Comment, *supra* note 203, at 171.

215 372 U.S. at 363 (Harlan, J., dissenting). There had been indications in a prior opinion that the Court might consider the question of counsel on appeal primarily in terms of the Due Process Clause. In Newsom v. Smyth, 365 U.S. 604 (1961), the Court dismissed its writ of certiorari on the ground that the defendant's right of counsel on appeal had not been properly presented below. The *per curiam* opinion stated that certiorari had been granted to consider the problem under the Due Process Clause. 365 U.S. 604 (1961). A dissent arguing against dismissal, however, referred to the question as one involving the Equal Protection Clause. 365 U.S. 604, 607 (Douglas, J., dissenting).

216 *Cf.* the cases cited note 62 *supra.*

217 *Douglas* was originally argued in April, 1962, before five members of the subsequent six-member majority. On June 4, 1962, certiorari in *Gideon* was granted with counsel directed to the question whether *Betts* should be overruled. 370 U.S.

3. *The capital offense exception.*—Prior to the *Douglas* decision, the most obvious ground for the argument that *Betts* had been undermined by a contrary principle adopted in later cases was that suggested in Justice Clark's concurring opinion in *Gideon*[218]—the development of a special exception to the *Betts* "fair trial" rule in cases involving crimes punishable by death. In the capital case, the Court had held that the Due Process Clause imposed an automatic requirement that counsel be appointed; there was no need to show that, under the particular facts of the case, the absence of counsel would result in a trial lacking in fundamental fairness. This departure from the case-by-case analysis of the *Betts* rule was gradual. While Justice Sutherland's opinion in *Powell* emphasized that the defendants there "stood in deadly peril of their lives," it also stressed various other factors including "the ignorance and illiteracy of the defendants, their youth," and "the circumstances of public hostility."[219] One of the pre-*Betts* cases following *Powell* possibly could be read as suggesting an unqualified right to appointed counsel in capital cases, but there was no explicit statement to that effect.[220] It was not until 1948, in *Bute v. Illinois*,[221] that the capital offense exception was explicitly acknowledged, and then only in dictum. This dictum was repeated in later decisions,[222] but it was only in

908 (1962). On June 25, 1962, reargument was ordered in *Douglas*, 370 U.S. 930. The Court did not direct counsel's attention on reargument to any special question, as is often done. If the decision in *Douglas* had been handed down in June, 1962, the Court would have found itself in the awkward position of having already answered the question to which counsel in *Gideon* were directed. The Court might well have felt that the question of overruling *Betts* should be faced "head on" rather than in a case involving counsel on appeal. This is all, of course, in the realm of speculation, and various other explanations of the juxtaposition of the two cases are equally plausible. It should be noted, moreover, that the Court had indicated a willingness to consider the question of counsel on appeal a full two years before *Gideon* was decided. See Newsom v. Smyth, *certiorari granted*, 363 U.S. 802 (1960), *dismissed for failure to present a federal question*, 365 U.S. 604 (1961).

[218] 372 U.S. at 348.

[219] 287 U.S. at 71; see also Williams v. Kaiser, 323 U.S. 471 (1944).

[220] Avery v. Alabama, 308 U.S. 444 (1940). *But see* Williams v. Kaiser, 323 U.S. 471 (1945), a post-*Betts* case dealing with a capital crime and emphasizing special circumstances that required the appointment of counsel. *Id.* at 474–75; see also Tompkins v. Missouri, 323 U.S. 485 (1944).

[221] 333 U.S. 640, 674 (1948).

[222] See, *e.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948).

Hamilton v. Alabama,[223] decided two years before *Gideon*, that the Court for the first time squarely based its decision on the ground that the case before it involved a capital crime and its reversal therefore did not require a showing of prejudice resulting from the absence of counsel.

The special rule for capital cases has been continuously criticized by commentators as basically inconsistent with the thesis of the *Betts* rule.[224] It frequently has been noted that the need for skilled representation may be as great in non-capital cases as in capital cases, that non-capital offenses in fact are often more complex and more difficult to defend than various offenses classified as capital in different states.[225] Certainly, there is no greater likelihood that a defendant on a first-degree murder charge will be more capable of adequately conducting his own defense in Michigan, which long ago abolished capital punishment, than in Ohio, where the death penalty still prevails.[226] The Court has never answered directly this claim of inconsistency inherent in the capital-noncapital distinction. Opinions of individual Justices, however, have suggested that the special exception for capital cases was justified by the awesome finality of the death penalty.[227] In light of this factor, it was explained, the Court had been "especially sensitive of the demands . . . for procedural fairness" by taking the extra precaution of imposing an absolute requirement of counsel.[228]

Aside from its logical difficulties, in terms of both the text of the Fourteenth Amendment[229] and its implicit admission of the likely

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223 368 U.S. 52 (1961).

224 See, *e.g.*, the articles cited in notes 225, 226, 229, and 233, *infra*.

225 Allen, *The Supreme Court, Federalism, and State Criminal Justice*, 8 DE PAUL L. REV. 213, 230–31 (1959).

226 Kamisar, *supra* note 186, at 256.

227 See Kinsella v. Singleton, 361 U.S. 234, 255–56 (1960) (Harlan, J., dissenting); Reid v. Covert, 354 U.S. 1, 45–46 (1957) (Frankfurter, J., concurring); see also Williams v. Georgia, 349 U.S. 375, 391 (1955). *But see* Note, 97 U. PA. L. REV. 865 (1949).

228 354 U.S. at 65, 77; 361 U.S. at 255. The opinions have not attempted to support the capital-noncapital distinction on the grounds that it "finds support in history." See Kamisar, *supra* note 186, at 258–59.

229 Commentators have frequently noted that "The Fourteenth Amendment speaks equally of life [and] liberty." Comment, 12 DE PAUL L. REV. 115, 118 (1962).

inaccuracy of the fair trial rule, this position had been thoroughly undermined by recent Court decisions rejecting a capital-noncapital distinction in related areas of constitutional law. In *Kinsella v. Singleton*[230] the Court refused to distinguish between noncapital and capital offenses as regards the application of various constitutional rights under the Fifth and Sixth Amendments to civilian dependents of military personnel stationed overseas.[231] Later in *Ferguson v. Georgia*,[232] the Court rejected the suggestion that this distinction be made applicable to the right to retain counsel. Yet, after both of these decisions, the Court adhered to an unqualified requirement for appointment of counsel in *Hamilton*. This would seem to add up to a "ready-made" situation for the traditional argument that the overruled case must be rejected in order to maintain consistency with a contrary position adopted in a subsequent decision. Admittedly, there is a certain air of unreality in relying only now on an inconsistency that has been apparent over the years,[233] but then again, as Justice Clark noted, it was not until *Hamilton* that the capital-offense exception was squarely upheld.[234]

4. *The special circumstances rule.*—There remains what may have been the best ground, at least in terms of the function of an overruling opinion, for arguing that the rejection of *Betts* was necessitated by the course of subsequent decisions. In his concurring opinion, Justice Harlan suggested that the *Betts* rule had been so "substantially . . . eroded" by decisions requiring the appointment of counsel in noncapital cases that it was "no longer a reality."[235] The reference here was to a steady stream of cases since *Betts* that had attempted to determine under what circumstances the failure to appoint counsel would result in a trial lacking in "fundamental fairness."[236] The "special circumstances" found in

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[230] 361 U.S. 234 (1960).

[231] *Id.* at 246.

[232] 365 U.S. 570, 596 (1960).

[233] See, *e.g.*, Note, 95 U. Pa. L. Rev. 793 (1947); Allen, *supra* note 225, at 230; Note, 10 Pitt. L. Rev. 232 (1948).

[234] See particularly Justice Clark's attitude toward this exception in Crooker v. California, 357 U.S. 433, 441 n.6 (1958).

[235] 372 U.S. at 350–51.

[236] During the period between *Betts* and *Gideon*, the Court considered more than thirty cases involving claims based upon the lack of counsel in state trials. In most

these cases to require the appointment of counsel generally fell into three categories: (1) the personal characteristics of the defendant, such as youth or mental incapacity; (2) "the complicated nature of the offense charged and the possible defenses thereto";[237] and (3) events during the trial that raised difficult legal problems. Although many indigent defendants have the characteristics found in the first category,[238] the primary erosion of the *Betts* rule came through the decisions relying upon circumstances falling within the second and third categories.[239] In fact, even prior to *Gideon,* two fairly recent decisions from this group–*Hudson v. North Carolina*[240] and *Chewning* v. *Cunningham*[241]–had been recognized as effectively abrogating the *Betts* rule.[242]

In *Hudson,* decided in 1960, the petitioner and two companions had been tried before a jury in a North Carolina court on a charge

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of these, the Court's decision dealt with the *Betts* rule. See Schilke, *The Right to Counsel–An Unrecognized Right,* 2 WM. & MARY L. REV. 318, 321 (1960) ("right to counsel [had] been principally decided . . . twenty-three times" between 1942 and 1960).

[237] Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948); see Note, 109 U. PA. L. REV. 623, 625 (1961).

[238] This takes into consideration such factors as age, experience in court, literacy, and mental ability or retardation. See, *e.g.,* Palmer v. Ashe, 342 U.S. 134 (1951); Wade v. Mayo, 334 U.S. 672 (1948); see also Note, 109 U. PA. L. REV. 623, 625–26 (1961) (collecting cases that relied upon such factors to find that counsel was required). Most of the special circumstances cases have fallen within this category. *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 54, 114 (1962).

[239] The limitations of the personal characteristics of the defendant as a basis for requiring counsel are graphically demonstrated in Hudson v. North Carolina, 363 U.S. 697 (1960). Although reversing on other grounds, the Court did state that *Hudson* was "not a case where it can be said the failure to appoint counsel for the defendant resulted in a constitutionally unfair trial because . . . of the defendant's chronological age." *Id.* at 701–02. The defendant there "was only eighteen and had been only to the sixth grade in school." *Id.* at 701. However, the hearing examiner had stated that the defendant was "intelligent, well-informed, and was familiar with and experienced in court procedure and criminal trials." *Ibid.* See also the dissenting opinion, 363 U.S. 704, 705, emphasizing the defendant's familiarity with courts as a result of having been "tried on different occasions for careless and reckless driving while under the influence of intoxicating liquor and for assault and robbery. . . ." *Id.* at 707.

[240] 363 U.S. 697 (1960).

[241] 368 U.S. 443 (1962).

[242] See Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values,* 61 MICH. L. REV. 219, 280 (1962); *The Supreme Court, 1961 Term, supra* note 238, at 115; Note, 14 W. RES. L. REV. 370 (1963); see also Pollock, *Equal Justice in Practice,* 45 MINN. L. REV. 737, 741 (1961).

of robbery. Petitioner's request for the appointment of counsel was denied, the trial judge stating that he would "try to see that [petitioner's] rights [were] protected throughout the case."[243] During the trial, a lawyer representing one of the other defendants tendered a plea of guilty to the lesser offense of petit larceny. The guilty plea, made in the presence of the jury, was accepted by the judge without any special comment. The trial of petitioner and his co-defendant then proceeded to its conclusion with the jury finding both defendants guilty of larceny from the person. On review of a habeas corpus proceeding, the Court found that the particular circumstances of the case had required the appointment of counsel. It noted that for most of the trial, the petitioner, who had been described by a lower court as "familiar with and experienced in court procedure,"[244] had been adequately represented through the efforts of his co-defendant's attorney. The attorney's action in entering his client's plea of guilty in the presence of the jury, however, had raised problems "requiring professional knowledge and experience beyond a layman's ken."[245] Although North Carolina law had definitely recognized the potential prejudice of such an occurrence, the "precise course to be followed by a North Carolina trial court in order to cure the prejudice" was not "entirely clear." At the least, the North Carolina decisions had established that "when request therefor is made, it is the duty of the trial judge to instruct the jury that a co-defendant's plea of guily is not to be considered as evidence bearing upon the guilt of the defendant then on trial."[246] No such request had been made by Hudson, who, as a layman, could hardly be expected to know that he was even entitled to any "protection" against the prejudicial effect of the co-defendant's plea, not to mention an obvious unawareness as to the "proper course to follow to invoke such protection." The Court concluded that Hudson therefore clearly needed a lawyer and the failure to appoint one had resulted in a denial of due process.[247]

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[243] 363 U.S. at 698.

[244] *Id.* at 701. The findings of the lower court on the post-conviction hearing were accepted by the Supreme Court. *Ibid.*

[245] *Id.* at 704–05.

[246] *Id.* at 702–03.

[247] Justices Clark and Whittaker dissented on the ground that the petitioner had not been prejudiced by his co-defendant's guilty plea. 363 U.S. at 704.

In *Chewning*, decided two years later, the indigent petitioner was charged under the Virginia recidivist statute with having been three times convicted and sentenced for a felony.[248] The trial judge refused a request for the appointment of counsel, though he did attempt to advise the petitioner of all his rights. The petitioner acknowledged that he had been the person mentioned in the prior conviction, and the court sentenced him to ten years of imprisonment. On appeal, the Supreme Court found that the failure to appoint counsel was a denial of due process because the complex "nature of the charge" required the assistance of an attorney. "In trials of this kind," the Court noted, "the labyrinth of the law is, or may be, too intricate for the layman to master."[249] The issue of "identity," for one, could have presented "difficult local law issues." The Court also mentioned that an attorney might have searched for defects in prior convictions that would have precluded their admission in the multiple-offender proceeding. This could have raised a whole host of issues including the jurisdiction of the courts rendering the prior judgments, the validity of the prior sentences, and the fairness of the previous trials. "Double jeopardy and ex post facto application of the law" were other "questions which . . . [might] well be considered by an imaginative lawyer, who looks critically at the layer of prior convictions on which the recidivist charge rests."[250] The Court was careful to note that it "intimated no opinion on whether any of the problems mentioned would arise on petitioner's trial or, if so, whether any would have merit."[251] It "only conclud[ed]" that the "issues presented under Virginia's statute [were] so complex," and "the potential prejudice from the absence of counsel so great," that due process required the appointment of counsel to represent the accused.[252]

[248] The charge was brought in connection with the last conviction on which the petitioner was still serving his sentence. 368 U.S. at 443–44.

[249] *Id.* at 446. The opinion heavily relied upon Reynolds v. Cochran, 365 U.S. 525 (1961), which dealt with an individual's right to be represented by his own counsel on a recidivist charge.

[250] 368 U.S. at 446–47.

[251] *Id.* at 447.

[252] *Ibid.* In a concurring opinion, Justice Harlan argued that "the bare possibility that any of these improbable claims could have been asserted does not amount to the 'exceptional circumstances' which, under *Betts* v. *Brady* . . . must be present before the Fourteenth Amendment impresses on the state a duty to provide

Taken together, the *Hudson* and *Chewning* decisions would seem to have expanded the special circumstances concept to the point where, as Justice Harlan put it, "the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel. . . ."[253] Even narrowly read, *Hudson* required the reversal of any conviction where the record contained a prejudicial occurrence that, under state law, might have been prevented, or at least modified, by appointed counsel.[254] Moreover, a subsequent case suggested that this principle might even carry so far as to encompass every trial where the unrepresented defendant failed to use some advantageous procedure or tactic that counsel might have employed.[255] The *Chewning* decision had an even broader scope, since it was not limited to those situations in which there was a trial. Surely research would almost always reveal, as it did in *Chewning*, that the defendant was charged with a crime to which an imaginative lawyer might, under some circumstances, raise a complex legal defense beyond a layman's grasp.[256] Combined with *Hudson*, the *Chewning* decision would find a denial of due process in practically every situation where "the defendant may have made a poorer showing than he would have if he had had counsel." It would be a rare case that failed this test.[257]

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counsel. . . ." *Id.* at 459. Justice Harlan found that the defendant, nevertheless, had been denied due process because he was forced to plead immediately after the recidivist charge was made known to him. *Id.* at 457–58.

[253] 372 U.S. at 351.

[254] See generally *The Supreme Court, 1959 Term,* 74 HARV. L. REV. 81, 137 (1960); Note, 109 U. PA. L. REV. 623, 629 (1961).

[255] Carnley v. Cochran, 369 U.S. 506 (1962). The Court here held that the petitioner had been denied due process by the state's failure to appoint counsel to represent him in defending against a charge of incest with his minor daughter. The opinion cited, *inter alia,* certain tactics that counsel might have employed that were not related to any potentially prejudicial occurrence during the trial such as was involved in *Hudson.* Thus, the Court noted that counsel might have filed for a psychiatric or psychological examination of the accused. *Id.* at 509–10. Similarly, he might have requested that the sentencing judge commit the petitioner to a hospital for treatment rather than to prison. The Court also noted that the illiterate defendant had hardly cross-examined his daughter and son, the state's primary witnesses, although there were possible grounds for impeachment.

[256] Kamisar, *supra* note 242, at 280; *The Supreme Court, 1961 Term, supra* note 238, at 115.

[257] *The Supreme Court, 1959 Term, supra* note 254, at 137.

The full impact of the *Chewning* and *Hudson* decisions upon the *Betts* "fair trial" rule is probably best illustrated by the fact that they would have required reversal in the *Betts* case itself. Certainly there are complex legal defenses that the imaginative lawyer might raise, even to the everyday charge of robbery. As Professor Kamisar's analysis of the *Betts* record has shown,[258] an appointed counsel in that case might well have defended on the ground that Betts had been so intoxicated as to lack the requisite intent.[259] With respect to the trial, the *Betts* record is replete with prejudicial occurrences that, as in *Hudson,* raised problems "requiring professional training beyond a layman's ken." For example, counsel representing Betts might well have forced the exclusion of crucial testimony on the grounds of hearsay, violation of the privilege against self-incrimination, and patent unreliability.[260] This illustration of the impact of *Chewning* and *Hudson* on the *Betts* case is reinforced by consideration of the fact situation in *Gideon,* that the Court described as a "nearly indistinguishable" from *Betts.*[261] As in *Betts,* the defendant in *Gideon* failed to raise both defenses and objections that counsel might have employed.[262] For example, no objection was made either to the admission of opinion testimony or to the trial judge's rulings which improperly restricted the scope of cross-examination.[263]

As exemplified by their application to the *Betts* and *Gideon* fact situations, the *Chewning* and *Hudson* decisions might well have

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[258] Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused,* 30 U. CHI. L. REV. 1, 42–57 (1962).

[259] There was testimony at the trial that Betts appeared to have been "drinking." *Id.* at 56.

[260] *Id.* at 45, 50–51, 46–48.

[261] 372 U.S. at 339. It should be noted that the trial record and transcript were not before the Florida Supreme Court. Brief for the Respondent, p. 3. They were added to the record on review before the United States Supreme Court, Brief for the Petitioners, p. 4, but they could not properly be considered as a basis for the Court's judgment. See Hedgbeth v. North Carolina, 334 U.S. 806 (1948).

[262] Coincidentally, there was testimony in the *Gideon* record, like that in *Betts,* that might have suggested a defense based upon defendant's intoxication. Gideon was acquitted after a retrial in which he was represented by counsel. New York Times, Aug. 7, 1963, p. 56, col. 1.

[263] *Id.* at 15; see Brief for Petitioner, p. 50; Adkinson v. State, 48 Fla. 1 (1904).

served as the basis for the argument in *Gideon* that, as a practical matter, *Betts* had already been overruled. Moreover, here, as opposed to the use of a similar argument based upon *Griffin* and *Douglas*, the abrogation of the rule was the product not of a sudden expansion of a previous ruling but rather of a gradual process of erosion involving a long line of cases. Though commentators have characterized *Chewning* and *Hudson* as "departure[s] from prior holdings,"[264] these decisions actually did little more than provide the final, logical extension of well-established principles.

The string of decisions leading up to *Chewning*, for example, started with the very first right-to-counsel case decided after *Betts*. In *Williams v. Kaiser*,[265] the Court found that the defendant, who pleaded guilty to the offense of robbery by means of a dangerous weapon, had been constitutionally entitled to appointment of counsel because the various degrees of that offense raised legal questions far too technical for a layman to appreciate. Three months later, in *Rice v. Olson*,[266] the Court found a denial of due process where the unrepresented defendant could have raised a defense involving questions of federal jurisdiction that were "obviously beyond the capacity of even an intelligent and educated layman."[267] Similarly, in *Moore v. Michigan*,[268] the Court concluded that the various "technical" defenses to murder, such as insanity and mistaken identity, had required the appointment of counsel to represent a defendant who had pleaded guilty.[269] The same line of reasoning was also employed to require reversals in

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264 *The Supreme Court, 1961 Term*, *supra* note 238, at 114; see also *The Supreme Court, 1959 Term*, *supra* note 254, at 136–37; Kamisar, *supra* note 242, at 236; Note, 109 U. PA. L. REV. 623, 627–29 (1961).

265 323 U.S. 471 (1945). *Accord*, Tompkins v. Missouri, 323 U.S. 485 (1945). Although these were capital cases, the Court emphasized the special complexity of the legal problems as a basis for finding a denial of due process.

266 324 U.S. 786 (1945).

267 *Id.* at 789. The jurisdictional defense arose out of the fact that the petitioner was an Indian and the crime was allegedly committed on an Indian reservation.

268 355 U.S. 155 (1957).

269 *Id.* at 159–61. Although primary emphasis was on this ground, the opinion also cited the petitioner's youth and lack of education.

Pennsylvania ex rel. Herman v. Claudy[270] and *McNeal v. Culver.*[271] Thus, by the time the Court reached *Chewning*, the possible complexity of even some fairly routine legal problems had been recognized as requiring the appointment of counsel. Admittedly, in most of these cases, unlike *Chewning*, the Court's opinions had relied upon "complex" defenses that the fact situation showed to be available to the defendants.[272] In at least *Williams*, however, the likelihood that the defendant might have taken advantage of the difference in degrees of the crime was only slightly less speculative than the possibility that Chewning might have attacked his prior convictions on the grounds mentioned in the Court's opinion.[273]

As with *Chewning*, the antecedents of *Hudson* had established a firm foundation for the concept of "special" circumstances advanced in that case. The Court recognized fairly soon after *Betts* that the failure to appoint counsel denied the defendant due process where his trial had been marred by "a deliberate overreaching by

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270 350 U.S. 116 (1956). Here the Court cited, *inter alia*, both the number and the complexity of the charges against the petitioner. He was charged with thirty offenses, eight each of burglary and forgery, two of false pretenses, and twelve of larceny.

271 365 U.S. 109 (1960). The Court here noted complex legal problems arising out of various degrees of assault under Florida law and the differences in the intent required for each offense. It also relied upon petitioner's lack of education and his mental state as a separate ground for requiring appointment of counsel.

272 This was the factor emphasized in *The Supreme Court, 1961 Term, supra* note 238, in characterizing *Chewning* as a "genuine departure from prior holdings." See also Kamisar, *supra* note 186, at 279, 280.

Although some cases had spoken in terms of the "active operation" of unfairness, see Foster v. Illinois, 332 U.S. 134 (1947), this did not require a showing of an actual trial error as the only basis for reversal. In those cases, like *Chewning*, which emphasized the nature of the crime, it had always been sufficient that fundamental unfairness was apt to result from the failure to appoint counsel. See 97 U. PA. L. REV. 855, 857 (1949); *cf. The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119, 135 (1949); BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 163 (1955).

273 See 323 U.S. at 475–76: "If we assume that petitioner committed a crime we cannot know the degree of prejudice which the denial of counsel caused. . . . only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate." The opinion gave no indication of the facts upon which counsel might make such a determination. In Moore v. Michigan, 355 U.S. 155 (1957), the only indication that the defendant might have relied upon the defense of mistaken identity was the fact "that the evidence pointing to him as perpetrator of the crime was entirely circumstantial." *Id.* at 160.

Court or prosecutor" that an attorney might have prevented.[274] In *Gibbs v. Burke*[275] this approach was extended to a situation involving only normal trial errors, such as the admission of hearsay evidence, the exclusion of relevant evidence, and the improper designation of a prosecution witness as defendant's witness. *Cash v. Culver*[276] went even further in holding that the state's mere introduction of accomplice testimony created problems "beyond a layman's ken" that required the appointment of counsel. Although the *Cash* opinion did note that there had been a "serious question" as to the admissibility of portions of the accomplice's testimony, much of its emphasis was upon missed opportunities rather than actual trial errors. The Court particularly stressed the defendant's failure to minimize the effect of the accomplice's testimony by such tactics as requesting a jury instruction cautioning against reliance on such testimony, cross-examining the accomplice as to whether he testified under an "agreement for leniency," and using the witness' testimony at a previous trial as a basis for impeachment.[277] Thus, from *Cash*, the step to *Hudson* was not a very large one.[278] Of course, *Cash* involved more omissions by the defendant that were clearly prejudicial, but its basic thesis seemed applicable so long as there were any occurrences at trial on which a lawyer's advice might have proved helpful.[279] Also, while the

[274] Hudson v. North Carolina, 363 U.S. 697, 701–02 (1960). See Townsend v. Burke, 334 U.S. 736 (1948); DeMeerleer v. Michigan, 329 U.S. 633 (1947) (based in part on this ground); see also Williams v. Kaiser, 323 U.S. 471, 476 (1945) (dictum); Marino v. Ragen, 332 U.S. 561 (1947).

[275] 337 U.S. 773 (1949); see also Palmer v. Ashe, 342 U.S. 134 (1951).

[276] 358 U.S. 633 (1959).

[277] *Id.* at 637–38. While the Court also mentioned petitioner's youth and inexperience, the decision expressly was grounded on the "complexity of the proceedings." *Ibid.*

[278] See also McNeal v. Culver, 365 U.S. 109 (1961).

[279] Some commentators had suggested that the Court found a denial of due process only when a particular trial error was thought to be especially prejudicial. See, *e.g.*, Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15, 26 (1951); *The Supreme Court, 1948 Term*, *supra* note 272, at 135. The Court, however, had never acknowledged the commission of an error in a case where a denial of due process was not found, and the language in various opinions, particularly in the later cases, seemed to reject any such analysis. See cases cited notes 283, *infra*, 268–71 *supra*.

legal problem that arose in *Hudson*, perhaps unlike those in *Cash*, would not have been assessable before the trial began,[280] the same had been true in cases like *Gibbs v. Burke*.

As this history of the "special circumstances" cases shows, the Court had consistently whittled away at the *Betts* rule until with *Chewning* and *Hudson* it was almost completely eroded. Admittedly, though this development started almost immediately after *Betts*, not every case during the twenty-two-year period required the appointment of counsel. Most of the cases that seemingly "reinforced" the *Betts* rule, however, actually were based on independent grounds such as the waiver of counsel.[281] In others, like *Bute v. Illinois*,[282] the Court was restricted by the limited scope of the common-law record.[283] So despite occasional setbacks, all of which occurred within six years after *Betts*, the over-all view of the counsel cases represents a fairly steady stream of development over twenty-two years in which eighteen different Justices had participated, including most of those who joined Justice Roberts in *Betts*. The eventual outcome of this progression had been recognized even before *Hudson* and *Chewning*.[284] In fact, it was so clear by the time of *Chewning* that counsel there was able to argue that, in effect, *Betts* had already been overruled.[285] Surely after the *Chewning* decision, the Court in *Gideon* could well have maintained that *Betts* indeed had been overruled *sub silentio* by the subsequent course of decisions, so that all that remained to be done was to publish its obituary—a task unfortunately necessitated by

[280] See Note, 109 U. PA. L. REV. 623, 627–28 (1961), distinguishing *Hudson* on this point.

[281] See, *e.g.*, Quicksal v. Michigan, 339 U.S. 660 (1950) (waiver); Carter v. Illinois, 329 U.S. 173 (1946) (waiver); Gayes v. New York, 332 U.S. 145 (1947) (issue of right to counsel not properly open to attack); see also Foster v. Illinois, 332 U.S. 134 (1947) (seeming to rely at least in part on waiver).

[282] 333 U.S. 640 (1948).

[283] See *id.* at 668, 673–74. In Gryger v. Burke, 334 U.S. 728 (1948), another case in which the Court sustained the conviction, the Court stressed that the only issue open under the recidivist charge against the defendant was whether he was in fact the person named in the prior convictions. Also, the Court refused to accept the contention advanced in the dissent that the trial judge had sentenced the defendant on the basis of an erroneous assumption.

[284] See, *e.g.*, Note, 26 TEXAS. L. REV. 665 (1948); Note, 1 U. FLA. L. REV. 450 (1948).

[285] Brief for the Petitioner, pp. 35–37.

the refusal of some state courts, like the Florida court in *Gideon,* to recognize the true state of the law.[286]

B. BETTS AND THE LESSONS OF EXPERIENCE

The Court in *Gideon* could also have argued that the rejection of the *Betts* rule was supported by knowledge derived from experience in applying that rule, which, had it been available originally, would have presented the *Betts* case in an entirely different light. In fact, the Court might even have suggested that, considering the limited experience of the *Betts* Court in this area, the fundamental approach it adopted in *Betts* was entirely proper, though misapplied to the particular facts of that case. While the broad reach of plaintiff's argument and the dissenting opinion may have led the majority to pass over the *Betts* record too casually,[287] the basic approach of a case-by-case analysis of the need for appointment of counsel arguably was well suited to the context of the problem at that time.[288] The Court in *Betts* lacked the sense of sureness needed to adopt a firm rule that defendants in state courts had to be represented by counsel in order to insure the fair hearing guaranteed by the Due Process Clause.[289] There were various matters that had to be determined before such a position could be taken: *e.g.*, what were the various offenses that might be involved, what types of procedures did the states employ when the defendant represented himself, and how did state judges conduct trials in such cases?[290] Lacking the general background that comes with

[286] See 372 U.S. 349, 351 (Harlan, J., concurring); see also Kamisar, *supra* note 242, at 281.

[287] Neither counsel for Betts nor the dissenting opinion attempted to cite any incidents where Betts might have been prejudiced by the absence of counsel. See Brief for the Petitioner, pp. 16–24; 316 U.S. at 474–80; see also Kamisar, *supra* note 258, at 52.

[288] Other cases decided at the time also emphasized this approach. See Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); see also Adamson v. California, 332 U.S. 46 (1947).

[289] The emphasis here must, of course, be on the diverse nature of state courts, since the Court had already been convinced that this was the case in federal courts. See Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

[290] The states have sometimes maintained that the informality of such trials gives the defendant great latitude in presenting defenses, examining witnesses, etc. See, *e.g.*, Brief for the States of Alabama and North Carolina as *amicus curiae* in *Gideon v. Wainwright* at pp. 9–10. See also 316 U.S. at 472.

consistent review of decisions in a particular area,[291] the Court had not fully developed what Llewellyn described as an appreciation of the total "situation-pattern" with all its "detailed variants."[292] Under these circumstances, the formulation of a narrow rule, a case-by-case approach, was consistent with the normal process of appellate decision-making.[293] It was particularly understandable when one considers that the use of the Due Process Clause as an effective device for the regulation of the state criminal process was then still a fairly recent innovation,[294] and that Judge Bond, a highly respected jurist, had observed that in his state "there [were] fair trials without counsel employed for the prisoners."[295]

The experience of twenty-two years, however, had provided a basis for re-examining the crucial assumptions upon which *Betts* was based. For one thing, the presumption that a lawyerless defendant would usually, or even frequently be able to defend himself adequately had been largely disproved by the constant expansion of the special circumstances concept. Certainly, the routine nature of many of the cases in which "special" circumstances were found suggests that the instances in which an indigent layman could appreciate all his legal defenses and rights are, to say the

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291 See Allen, *supra* note 205, at 193–95, discussing the Court's rather limited consideration of the criminal process in the states prior to *Powell.* While the Court had considered some cases involving state criminal procedure (including two right-to-counsel cases) during the period between *Betts* and *Powell,* it still lacked the familiarity with the practices and problems in this area that has come with the constantly expanding scope of due process. See note 294 *infra.*

292 LLEWELLYN, THE COMMON LAW TRADITION 268–70, 426–27 (1960).

293 *Id.* at 427–29.

294 See generally Allen, *supra* note 205. Some of the most important restrictions upon the states had not yet been considered by the Court. See, *e.g.,* Wolf v. Colorado, 338 U.S. 25 (1949). In other areas where initial action had already been undertaken, the Court had considered only the relatively "easy" cases where the abusive aspects of the state's action were most glaringly presented. *Compare, e.g.,* Chambers v. Florida, 309 U.S. 227 (1940), *with* Turner v. Pennsylvania, 338 U.S. 62 (1949), or Colombe v. Connecticut, 367 U.S. 568 (1961); Mooney v. Hollohan, 294 U.S. 103 (1935), *with* Alcorta v. Texas, 355 U.S. 28 (1957).

295 316 U.S. at 472 n.31. See also FREUND, THE SUPREME COURT OF THE UNITED STATES 146 (1961), where the author speculates as to "whether the decision in *Betts* v. *Brady* . . . would have been the same had the opinion of the court below been written by someone less highly esteemed than Chief Judge Bond of Maryland, who is referred to by name in Mr. Justice Roberts's opinion no fewer than fifteen times." The Court had taken special note of Judge Bond's scholarship even before *Betts.* See O'Malley v. Woodrough, 307 U.S. 277, 281 n.8 (1939).

least, exceedingly rare[296]—probably too rare in fact even to bother considering in framing a constitutional rule governing appointment of counsel.[297]

Furthermore, even if such instances were far more common, experience in applying the *Betts* rule had shown the frequent impossibility of determining which defendants would be deprived of a fair hearing without a lawyer. As cases like *Hudson* illustrate, the legal difficulties that defendant will face are frequently unassessable at the start of the proceedings. The judge can hardly be expected to predict accurately the course of the trial or the indigent's response to the problems that might arise. *Betts*, of course, assumed that the trial judge would help the defendant over any such unexpected hurdles,[298] but, as *Hudson* again exemplifies, even where the trial judge is making every effort to do this,[299] he cannot, consistent with his judicial function, truly place himself in the position of defendant's advocate.[300] Also, as cases like *Chewning* show, even if problems concerning the trial are avoided because the defendant pleads guilty, one can never be sure that a lawyer's investigation and analysis might not have produced a defense, unknown to the defendant, that could have resulted in a different plea.[301]

[296] Even the most severe critics of the *Betts* rule have recognized that there may be instances in which the absence of counsel did not deprive the defendant of a fair hearing. See, *e.g.*, Kamisar, *supra* note 258, at 42. *But see* Schilke, *supra* note 236, at 342.

[297] *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961).

[298] See 316 U.S. at 472 (referring particularly to a judge in non-jury trial); see also Gibbs v. Burke, 337 U.S. 773, 781 (1949). It should be noted that *Betts* did not reinstate Coke's argument, rejected in *Powell,* that the judge could perform all of the functions of counsel. See 287 U.S. at 61. The *Betts* opinion apparently accepted the same assumption that was made in *Powell* that the judge would "see to it that in the proceedings before the Court the accused shall be dealt with fairly and justly," presumably by advising him of all of his rights. *Compare* Betts, 316 U.S. at 472, and Gibbs, 337 U.S. at 781, *with* Powell, 287 U.S. at 61.

[299] See 363 U.S. at 698, 700–01; *cf.* Carnley v. Cochran, 369 U.S. 506 (1962).

[300] Thus, in *Hudson,* the judge can hardly inform the defendant of a jury instruction that was not required, but might be to his advantage. See also Pollock, *Equal Justice in Practice,* 45 MINN. L. REV. 737, 741–42 (1961).

[301] This defect in the *Betts* rule is reinforced by the paradox that the more the accused needs counsel, the less likely it is that he will be capable of proving this need to the court. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 185 (1955).

Finally, even if a judge following the *Betts* rule could recognize all the instances in which counsel were needed, the difficulties revealed in the administration of the rule might outweigh any advantages it would have over a flat requirement that counsel be appointed. The necessary vagueness of the special circumstances concept left the *Betts* rule open to extreme manipulation by the lower courts. In some states, the courts had twisted the rule to the point where the right to appointed counsel was almost non-existent no matter what the nature of the case.[302] And while the time-consuming process of constant review of counsel cases by the Court might have corrected these tendencies,[303] experience had revealed that the very nature of *Betts* rule made it inevitable that lower court application would always be uncertain and uneven.[304]

On the other side, the lessons of experience had revealed the myth in what the Court had considered a major advantage of the *Betts* rule—that it was more consistent with the "obligations of federalism" than an absolute requirement of counsel, since it kept to a

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302 See, *e.g.*, Butler v. Culver, 111 So. 2d. 35 (Fla. 1959); Commonwealth *ex rel.* Simon v. Maroney, 405 Pa. 562 (1961); Shaffer v. Warden, 211 Md. 635 (1956). All the post-*Betts* state cases listed in the state reports are collected in the brief *amicus* of the American Civil Liberties Union in *Gideon* at pp. 50–51. They show, for example, that the Florida court has found a denial of due process in only one of fourteen reported cases involving the refusal to appoint counsel. (One other was remanded for a hearing.) Maryland reversed three out of thirty-nine cases, two out of the three being cases reviewed on direct appeal. The ratio for cases decided since 1949 are about the same, even though the Supreme Court has reversed over a dozen state cases during that period without one affirmance.

303 Full appreciation of the *Betts* rule seemed to improve in certain states following Supreme Court reversals of their state court decisions finding no need for counsel. See, *e.g.*, People v. Whitsitt, 359 Mich. 656 (1960); People v. Coates, 347 Mich. 626 (1957).

304 See generally Allen, *The Supreme Court, Federalism, and State Criminal Justice*. 8 De Paul L. Rev. 213, 228–29 (1959). For one thing, the lower court results often will vary, according to the willingness of the trial judge to undertake the heavy burden placed upon him both in advising defendants of their rights and in attempting to learn enough about defendant's view of the facts so as to know whether any "complex" defenses might be considered by a lawyer. The scope of this task is illustrated by the lengthy list of inquiries that one judge has suggested as absolutely necessary to be able properly to apply the *Betts* rule. See Sloan, *The Jail House Lawyer versus Court and Counsel: Some Ideas for Self-Protection*, 1 Washburn L.J. 517, 524, 526 (1962). Past cases indicate that many state judges would be reluctant to go so far as Justice Sloan suggests.

minimum the federal restriction upon the "historic power of the states to prescribe their own local court procedures."[305] Experience with the *Betts* rule had shown that it probably engendered as much friction between federal and state courts as an absolute requirement would have produced. *Betts* was in large part responsible for proliferation of the vexing habeas corpus cases in federal courts.[306] Probably more state prisoners were released by federal courts for the failure of the state to appoint counsel than on any other ground.[307] In other cases, reversals were based on obvious errors that presumably would have been prevented had defendant been represented by counsel.[308] Moreover, the reaction to these reversals of state convictions was probably intensified by the type of analysis the federal courts were required to make under *Betts*. The special circumstances concept, particularly in the light of cases like *Hudson* and *Cash*, required the reviewing court to make an extensive examination of state law in order to find errors or unconsidered issues that showed the need for counsel. State court judges were told not only that they had failed to give "adequate judicial guidance or protection" to the defendant,[309] but that their error had been in the misapplication of their own state law.[310] In the light of this experience, a strong argument could be made that the obligations of federalism would be more adequately served by

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[305] Bute v. Illinois, 333 U.S. 640, 668, 652–54 (1948); see also Foster v. Illinois 332 U.S. 134, 136–38 (1947); Carter v. Illinois, 329 U.S. 173, 175 (1946).

[306] See Reitz, *Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners,* 108 U PA. L. REV. 461, 465, 483–85 (1960); Note, 15 U. CHI. L. REV. 107, 119–20 (1947); see also the Brief for the American Civil Liberties Union in Gideon v. Wainwright, p. 29.

[307] See Reitz, *supra* note 306, at 483.

[308] See Brief for the State of Oregon as *amicus curiae* in Gideon v. Wainwright, pp. 4–6, citing statistics on the cases reversed under the Oregon Post Conviction Act.

[309] Gibbs v. Burke, 337 U.S. 773, 781 (1949).

[310] See, *e.g.*, McNeal v. Culver, 365 U.S. 109, 116 (1961), where the Court found both that the admission of certain evidence had been a "patent violation" of state law and that defendant had been convicted of a crime that probably did not exist under state law. See also Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, *supra* note 309. In Hudson v. North Carolina, 363 U.S. 697, 705 (1960), the Court *sua sponte* found a problem that the trial court, the post-conviction court, and counsel on both sides had overlooked.

a simple, unqualified requirement for the appointment of counsel than the inevitable reversals (and subsequent retrials) under the special circumstances doctrine of *Betts*.[311] Thus, the Court in *Gideon* could have suggested, as it did in another recent case, that experience under the overruled case had shown that at least one of the earlier Court's basic objectives could best be achieved through reversal of its original decision.[312]

C. BETTS AND CHANGING CONDITIONS

There remains for consideration the possibility of employing in *Gideon* the argument that "changed conditions" had "completely sapped [*Betts*] of [its] authority."[313] Based as it was on due process, "the least frozen concept of our law—the least confined to history and the most absorptive of powerful standards of a progressive society,"[314] the *Betts* decision naturally lends itself to the rationale of the changed conditions. This is particularly true in the light of the Court's opinion. Mr. Justice Roberts relied heavily upon "the common understanding of those who have lived under the Anglo-American system of law" to sustain the Court's conclusion that appointment of counsel was not invariably essential to a fair trial and therefore was not "fundamental."[315] This consensus of Anglo-American opinion was found in the "constitutional and statutory provisions subsisting in the colonies and the states prior to the [adoption] of the Bill of Rights . . . and in the constitutional, legislative, and judicial history of the states to the present date."[316] Such "material demonstrates," said Justice Roberts, "that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy."[317]

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[311] Indeed, the practical difficulties of relitigating years after the crime occurred will often make a retrial unlikely.

[312] *Cf.* Fay v. Noia, 372 U.S. 391, 437–38 (1963); Kamisar, *supra* note 251, at 36.

[313] Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 187 (1941).

[314] Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (concurring opinion).

[315] 316 U.S. at 464.

[316] *Id.* at 465.

[317] *Id.* at 471. The same conclusion was reached, after a similar analysis of both state and pre-1938 federal practices, in Bute v. Illinois, 333 U.S. 640, 660–68 (1948).

Obviously, one basis for the Court's conclusion—the original colonial and state provisions—has not and will not change. It might be urged, nevertheless, that developments within the pattern of current state practices over the past twenty-two years had reached the point where Justice Roberts' judgment as to the "common understanding" of the community was no longer accurate. When *Betts* was decided, thirty-one states had "some clear legal requirement or an established practice that indigent defendants in serious non-capital . . . cases be . . . provided with counsel."[318] Today, thirty-eight states have legal provisions requiring the appointment of counsel in such cases,[319] and seven more almost invariably follow that procedure as a matter of practice.[320] There also have been increased indications that these state requirements are viewed as "fundamental" laws rather than matters of "legislative policy" subject to modification "from time to time as [the legislature] deemed necessary."[321] Since *Betts*, at least seven additional states, making ten in all, have held that a statutory requirement merely restated a constitutional guarantee of the defendant's right to appointed counsel.[322]

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[318] 316 U.S. at 477 n.2 (dissenting opinion). The appendix to Justice Black's dissent listed thirty-five states in this category. But four states were "misclassified." See Kamisar, *supra* note 258, at 17 n.74. Of the remaining thirty-one states, all required counsel in at least every felony case except New Hampshire, which furnishes counsel only where the defendant is charged with an offense punishable by at least three years' imprisonment.

[319] Kamisar, *supra* note 258, at 17–18. One of the new additions to this group, however, Maryland, only provides counsel in cases where the maximum sentence is at least five years' imprisonment.

[320] Kamisar, *supra* note 258, at 18–20.

[321] See Betts v. Brady, 316 U.S. 455, 471 (1942).

[322] Justice Roberts' opinion cited three state courts that had held that appointment of counsel was constitutionally required. *Id.* at 469 (listing Georgia, Kentucky, and Wisconsin). See also Therman v. State 205 Ark. 376, (1943); People v. Mattson, 51 Cal. 2d 777, (1959); State *ex rel.* Grecco v. Allen Circuit Court, 238 Ind. 571 (1958); Wiley v. Hudspeth, 162 Kan. 516 (1947); State v. Johnson, 63 N.J. Super 16 (1960); State v. Garcia, 47 N. Mex. 319 (1943) (dictum); *In re* Motz, 100 Ohio App. 296 (1955); Hunter v. State, 288 P. 2d 425 (Okla. Cr. 1955); *cf.* People v. Waterman, 9 N.Y. 2d 561 (1961). There are many states, however, that have held that appointment of counsel is not constitutionally required. See Brief for the American Civil Liberties Union in *Gideon*, pp. 51–55. See, *e.g.*, Kelley v. People, 206 P. 2d 337 (Colo. 1949); Sneed v. Mayo, 66 So. 2d 865 (Fla. 1953); Marvin v. Warden, 212 Md. 634 (1957); People v. Haddad, 306 Mich. 561 (1943); State v. Delaney, 332 P. 2d 71 (Ore. 1958),

Moreover, with the passage of an additional twenty-two years, many of these statutory provisions have become so firmly embedded in a state's law that they have practically achieved the "sanctity" of a constitutional provision.[323]

While similar developments in state practices have been cited in past opinions,[324] the nature and degree of these changes since *Betts* do not provide a strong case for arguing that contemporary views on appointment of counsel have so changed in twenty-two years that they now represent a "permanent and pervasive feeling" "rooted in our traditions and conscience."[325] This is not to suggest, however, that such changes have no bearing on the argument for overruling *Betts*. The positions taken in statutes, court decisions, and state constitutions over the years may be valid criteria for determining whether a particular value or principle is "fundamental" to our society, but that was not the issue before the Court in *Betts*. Justice Roberts' analysis began with the acceptance of the fundamental principle of a fair hearing, which requires *inter alia* a process insuring the reliability of the final determination of

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[323] The trend toward the mandatory appointment of counsel has been primarily a post-Civil War development, so most of the state provisions will be less than a century old. Bute v. Illinois, 333 U.S. 640, 665 (1948). But a provision in existence for even half that period might be considered almost on a par with state constitutions, which do not usually last much longer than that without major modifications. This is particularly true in those states where constitutional amendments are fairly easily adopted. See, *e.g.*, MINN. CONST., art. 14, § 1 (1898).

It should also be noted that the passage of time has lessened the practical consequences of applying the *Gideon* decision retrospectively. Those states that had only recently adopted appointment provisions in 1942 are unlikely to have many prisoners in jail today, as they would have had then, who will be entitled to release on the basis of *Gideon*. The Court had previously suggested that its rejection of an absolute requirement of appointment of counsel was reinforced by the fact that "such an abrupt innovation . . . would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." Foster v. Illinois, 332 U.S. 134, 139 (1947).

[324] See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 331-32 (1959) (collecting cases); *cf.* Elkins v. United States, 364 U.S. 206 (1960). As Professor Kadish notes, the "use of a commonly followed state practice as evidence that a contrary practice violates due process has found favor primarily in dissenting opinions."

[325] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (dissenting opinion); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); see also *The Supreme Court, 1961 Term*, *supra* note 256, at 114.

guilt.[326] The issue in *Betts* was whether a lawyer was needed to achieve that objective, *i.e.*, whether the innocent but lawyerless defendant may be convicted "because he does not know how to establish his innocence."[327] This is largely a question of fact, not of values, to which state practices serve as no more than evidence of how others have approached this same problem. In this respect, the increase in the number of states affording counsel to indigents might well have been used to support the *Gideon* result in the same manner that the *Mapp* opinion employed the states' shift to the exclusionary rule.[328]

IV. Conclusion

It seems fair to say that the Court in *Gideon* could easily have relied upon at least two of those rationales that have traditionally been employed in overruling opinions. Not only were arguments based upon the "lessons of experience" and the requirements of later precedent relevant and persuasive, but they had been urged upon the Court both by petitioner's brief and by the separate opinions of Justices Douglas and Black in two recent cases.[329] Moreover, the application of these "techniques" of overruling was particularly appropriate under the circumstances surrounding the *Gideon* decision. During a Term in which so many of the Court's rulings had been attributed to recent changes in personnel,[330] it would have been especially advantageous to emphasize those factors other than the different outlook of the present Court that contributed to the rejection of a renowned decison of its predecessor. It was, perhaps, inevitable, no matter what the Court wrote, that the *Time* article on *Gideon* would observe that the "flow of U.S. law . . . often reverses its course according to the personalities and

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[326] See Kadish, *supra* note 324, at 346.

[327] Powell v. Alabama, 287 U.S. 45, 69 (1932); see Kadish, *supra* note 324, at 333–34.

[328] 367 U.S. at 651–53; see text at note 54 *supra*.

[329] See Petitioner's Brief, pp. 20–33, 36–43, 50–53; McNeal v. Culver, 365 U.S. 109, 117–22 (1961) (Douglas, J., concurring); Carnley v. Cochran, 369 U.S. 506, 517–20 (1962) (Black, J., concurring).

[330] See, *e.g.*, Lewis, *Focus on High Court*, New York Times, April 7, 1963, § 4, p. 13, col. 1; U.S. News and World Report 19 (March 4, 1963).

politics of reigning justices," and, with obvious innuendo, would pose the question "what do all those earlier decisions mean?"[331] Still, and perhaps particularly for that reason, the Court might have framed an opinion that provided its supporters with a foundation for answering that question consistent with the accepted image of judicial review.

One further thought might be added. In keeping with Justice Frankfurter's admonition that a true evaluation of an opinion must take into account the "considerations that lead a court to write an opinion one way rather than another,"[332] the question should be asked why the *Gideon* opinion followed the path that it did. Many speculations might be offered, but the thesis that seems the most convincing, though hardly a complete explanation, is simply that the failure of the *Gideon* opinion to utilize the usual overruling rationale is attributable primarily to its authorship by Justice Black. As the writer of the dissent in *Betts*, Justice Black would have a natural interest in vindicating his original opinion (which might well be reflected in *Gideon's* emphasis upon the argument that *Betts* represented "an abrupt break with its own well-considered precedents").[333] But to explain the *Gideon* opinion solely or even primarily in terms of this interest hardly does justice to the depth of the Justice's views. One of the cornerstones of Justice Black's constitutional philosophy[334] has been his belief, most clearly articulated in his *Adamson* dissent,[335] that the Fourteenth Amendment "incorporates" all of the guarantees of the Bill of Rights. Of

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[331] These comments were also directed at Fay v. Noia, 372 U.S. 391 (1963), see note 1 *supra*, and Gray v. Sanders, 372 U.S. 368 (1963) (holding invalid the Georgia County Unit system as applied to statewide elections), two cases decided on the same day as *Gideon* that were also classified as overruling decisions. The article also noted, as might be expected, that Justice Black had dissented in *Betts* while all of the members of the majority in that case were either deceased or retired.

[332] PHILLIPS, FELIX FRANKFURTER REMINISCES 296 (1960).

[333] See text at notes 136–83. Although Justices who dissented in the original case have frequently joined subsequent overruling opinions, they have only infrequently been assigned the Court's opinion in the overruling case. See Blaustein & Field, *"Overruling" Opinions in the Supreme Court,* 57 MICH. L. REV. 151, 184–94 (1958).

[334] See generally, Reich, *Mr. Justice Black and the Living Constitution,* 76 HARV. L. REV. 673 (1963); Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview,* 37 N.Y.U.L. REV. 549, 559 (1962).

[335] Adamson v. California, 332 U.S. 46, 68, 71-72 (1947).

course, his opinion for the Court in *Gideon* did accept the prevailing "fundamental rights" interpretation of the Fourteenth Amendments,[336] but that "acceptance" was carefully based only on the force of prior precedent and even then seemingly was limited to a view of the "fundamental rights" test that requires "complete absorption" of each such right.[337] Moreover, the Court's opinion was

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[336] 372 U.S. at 342: "We accept *Betts* v. *Brady*'s assumption, *based as it was on our prior cases*, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." (Emphasis added.) Justice Black ordinarily has been most willing to disregard precedents in constitutional cases. See Reich, *supra* note 334, at 681; Green v. United States, 356 U.S. 165, 193 (1958) (dissenting opinion). *But cf.* United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (dissenting opinion).

[337] Under the traditional view of the "fundamental rights" approach, the Fourteenth Amendment may encompass only a portion of a right protected against the federal government under one of the first eight Amendments. See Palko v. Connecticut, 302 U.S. 319 (1937); Adamson v. California, 332 U.S. 46, 66 (1947) (concurring opinion). See also Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 641 (1961).

Justice Brennan recently has advanced the view that individual rights within the Bill of Rights that are ranked as fundamental must be "absorbed" by the Fourteenth Amendment "in toto," *i.e.*, these individual rights must have the same scope in their application to the states as they do to the federal government. See Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (dissent from the judgment of an equally divided Court); Cohen v. Hurley, 366 U.S. 117, 154 (1961) (dissenting opinion). Justice Black apparently has accepted this view as the best alternative to the total "incorporation" position of *Adamson.* See Ohio *ex rel.* Eaton v. Price, *supra.* There are various indications that the *Gideon* opinion was written with this view in mind. First, the opinion consistently refers to the "Sixth Amendment right to counsel" that is made applicable to the states. See, *e.g.*, 372 U.S. at 340, 342. In the same vein, the opinion notes that "those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are *equally* protected against state invasion by the Due Process Clause. . . ." *Id.* at 341. (Emphasis added.)

It is also interesting to note that the opinion describes *Palko* simply as a case that refused to make the "double jeopardy provision of the Fifth Amendment" obligatory in the states. There is no reference to Justice Cardozo's careful restriction of the *Palko* opinion to the particular aspect of double jeopardy involved there, including a suggestion that other aspects of double jeopardy may apply to the states *via* the Fourteenth Amendment. See 302 U.S. at 328. It was apparently these features of the *Gideon* opinion that made Justice Harlan feel it necessary to express his "understanding" that the Court was not embracing the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such. See 372 U.S. at 352. Justice Douglas argued in reply that total incorporation of each federal guarantee was clearly the present constitutional standard. *Id.* at 346. Even if Justice Douglas' views on this score are not accepted by a majority, certainly the *Gideon* opinion is consistent with the later adoption of this concept of the

accompanied by a separate statement of Justice Black's co-dissenter in *Adamson*, Justice Douglas, that the *Gideon* decision "happily" would not prevent the Court from adopting the "total incorporation" view sometime in the future.[338] In the light of this position, Justice Black certainly could not be expected to adopt any rationale that even hinted at the original validity of *Betts*, a decision that exemplifies for him all the evils of the "fundamental rights" approach.[339] Neither could he adopt any argument, such as the gradual erosion of *Betts* under the "special circumstances" cases, that might seemingly accept the basic premise of that approach. In any event, all such arguments are superfluous to one who believes that the Fourteenth Amendment automatically includes the right to appointment of counsel because the same guarantee is contained in the Sixth Amendment.

The contents of the *Gideon* opinion thus were almost preordained by the deeply set views of its author. With all due respect to Justice Black, one might suggest that so long as his philosophy is not accepted by a majority, the interests of the Court would have been better served if the Court's opinion had been written by a Justice whose views permitted him to employ the traditional arts of overruling.[340]

Fourteenth Amendment. At the least, the opinion indicates that so far as the right to counsel is concerned, the standards under the Sixth and Fourteenth Amendments will be the same. *Cf.* Ker v. California, 374 U.S. 23 (1963), where the Court took this same approach in the more complex area of search and seizure.

[338] 372 U.S. at 346; see note 336 *supra.*

[339] See, *e.g.*, his comments upon *Betts* in the following separate opinions: International Shoe Co. v. Washington, 326 U.S. 310, 326 (1945); Adamson v. California, 332 U.S. 46, 83, 84, 90 (1947).

[340] *Cf.* Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963).