Maryland Law Review

Volume 23 | Issue 4 Article 4

The Right to Counsel for Indigents in State Criminal Trials

H,. Rutherford Turnbull III

Comments and Casenotes

THE RIGHT TO COUNSEL FOR INDIGENTS IN STATE CRIMINAL TRIALS

By H. Rutherford Turnbull III

I. Introduction

In establishing in *Gideon v. Wainwright*[1] the Fourteenth Amendment right of indigent state court defendants to court-appointed counsel in non-capital cases, overruling *Betts v. Brady*,[2] the Supreme Court discarded one of its most criticized decisions and progressed yet another step in applying to the states one of the rights and immunities specifically guaranteed by the Bill of Rights against Federal violation. *Gideon* is noteworthy not only because it illustrates the history of the overruling of a bad precedent, but also because it serves as an example of an evolving concept of federal-state relations. It represents another resolution of the constitutional conflict between the preservation of individual rights and the reservation of power to the states to expediently enforce the criminal law. Finally, it can be interpreted as another piecemeal victory for those members of the Supreme Court whose judicial activism is summed up in the doctrine of "absorption" of the specific guarantees of the first eight amendments against Federal action into the Fourteenth Amendment's due process clause over those whose judicial self-restraint caused them to refuse to depart from *Betts v. Brady* and further reduce state control of criminal procedure. Beneath these microcosmic views of *Gideon* run the persuasive forces of history and of the 1932 case of *Powell v. Alabama*.[3] So forcefully does *Gideon* resort to them that they must be examined and understood if *Gideon* is to take on full meaning in the stream of cases and the scheme of law.

II. Historical Considerations

At the outset, it is important to recall the distinction between the right to counsel of one's own choosing and the right to court-appointed counsel. In discussing the latter

[1] 372 U.S. 335; 153 So. 2d 299 (1963), case on remand from the Supreme Court.

[2] 316 U.S. 455 (1942). Both Betts and Gideon were charged with felonies, a factor which could be a basis for limiting *Gideon* to felony cases only.

[3] 287 U.S. 45 (1932).

right, the Court has borrowed language, essentially dicta, from opinions which involved the right to counsel of one's own choosing, and has used the language to support a finding of a violation of Fourteenth Amendment due process by the trial court's failure to appoint counsel for the defendant. This blending of cases, basically different in their nature but commonly related to the Sixth and Fourteenth Amendments, is evident in *Gideon's* reliance on *Powell,* as will be indicated below. Further, it is important to note that *Gideon* found that *Betts'* historical approach was "wrong" in its basic premise that "the Sixth Amendment's guarantee of counsel is not one of these fundamental rights,"[4] and that *Gideon* found "ample precedent", especially *Powell,* existed to uphold a contrary view.

As early as the 13th Century,[5] a defendant enjoyed the right to have counsel of his own choosing represent him on questions of law, such as exceptions to an indictment,[6] and in the 16th Century, he had a similar right in appealing a felony conviction.[7] In subsequent years, the restriction on the right of counsel to appear only when questions of law were raised, as distinguished from questions of fact, was preserved.[8] The limitation of the right was justified on two grounds: (1) the canon law principle that the prosecution would make its case so plain that it would be useless to look at any evidence to the contrary,[9] and (2) the assumption that the court would protect the defendant's rights.[10] The right was further restricted as the degree and seriousness of the alleged crime increased,[11] the Crown thereby preserving an obvious advantage in all serious criminal prosecutions.[12]

---

[4] *Supra,* n. 1, 342; see also Becker and Heidelbaugh, *The Right to Counsel in Criminal Cases,* 28 Notre Dame L. 351 (1953).

[5] I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (Lawyers' Literary Club Ed., 1959) 211.

[6] I COOLEY, CONSTITUTIONAL LIMITATIONS (6th Ed., 1890) 403-7.

[7] SAINT GERMAIN, THE DOCTOR AND THE STUDENT (Muchall's Ed., 1874) 256-9.

[8] COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (Brooke Ed., 1797) 29, 33-4, 136-7, 230; II HAWKINS, PLEAS OF THE CROWN (1824) 554; II HALE, THE HISTORY OF THE PLEAS OF THE CROWN (1st Am. Ed., 1847) 236; Becker and Heidelbaugh, *supra,* n. 4, 354, 356.

[9] III COKE, INSTITUTES, *op. cit. supra,* n. 8, 29; II STORY, CONSTITUTION OF THE UNITED STATES (4th Ed., 1873) 549-550.

[10] II STORY, *op. cit. supra,* n. 9, 550; IV BLACKSTONE'S COMMENTARIES (1898) 335, Gibbs v. Burke, 337 U.S. 773 (1949). See also Becker and Heidelbaugh, *supra,* n. 4, 354, 356, Fellman, *The Constitutional Right to Counsel in Federal Courts,* 30 Neb. L. R. 559, 560 (1951).

[11] BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (U. Mich. Press, 1955) 8.

[12] I COOLEY, *op. cit. supra,* n. 6, 405.

By the Treason Act of 1695,[13] Parliament began to equalize the power of the Crown and of the defendant by guaranteeing the right to employ counsel and the right to request court-appointed counsel in cases of misprison of treason and treason. In 1747, the Parliament granted the same rights in cases of impeachment for treason.[14] In 1836, the right to retain counsel in all criminal trials was finally given a statutory basis.[15] Thereafter, in 1903, the Poor Prisoners' Defense Act left it to the court's discretion whether to appoint counsel in all felony cases;[16] in 1930, a similarly entitled statute required court-appointed counsel in all murder cases;[17] and finally in 1949 the Legal Aid and Advice Act permitted appointment of counsel before arraignment but conditioned the right upon the court's discretion and the defendant's request.[18]

Although there is controversy over the relative influence of English common law in its substantive and procedural aspects upon the American colonies, it seems clear that, before the Constitution was adopted, Pennsylvania, Delaware, South Carolina, Virginia and Rhode Island had statutory provisions more liberal than England's;[19] that the other colonies at least in practice borrowed the English procedure relating to the right to privately-employed counsel;[20] and that most state constitutions preserved the right to counsel of one's own choosing in one form or another.[21] Along with Massachusetts,[22] Maryland improved on the English right: "[I]n all criminal prosecutions, every man hath a right . . . to be allowed counsel."[23] Judge Alfred S. Niles says that Art. XXI "is very similar both in language and effect to the Sixth Amendment to the Federal Constitution."[24] Professor Beaney, however, argues that the colonies generally made only technical improvements on the English law.[25] This is not the view expressed in *Powell v. Alabama*.[26]

With respect to the Federal Constitution and the colonial improvement over the English law, Story says that the Sixth Amendment creates as a "matter of constitutional

---

[13] 7 & 8 W. III, c. 3, s. 1 (1695).
[14] 20 Geo. II, c. 30 (1747).
[15] 6 & 7 Will. IV, c. 114, s. 1 (1836).
[16] 3 Edw. VII, c. 38, s. 1 (1903).
[17] 20 & 21 Geo. V, c. 32 (1930).
[18] 12 & 13 Geo. VI, c. 51 (1949).
[19] BEANEY, *op. cit. supra*, n. 11, 18.
[20] *Ibid.*
[21] BEANEY, *op. cit. supra*, n. 11, 19.
[22] Pt. I, Art. XII, Massachusetts Constitution of 1780.
[23] Declaration of Rights, Art. XXI.
[24] NILES, MARYLAND CONSTITUTIONAL LAW (1915) 41.
[25] BEANEY, *op. cit. supra*, n. 11, 22.
[26] 287 U.S. 45, 64-5 (1932).

right what the common law had left in a most imperfect and questionable state,"[27] and Cooley writes:

> "With us, it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel. And generally, it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him, who shall be paid by the government."[28]

In point of time, the Sixth Amendment was preceded by the Judiciary Act of 1789, providing an apparent right to be represented by *privately-employed counsel* in "all courts of the United States"[29] and by a later statute, granting the right to receive *court-appointed counsel* in cases of treason or other capital crime.[30] Moreover, the general practice of United States District Courts was to appoint counsel in less than capital cases;[31] but, it was not the concensus before 1938 that defendants in non-capital cases who failed to request counsel had a constitutional right to court-appointed counsel or that a conviction without counsel was voidable.[32] However, in 1938, the Supreme Court, in *Johnson v. Zerbst,*[33] created a constitutional requirement of what had been practice and custom in the United States courts, stating that the Sixth Amendment invalidates a conviction of an accused who was not represented by counsel at every stage of the trial unless the defendant has intelligently waived the assistance of counsel.

In reaching its decision in *Johnson,* the Court avoided an historical consideration of the right to counsel because there appeared to be no decisional precedents squarely on point. It is unclear why the Court ignored the statutes enacted immediately prior to the ratification of the Sixth Amendment in 1791 and the practice of lower courts over the years. The Court may simply have elected "to adopt a more enlightened procedure because modern conditions and attitudes seemed to make such action desirable."[34] Whatever the basis for the opinion, it could have been

[27] II STORY, *op. cit. supra*, n. 9, 551.
[28] I COOLEY, *op. cit. supra*, n. 6, 406.
[29] 1 Stat. 73, sec. 35 (1789); BEANEY, *op. cit. supra*, n. 11, 28 and 32 discusses the ambiguity of the background of this conclusion.
[30] 1 Stat. 118 (1790).
[31] BEANEY, *op. cit. supra*, n. 11, 29.
[32] BEANEY, *op. cit. supra*, n. 11, 32.
[33] 304 U.S. 458 (1938).
[34] *Supra*, n. 33, 463; BEANEY, *op. cit. supra*, n. 11, 44; KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY (U. Mich. Press, 1956) 42, 43.

predicated on two grounds: (1) the historical, with its liberalized standards of fair judicial procedure, and (2) an outright humanitarian policy decision supported by dicta in *Patton v. U.S.*[35] and *Powell v. Alabama.*[36] The possibility of a dual approach in establishing a constitutional right for federal defendants has been invoked for many years in attempts to establish a similarly broad right for state defendants under the due process clause of the Fourteenth Amendment.[37] With *Gideon,* those efforts became successful.

III. UNDER THE CONSTITUTION

Prior to *Gideon,* the right to court-appointed counsel under the Sixth Amendment had been considerably broader than under the due process clause of the Fourteenth. The explanation for this dichotomy is found in evolving constructions of due process, in interpretation of constitutional language, and in the maintenance of a satisfactory balance of state and national power within a federal system.

Powell is, for all intents and purposes, the *fons et origio* of the law of right to counsel of one's own choosing and, arguably, of the right to court-appointed counsel. On its face, it held that the defendants were entitled to secure counsel of their own choice and to have adequate time to advise with counsel and to prepare their defenses. But the opinion added a second leg to its holding, to which some members of the Court objected as unessential to the decision of the case and hence as not proper matter for ruling at that time, and which is the basis of the argument that *Powell* created a right to court-appointed counsel:

> "[T]hat in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested to or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[38]

---

[35] 281 U.S. 276, 308 (1930).

[36] *Supra,* n. 3, 68-9 (1932).

[37] *Supra,* n. 2, 474, and Bute v. Illinois, 333 U.S. 640, 649 (1948). See also Holtzoff, *Right to Counsel Under the Sixth Amendment,* 20 N.Y.L.Q. 1 (1944).

[38] 287 U.S. 45, 71 (1932).

Powell and its subsequent interpretations established the absolute right to have and secure counsel of one's own choice. In *Chandler v. Fretag*,[39] the defendant, charged with housebreaking and larceny, was informed at his trial that, because of three prior felony convictions, he would be tried as an habitual criminal, and, if convicted, would face possible life imprisonment. His request for a continuance to permit him an opportunity to obtain counsel was denied. On certiorari the Court stated: "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."[40] In *Chandler*, the Court quoted from *Powell*: "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right."[41] In a later case, where the defendant objected to being tried when his privately-retained counsel was absent, and his request for a continuance was denied, the Court held that there "was a denial of petitioner's constitutional right to a fair trial, with the aid and assistance of counsel whom he had retained."[42] In Maryland, the Court of Appeals has stated the rule: "Every citizen is entitled to employ counsel when put upon trial for a criminal offense."[43] Any interference with that right by state officials constitutes a denial of due process.[44]

There also was created as an outgrowth of *Powell* an absolute right to have sufficient opportunity to prepare for trial and to obtain a reasonable continuance until counsel is ready to proceed. In *Powell*, the Court stated: "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."[45] Although the denial of a continuance, standing alone, does not violate due process,[46] the Court

[39] 348 U.S. 3 (1954).
[40] *Id.*, 9.
[41] *Ibid.*
[42] House v. Mayo, 324 U.S. 42, 46 (1945).
[43] Smith v. State, 189 Md. 596, 608, 56 A. 2d 818 (1948); MD. RULE 719 c, amended, Daily Record, August 9, 1963. See also Chewning v. Cunningham, 368 U.S. 443 (1962); Reickauer v. Cunningham, 299 F.2d 170 (4th Cir. 1962). *Cf.* Quicksall v. Michigan, 339 U.S. 660 (1950), Wade v. Mayo, 334 U.S. 672 (1948), Gryger v. Burke, 334 U.S. 728 (1948), and Foster v. Illinois, 332 U.S. 134 (1947).
[44] McCleary v. State, 122 Md. 394, 400, 89 A. 2d 1100 (1914).
[45] *Supra*, n. 38, 59.
[46] Avery v. Alabama, 308 U.S. 444 (1940).

will not condone proceedings which deprive a defendant of the effective assistance of counsel, as where the defendant in a murder case is allowed to see only the Public Defender for 15 minutes late the night before his trial and where his request for a 24-hour continuance is denied although it would have enabled him to examine the indictment, consult with the assistant Public Defender assigned to represent him, subpoena witnesses and otherwise prepare his defense.[47] But there is no hard and fast rule to guide lower courts as to when or under what circumstances to grant or deny a continuance. In Maryland, Judge Grason stated the rule:

> "Counsel appointed to defend one charged with crime must be given a reasonable time to prepare his client's case for trial. It would be a great injustice to the accused to appoint counsel for him and immediately put the accused upon trial without an opportunity to the counsel to thoroughly investigate the case."[48]

However, there still is uncertainty as to the stage at which the right to counsel of one's own choosing or, in fact, by court appointment, attaches, but a discussion of this point is reserved for later.

Powell was significant in several respects. It rested upon an historical consideration of the right to counsel as one test to determine whether due process of law has been met, subject to the qualification that "the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence . . . be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation."[49] Applying this test, the Court concluded that the right to counsel *at common law* could be maintained as necessary to due process only with great difficulty.[50]

Further, *Powell* marked a repudiation of the doctrine of *Hurtado v. California*,[51] i.e. that, as the *Powell* opinion put it,

> ". . . in the sense of the Constitution due process of law was not intended to include, *ex vi termini*, the in-

[47] Hawk v. Olson, 326 U.S. 271 (1945). See also House v. Mayo, 324 U.S. 42 (1945); *cf.* White v. Ragan, 324 U.S. 760 (1945).

[48] Smith v. State, 189 Md. 596, 608-9, 56 A. 2d 818 (1948); see also Harmon v. State, 227 Md. 602, 177 A. 2d 902 (1962); and Taylor v. State, 226 Md. 561, 174 A. 2d 573 (1961).

[49] *Supra*, n. 38, 65.

[50] *Supra*, n. 38.

[51] 110 U.S. 516 (1884).

> stitution and procedure of a grand jury in any case; and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the states, was to be interpreted as having been used in the same sense and with no greater extent; and that if it had been the purpose of that Amendment to perpetuate the institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect."[52]

This construction—that no language in the Constitution is meaningless—presented a barrier to the holding that due process had been violated in the *Powell* case, but it was overcome by the Court's statement that *Hurtado* merely set out a rule of construction which must give way when its application would violate fundamental principles of justice.[53] *Powell* predicated due process with respect to the right to counsel not on the fact that the Sixth Amendment says that counsel is required in all criminal cases in Federal courts, but on the fact that the right is of such a "fundamental character,"[54] that the necessity of counsel was so vital under all the circumstances of the case that the trial court's failure to make an effective appointment of counsel constituted such a denial of the basic sense of justice and fair play as to be a denial of due process. *Powell* thus created a conceptual basis for Fourteenth Amendment absorption, founded upon the nature of the right to counsel under *all the circumstances of the case.* In *Gideon*[55] the Court interpreted *Powell* as protecting the right to counsel in *all* cases because the right is "fundamental."

Finally, in *Powell,* judicial empiricism was exercised to recognize and safeguard rights which were deemed "implicit in the concept of ordered liberty" and to condemn the blind reapplication of common law procedures which stultify progressive change and development. But, as will be shown below, later interpretations indicated that the Court also would strive to maintain state legislative and judicial autonomy, subject to a flexible conceptual due process limitation and case-by-case establishment of minimal standards of justice. *Gideon* has the effect of dispelling any possibility for balancing in this area by establishing an absolute right to counsel in certainly every serious, and perhaps

[52] *Supra,* n. 38, 66.

[53] *Id.,* 67.

[54] *Id.,* 68. See also Palko v. Connecticut, 302 U.S. 319 (1937); Hebert v. Louisiana, 272 U.S. 312 (1926); Twining v. New Jersey, 211 U.S. 78 (1908).

[55] 372 U.S. 335, 342 (1963).

even in all, criminal proceedings, unless the right is intelligently waived.[56]

The previous need for balancing or weighing in each non-capital case arose from the fact that after several narrow constructions of *Powell*,[57] the Court in *Betts v. Brady* rejected an argument that due process under the Fourteenth Amendment required the appointment of counsel for indigent state defendants in non-capital cases, finding that historical considerations compelled the conclusion that "appointment of counsel is not a fundamental right, essential to a fair trial,"[58] but recognizing, consistent with the doctrine of *Palko v. Connecticut*,[59] that "in certain circumstances or in connection with other elements" the lack of counsel in a non-capital case "may result in a conviction lacking in such fundamental fairness"[60] as to violate due process. In dissent, Justices Black, Murphy and Douglas stated that the Fourteenth Amendment made the Sixth applicable to the states.[61] In *Betts*, the Justices divided between the balancing approach, requiring a case-by-case analysis, and the absolutist approach, advocating total absorption of the first eight amendments into the Fourteenth.[62] The Court has remained divided ever since, but the division in approach to the problem has not prevented it from finding the crucial element of unfairness in many pre-*Gideon* right to counsel cases.[63] Even in *Gideon*, Justice Harlan emphasized the persistent division in approach, stating that the holding that a right valid against the Federal government is "implicit in the concept of ordered liberty" and thus valid against the states should not be read "to suggest that by so holding, we [the Court] automatically carry over an entire body of federal law and apply it in full sweep to the States."[64]

---

[56] *Id.*, 346, 352, indicating that Justices Douglas and Harlan will continue to maintain different views of the effects of Gideon and the Fourteenth Amendment.

[57] BEANEY, *op. cit. supra*, n. 11, 157.

[58] 316 U.S. 455, 471 (1942).

[59] 302 U.S. 319 (1937).

[60] *Supra*, n. 58, 473.

[61] *Id.*, 474.

[62] See Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, *supra*, n. 59; Twining v. New Jersey, 211 U.S. 78 (1908).

[63] Quicksall v. Michigan, 339 U.S. 660 (1950); Gryger v. Burke, 334 U.S. 728 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Foster v. Illinois, 332 U.S. 134 (1947).

[64] 372 U.S. 335, 352 (1963).

IV. Criticism of the Fair Trial Rule

Historical considerations aside, *Betts* had been the cause of much criticism[65] and was implicitly criticized in *Gideon* as watering down *Powell* and *Grossjean v. American Press*,[66] where, speaking of its decision in *Powell*, the Court stated:

> "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 clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."[67]

It is not altogether ancillary to note the vagueness of "the aid of counsel" and to wonder whether counsel of one's own choice or of court-appointment is meant.

Although the rule in *Johnson v. Zerbst*, that the right to counsel in all criminal matters in federal courts is an absolute right, had provided an argument by analogy for an identical rule applicable to the states, the argument had not been adopted until *Gideon*. *Johnson* also had been grounds for argument that there existed an unconscionable double standard, one rule obtaining in federal courts and another in state courts, and that the Court should not sanction the duality but avoid needless conflict between the federal and state governments[68] by overruling *Betts* or otherwise creating a rule for state courts analogous to the federal rule. Justice Harlan's opinion in *Gideon* shows the impact of the argument: "To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system."[69] It also reflects his adherence to maintaining clear lines of distinction between the state and federal governments and justifies his concurrence in *Gideon*.

The argument against a double standard was complemented by an argument that many of the states by statute or by rule of court or in practice had abandoned *Betts*. In *Gideon*, the Court agreed that *Betts* was an "anachronism" when decided,[70] and in his concurring opinion, Justice Harlan noted the substantial and steady erosion of *Betts*.[71] By

[65] Note, 21 Chi.-Kent L. Rev. 107 (1942); Note, 16 So. Cal. L. Rev. 55 (1942); Note, 17 Tul. L. Rev. 306 (1942).
[66] 297 U.S. 233 (1936).
[67] *Id.*, 243-4.
[68] Elkins v. United States, 364 U.S. 206, 221 (1960).
[69] 372 U.S. 335, 357 (1963); see also Ker v. California, 374 U.S. 23 (1963).
[70] *Id.*, 345.
[71] *Id.*, 349.

the same token, twenty-two states, as *amici curiae* in *Gideon,* urged the Court to overrule *Betts* on the ground that the Court ought to conclude, as it did in *Mapp v. Ohio,*[72] that the laws and practice of the states and of England justify its abandoning an archaic rule.

It also had been pointed out that the due process clauses of the Fifth and Fourteenth Amendments make no distinction between the loss of life and liberty and that the Court's differentiation of cases on that basis was not supported by constitutional language, practical considerations or logic.[73] Only Justice Clark adopted this criticism in his concurring opinion in *Gideon*: "The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority."[74] Even before Justice Clark had sanctioned the criticism, Justice Douglas, dissenting in *Bute v. Illinois,*[75] indicated that the crucial question is the need for legal assistance, not the nature of the charge or the ability of the lay defendant to defend himself. In recent years, moreover, the Court, by dicta, had tended to abolish the capital—non-capital distinction. In *Griffin v. Illinois,*[76] it noted the disparity of treatment of capital and non-capital cases in a statute providing for free trial transcripts only for indigents sentenced to death. In *Kinsella v. Singleton,*[77] the Court stated that court-martial jurisdiction over non-military dependents at American military bases in foreign countries cannot be made to depend on whether the offense charged is capital or non-capital. Finally, in *Ferguson v. Georgia,*[78] a capital case involving an evidentiary rule that a person charged with a criminal offense is incompetent to testify in his own behalf but may give a statement in his behalf, the Court held it to be a denial of due process to deny the defendant the right to have his counsel question him to elicit the permissible statement, but it added significant dicta indicating the capital—non-capital distinction in *Betts* was becoming unacceptable.

The theory that the trial court would protect the defendant's rights where no counsel was present was promi-

[72] 367 U.S. 643 (1961).

[73] Bute v. Illinois, 333 U.S. 640, 677 (1948); see also Hamilton v. Alabama, 368 U.S. 52 (1961) and Williams v. Kaiser, 323 U.S. 471 (1945).

[74] 372 U.S. 335, 348 (1963).

[75] 333 U.S. 640, 677 *et. seq.* (1948); Note, 4 Wayne L. Rev. 191 (1958); Fellman, *The Right to Counsel in State Courts,* 31 Neb. L. Rev. 15, 25 (1951).

[76] 351 U.S. 12, 14 (1956).

[77] 361 U.S. 234, 246 (1960).

[78] 365 U.S. 570, 596 (1961).

nent in *Powell*[79] and *Betts*.[80] More recently, in *Gibbs v. Burke*, the Court commented:

> "[T]he fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial. The primary duty falls on him to determine the accused's need of counsel at arraignment and during trial. He may guide a defendant without a lawyer past the errors that make trials unfair."[81]

But the Court found that Gibbs' trial lacked fundamental fairness because neither counsel nor adequate judicial guidance or protection was afforded, predicating its finding on the grounds that the admission of incompetent testimony and the exclusion from evidence of relevant defense evidence were matters to which counsel, but not a layman, could have been expected to object or except.

As the Court implied in *Gibbs* and as it indicates in *Gideon*,[82] there are eminently practical reasons why an indigent defendant needs the advice and assistance of counsel. He cannot be expected to evaluate the lawfulness of his arrest, seizure or search; the validity of the indictment; what preliminary motions to file; whether his confession is considered voluntary and admissible; whether he is responsible for the crime charged or for a different one; whether he should plead guilty to a lesser offense; whether he should pray a jury trial and what questions to submit on voir dire; whether he should object to certain evidence; whether he should cross-examine and if so to what extent and how. While in jail awaiting trail, the indigent defendant is unable to prepare his defense, and after conviction, the layman is unsophisticated in the sentencing procedure or the methods for appealing. His ignorance of the law is not counter-balanced by his native ability to such a degree as to justify matching him against the state's prosecutor and investigative agencies.[83] These same arguments may justify extending *Gideon* to cases where the sanction for the offense charged is less than a substantial prison sentence, such as a misdemeanor or all crimes within the exclusive jurisdiction of the Municipal Court of Baltimore City, for example.

---

[79] 287 U.S. 45, 52 (1932).
[80] 316 U.S. 455, 472 (1945).
[81] 337 U.S. 773, 781 (1949); see also Carnley v. Cochran, 369 U.S. 506 (1962); McNeal v. Culver, 365 U.S. 109 (1961); Hudson v. North Carolina, 363 U.S. 697 (1960).
[82] 372 U.S. 335, 344 (1963).
[83] *The Supreme Court, 1948 Term*, 63 Harv. L. Rev. 119, 135-6 (1949).

On strictly constitutional grounds, it had been urged that *Betts* denied equal protection of the law by distinguishing between those defendants who are financially able to obtain counsel and those who are indigent in instances where those able and unable to retain counsel are charged with the same, less-than-capital crime. Justice Douglas long had been of the opinion that *Betts* should have been overruled because of the burdens it placed on an accused "solely because of his poverty."[84] In *Griffin v. Illinois*,[85] the Court itself condemned the denial of equal opportunity for appellate review,[86] and in strong dicta indicated the right to counsel is likewise covered by the equal protection clause of the Fourteenth Amendment.[87] In *Eskridge v. Washington Prison Board*,[88] the Court held unconstitutional as violating Fourteenth Amendment due process a state statute[89] under which a trial court was empowered with discretion to grant or deny an indigent defendant's request for a free transcript of trial for a non-capital offense. *Gideon*, however, is devoid of any consideration of the equal protection argument.

V. WHEN THE RIGHT ATTACHES

In *Powell*, the Court found one of the crucial facts to be that the trial court did not designate counsel for the time after arraignment and before trial, the implication being that the right attaches at least at arraignment.[90] This would be true whether *Powell* is read as holding only that a defendant has an absolute right to counsel of his own choice or as holding that due process was violated by the failure to appoint counsel. But at what point prior to the pretrial stage does the right attach? *Gideon* gives no indication, but the answer may well depend on how soon after arrest the accused is given a preliminary hearing or a formal arraignment, what prejudice to his subsequent trial may arise during the pre-hearing period,[91] and whether he is able and indicates a desire to hire his own counsel immediately after his arrest.

The overriding criterion for finding a violation of due process was established in *Crooker v. California*,[92] and

[84] McNeal v. Culver, *supra*, n. 81, 118-9.
[85] 351 U.S. 12, 19 (1956).
[86] Ill. Rev. Stat. (1955) c. 38, sec. 769.1.
[87] *Supra*, n. 85, 17-18.
[88] 357 U.S. 214 (1958); see also Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963).
[89] Remington's Wash. Rev. Stat. (1932) sec. 42-5.
[90] 287 U.S. 45, 52-53 (1932).
[91] Canizio v. People, 327 U.S. 82 (1946); see also Reece v. Georgia, 350 U.S. 85 (1955).
[92] 357 U.S. 433 (1958).

Cicenia v. LaGay.[93] In both cases, the accused had indicated a desire to contact counsel of his own choice; in *Crooker*, the accused was a former law student who was able to retain counsel and who requested the right to do so, and, in *Cicenia*, the accused already had retained counsel but was not permitted to contact him during police interrogation. In both cases, the confessions were held admissible. In the Court's view of these cases, however, the test for finding a violation of due process was stated to be whether the lack of counsel at that particular stage was so prejudicial as to infect the subsequent trial "with an absence of 'that fundamental fairness essential to the very concept of justice'."[94] In those cases, such a determination depended upon "all the circumstances of the case,"[95] especially whether a coerced confession was obtained while the police held the accused and he was denied his request to be permitted to obtain counsel prior to making any statements.[96] In neither case was the confession proved coerced. Whether *Crooker* and *Cicenia* will be limited to their exact factual circumstances—where the accused wished to contact his own counsel—or will be blended with cases where the accused requests counsel be appointed for him during the pre-hearing stage, is open to wide speculation, but there is ample room for predicting that such blending could well take place, if the *Gideon* interpretation of *Powell* is to be followed.

On the other hand, the Court has been reluctant to defeat valid police purposes and methods by creating a rule which would vitiate *any* conviction of a defendant whose request for counsel, made while he was in police custody prior to a preliminary hearing, was denied, regardless of any consequences to the accused arising from such a denial.[97] The Court has not imposed on the states the *McNabb-Mallory* rule,[98] applicable to federal officers, that the person arrested without a warrant must be taken to a magistrate without unnecessary delay, at which time a complaint shall be filed. The argument for the imposition of the *Mallory* rule apparently has been that the rule has been the only real deterrence to unsanctionable police activity and

[93] 357 U.S. 504 (1958).

[94] *Supra*, n. 92, and *id.*

[95] Townsend v. Burke, 334 U.S. 736, 739 (1948) and House v. Mayo, 324 U.S. 42 (1945).

[96] Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Crooker v. California, *supra*, n. 92, 440; Cicenia v. LaGay, *supra*, n. 93; Miller v. State, 231 Md. 158, 189 A. 2d 118 (1963).

[97] Culombe v. Connecticut, *supra*, n. 96, and Crooker v. California, *supra*, n. 92, 440-1.

[98] Mallory v. United States, 354 U.S. 449 (1957) and McNabb v. United States, 318 U.S. 332 (1943).

methods, but the Court has not extended *Mallory*'s rationale to the problems of right to counsel.[99] In addition, the Court (in recent years by a bare majority) has rested its reluctance to use the Fourteenth Amendment as a vehicle for supervising state administration of criminal law on an elastic concept of due process, defined with reference to the practice of the states and other countries in matters pertaining to police investigation and the rights of the accused.[100] However, Chief Justice Warren and Justices Douglas, Black and Brennan have argued that, in the words of Justice Douglas, in *Culombe v. Connecticut,* "any accused—whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused, he is denied 'the Assistance of Counsel for his defense' guaranteed by the Sixth and Fourteenth Amendments."[101] The case then before Justice Douglas, in which he filed a concurring opinion, involved an illiterate mental defective of the moron class who had requested counsel throughout his detention and interrogation of several days, but whose request had been denied, and who had been told only that he could have a lawyer if he knew of one to contact, which he did not. Moreover, the police made no effort to contact even the Public Defender, much less inform Culombe of the fact that the State maintained an office of a Public Defender. Whether Justice Douglas' broad statement, inclusive of "any accused—whether rich or poor—", is to be taken as limited to the facts of *Culombe* is doubtful when read with subsequent language in his concurring opinion. It is precisely the breadth of language in this part of the *Culombe* opinion which leads to subsequent blending of dicta and holding in the areas of right to counsel of one's own choosing and right to counsel by court appointment.

Douglas' view underlies *Spano v. New York,*[102] where it was held that the admission of an involuntary post-indictment confession made in the absence of counsel violates due process. The Court found it unnecessary to reach the argument that *Crooker* and *Cicenia* were inapplicable because no indictment had been returned, as in *Spano,* and that the Court therefore should adopt the rule that "follow-

[99] Mapp v. Ohio, 367 U.S. 643 (1961), provides the basis for the argument.
[100] Culombe v. Connecticut, 367 U.S. 568 (1961).
[101] *Supra,* n. 100, 637; see also Spano v. New York, 360 U.S. 315, 324 (1959); Cicenia v. LaGay, 357 U.S. 504, 511 (1958); Crooker v. California, 357 U.S. 433, 441 (1958); Ashdown v. Utah, 357 U.S. 426, 431 (1958). This is not the same, but a supplementary, view urged by Justice Douglas in Reck v. Pate, *supra,* n. 96, 447.
[102] 360 U.S. 315 (1959).

ing indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment."[103] However, Justices Douglas, Black and Brennan stated that the post-indictment interrogation and confession in the absence of counsel deprived the accused of his right to counsel, contrary to the dicta in *Powell.*[104] Justice Stewart, with whom Justices Douglas and Brennan concurred, joined in the Court's opinion, stating: "It is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment."[105]

These same Justices recently succeeded in overthrowing a conviction where the accused, without counsel, could have been prejudiced by his actions during arraignment. In *Hamilton v. Alabama,*[106] a unanimous Court reversed the conviction of a defendant in a capital case where the accused was denied counsel at the arraignment and where arraignment was found to be a critical stage in the entire proceedings where "what happens there *may* affect the whole trial."[107] *Hamilton* stands in contrast to *Spano,* where actual prejudice, not potential prejudice, was controlling. The Court stated in *Hamilton* that the admissibility of a confession was not involved and it specifically rejected the "resulting prejudice" theory of *Crooker* and *Cicenia.* Combining *Spano* and *Hamilton* the Court finds a violation of due process under the theory of potential, rather than actual, prejudice.[108]

Hamilton has particular importance to Maryland because of the Supreme Court's reversal of *White v. State,*[109] where the Maryland Court of Appeals sustained the conviction of the accused in a capital case where at trial the "guilty" plea of the defendant, made before a magistrate and in the absence of counsel, was admitted into evidence although the defendant, at his subsequent arraignment and trial, pleaded not guilty upon the advice of counsel. In *White,* the Maryland Court had stated that the defendant was not denied due process by the absence of counsel at the preliminary hearing, and had distinguished *Hamilton* as resting on the fact that although arraignment was a critical stage in Alabama, it was not critical in Maryland because,

[103] *Id.*, 320.
[104] Powell v. Alabama, 287 U.S. 45, 57 (1932).
[105] Spano v. New York, *supra,* n. 101, 326.
[106] 368 U.S. 52 (1961).
[107] *Id.*, 54 (emphasis added).
[108] *Supra,* n. 106. See also Chewning v. Cunningham, 368 U.S. 443 (1962) and Hudson v. North Carolina, 363 U.S. 697 (1960).
[109] 227 Md. 615, 177 A. 2d 177 (1962), *rev'd* per curiam, 373 U.S. 59 (1963).

at trial, a waiver of various motions available at arraignment could be cured and the plea entered at arraignment changed. The Court also had stated that, although evidence of the original plea is admissible, the admission of such evidence did not prejudice White. The Court did not find it necessary to consider the statement in *Hamilton* that where the arraignment is a critical stage the defendant need not later plead or prove prejudice to reverse a conviction, since the degree of prejudice from the lack of counsel is not determinable. The Supreme Court reversed, holding that, in a capital case, where the defendant entered a guilty plea before a magistrate when he had no counsel, the preliminary hearing in those circumstances becomes a critical stage at which the defendant has a right to counsel. The holding rests on the facts that the plea entered before the magistrate was admitted at the actual trial and that it becomes purely speculative whether any prejudice resulted from the admission of the plea. That White's co-defendant was not sentenced to death may have been an underlying motive for the Court to reverse. There was no finding that in other cases the preliminary hearing in Maryland would become a critical stage, but, reading *White* and *Gideon* together, it could be interpreted as a stage at which counsel is required.

VI. THE RIGHT IN MARYLAND—THE SUPREME COURT AND THE STATE COURT

Unfortunately, *Gideon* leaves some crucial problems unanswered, including the question whether it will be applied retroactively, but it can be inferred from some of its language and from a recent remand of a Maryland case that it could be so applied.[110] In view of the confusion generated by *Mapp*, it is an unsatisfactory opinion on this point.

It is also not clear from the opinion in *Gideon* whether, as Justice Harlan indicates, the states will be required to appoint counsel only in cases where there is a possibility of a "substantial prison sentence"[111] or whether they will be required to appoint counsel in all cases, regardless of the sanctions attached to the offense charged.

With respect to the pre-arraignment stage in Maryland, it is the rule that due process is not violated when the de-

[110] Patterson v. State, 227 Md. 194, 175 A. 2d 746, *rev'd* in light of Gideon, 372 U.S. 776 (1963). *Cf.* Lumpkin v. Director, Daily Record, July 13, 1963; Thompson v. Warden, Daily Record, July 12, 1963; Wilson v. Warden, Daily Record, May 25, 1963; and In Re Manning Daily Record, May 14, 1963.

[111] 372 U.S. 335, 351 (1963).

fendant, whose counsel is not present or whose request for counsel has been denied, makes a voluntary confession during police investigation but before arraignment.[112] Similarly, counsel need not be appointed for the magistrate's hearing and the absence of retained counsel at that hearing is not a violation of due process.[113] However, the arraigning judge must advise the defendant of his right to counsel and compliance with the duty is obligatory.[114]

Prior to *Gideon*, where an offense carried maximum punishments of death or imprisonment for five years or more, a Maryland Court was duty-bound to assign counsel,[115] although this rule has recently been amended. But the trial court could assign counsel in any other case,[116] taking into consideration the complexity of the case, the youth, inexperience and mental ability of the accused.[117]

Where a defendant was tried without counsel and there was such an absence of fairness as to deny the essentials of justice, the Court of Appeals had been loathe to sustain a conviction.[118] Due process still may be violated as a result of such inadequate representation as to be, in effect, no representation at all.[119]

Under present Maryland law, the defendant either may waive his right to court-appointed counsel,[120] or by entering a guilty plea, he may forego the right,[121] or where he is experienced because of former trials in the criminal courts and he does not request counsel, he may likewise waive his right.[122] Moreover, the trial court's failure to appoint counsel, though not requested to do so, and to ask whether the defendant wishes to have counsel assigned to represent him, does not *ipso facto* become a denial of due process.[123] *Gideon* makes no reference to the problems of waiver because both Betts and Gideon requested counsel, and it is

[112] Lenoir v. State, 197 Md. 495, 80 A. 2d 3 (1951) and Day v. State, 196 Md. 384, 76 A. 2d 729 (1950).

[113] Nettles v. Warden, 215 Md. 659, 139 A. 2d 242 (1958), but see *supra*, n. 109.

[114] Merritt v. State, 221 Md. 118, 156 A. 2d 228 (1959); Williams v. State, 220 Md. 180, 151 A. 2d 271 (1959); Hill v. State, 218 Md. 120, 145 A. 2d 445 (1958).

[115] MD. RULE 719 b 2 (a) and amendment, Daily Record, August 9, 1963.

[116] MD. RULE 719 b 2 (b) and amendment, Daily Record August 9, 1963.

[117] Sears v. Superintendent, 202 Md. 656, 97 A. 2d 133 (1953).

[118] The cases are collected in 5 M.L.E., sec. 289.

[119] Hall v. Warden, 224 Md. 662, 168 A. 2d 373 (1961), 201 F. Supp. 639, 313 F.2d 483 (4th Cir., 1963) and 31 L. W. 3405 (1963); Hardesty v. State, 223 Md. 559, 165 A. 2d 761 (1960); Woodell v. State, 223 Md. 89, 162 A. 2d 468 (1960).

[120] Meekins v. Warden, 203 Md. 655, 99 A. 2d 724 (1953) and MD. RULE 719, Daily Record, August 9, 1963.

[121] Parker v. Warden, 222 Md. 598, 158 A. 2d 762 (1960).

[122] Wilson v. Warden, 209 Md. 659, 121 A. 2d 695 (1956).

[123] Jewett v. State, 190 Md. 289, 58 A. 2d 236 (1948).

uncertain whether the case will have any effect on the problems involved in the theory of waiver.

Just as *Gideon* does not specify when the right attaches, it is barren of advice when the right terminates. In Maryland, the trial court is under no obligation to inform the defendant of his right to appeal,[124] and counsel's duty terminates upon the imposition of a sentence, although he is authorized to note, but need not perfect, an appeal, if directed by the accused to do so.[125] But he has no duty to advise the defendant of the right of appeal. It would seem to be the better rule that the duration of representation should begin at such time after arrest that the police could pursue their goals without violating defendants' rights, but not so late that the defendant might be denied his rights, and that it should extend through the 30-day period in which an appeal can be noted, for the reason that the indigent and untutored defendant may lose many of his rights to subsequently attack the judgment if he fails to enter a timely appeal. In the time before arraignment and after judgment of conviction, the need for counsel to preserve the accused's rights is no less necessary than at trial, for whenever there is a possibility that a person's rights unwittingly and unwillingly may be lost or otherwise violated, there is a countervailing need for representation. This need was implicitly recognized in *Douglas v. California*[126] where the Court held unconstitutional as against the equal protection clause of the Fourteenth Amendment a state statute which provided that state appellate courts, upon the request of an indigent defendant for counsel, should appoint counsel if in the opinion of the court it would be helpful either to the court or to the defendant, citing *Draper v. Washington*,[127] where a statute granting the right to a free transcript was based upon the trial court's discretion and held to violate the Fourteenth Amendment.

It would serve no useful purpose to delineate those instances where the Supreme Court found that the absence of counsel deprived the trial of fundamental fairness; in those cases, the basic issue was whether the type of case or the individual defendant, or both together, required, by their very nature, that counsel be appointed to represent the accused. Yet it still remains remarkable that the Court could have so long tolerated a rule so unwieldy and difficult to administer as *Betts* had been.

---

[124] Rayne v. Warden, 223 Md. 688, 165 A. 2d 474 (1960).
[125] MD. RULE 719 b 4 and Chewning v. Cunningham, 368 U.S. 443 (1962).
[126] 372 U.S. 353 (1963).
[127] 372 U.S. 487 (1963).

VII. FEDERALISM

The problems inherent in *Betts* fundamentally were problems in Federalism. The same problems persist in *Gideon*. They concern the relation of the Supreme Court to the states, and the reaction of the Supreme Court, traditionally sensitive to maintaining an acceptable balance of powers between the federal government and the states, to the conflict between principles of individual rights and the expedient administration of the criminal law.

Only twice in *Gideon* are problems of federalism directly considered. Justice Harlan openly maintains the position that an "entire body of federal law" is not applied in "full sweep to the states" by *Gideon* and that there is no wholesale "incorporation" of the Sixth Amendment into the Fourteenth.[128] However, he justifies the application of the Sixth to the states on the ground that *Betts* would do a disservice to the federal system if the Court continued to pay it lip-service only. Justice Black merely enumerates those provisions of the first eight amendments which have been made obligatory on the states.[129] In this argument by analogy, he stops short of advocating that the Bill of Rights has been or should be absorbed into the Fourteenth Amendment, although he implicitly contends the same.[130] Justice Black's retreat from his usual position perhaps can be explained by the fact that a unanimous Court could be persuaded to overrule *Betts* only if Justice Black modified his usual language of incorporation.

Between these poles of thought there has long been waged a debate as to what Fourteenth Amendment due process requires of the states. There had been a time when the Court had permitted the administration of the criminal laws to be left largely to the states.[131] Yet despite its historical reluctance to use the Fourteenth as a vehicle to extensively limit state authority, the Court in *Gideon* again exercised its contemporary role of setting at least minimum standards of criminal law on a national scale,[132] justifying

[128] 372 U.S. 335, 372 (1963) and Ker v. State of California, 374 U.S. 23 (1963).

[129] *Id.*, 341-42.

[130] *Id.*

[131] Rochin v. California, 342 U.S. 165, 168-69 (1952). See also Hurtado v. California, 110 U.S. 516 (1884), Wolf v. Colorado, 338 U.S. 25 (1949), overruled by Mapp v. Ohio, 367 U.S. 643 (1961); KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY (U. Mich. Press, 1956) 154, 159-60.

[132] Exemplifying this approach are: Mapp v. Ohio, *id.*; Robinson v. California, 370 U.S. 660 (1962); Griffin v. Illinois, 351 U.S. 12 (1956) and Draper v. Washington, *supra*, n. 127; Reece v. Georgia, 350 U.S. 85 (1955); Shepherd v. Florida, 341 U.S. 50 (1951); Fay v. New York, 332 U.S. 261

its position on the broad ground that it was recognizing and safeguarding still another fundamental right. In fact, as *Gideon* illustrates, the recognition of a fundamental right is largely an empiric, flexible and eclectic process which allows leeway for judicial creativity and is exercised with reference to such expansive concepts as the community's sense of decency, civilized standards of decency, or the essence of what is implicit in a scheme of ordered liberty, that is, with reference to those standards which constitute due process. As due process is thus broadly defined, the Court is afforded greater room in which to exercise its judicial discretion.

There have been two results of this flexible agreement to protect fundamental rights. On the one hand, some Justices have argued that the Bill of Rights is not absorbed into the Fourteenth Amendment. The natural result of non-absorption is to impose less rigid standards on the states, permit them opportunities to experiment with their criminal law procedures and leave to them the primary responsibility for administering the criminal law. By this doctrine, certain safeguards of the first eight amendments have been excluded from the Fourteenth.[133]

On the other hand, Justices Black and Douglas have argued[134] that the first eight amendments are absorbed into the Fourteenth, and Justices Murphy and Rutledge had contended[135] that the Fourteenth guarantees not only what is secured by the first eight, but also whatever else may be required to protect a defendant's rights. Where either view has prevailed, rights guaranteed to state-court defendants have been established on a national level; the concept of "fundamental right" has been engrafted upon them; and the federal judiciary has enlarged its supervisory role over the states.

By piecemeal victories over the years, those Justices who have advocated either version of absorption have put aside *Hurtado's* doctrine. They have caused a major expansion in the scope of the Fourteenth Amendment's due

(1947); Brown v. Mississippi, 297 U.S. 278 (1936); Mooney v. Holohan, 294 U.S. 103 (1935); Moore v. Dempsey, 261 U.S. 86 (1923); and Strauder v. West Virginia, 100 U.S. 303 (1880).

[133] Exemplifying this approach are: Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908); Hurdato v. California. *supra*, n. 131; see also Pugach v. Dollinger, 365 U.S. 458 (1961) and Schwartz v. Texas, 344 U.S. 199 (1952).

[134] See Justice Black's dissent in Adamson v. California, *supra*, n. 133, and in Betts v. Brady, 316 U.S. 455 (1942).

[135] See dissents of Justices Murphy and Rutledge, in Bute v. Illinois, 353 U.S. 640 (1948), adopting dissent of Justice Douglas therein. See also Glasser v. United States, 315 U.S. 60 (1942).

process clause, and they have succeeded in narrowing the ambit of the states to administer their criminal procedures. In these respects, those "liberal" activist Justices do not appear to be out-of-step with the political processes of contemporary federalism, which no longer permits abuses of defendants' rights which formerly had been condoned in the name of state administration of the criminal law, in the name of an older version of federalism.