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Gideon's Muted Trumpet

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GIDEON'S MUTED TRUMPET

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Once the darling of the legal academy, criminal procedure has fallen into disrepute. Thirty-five years ago, when *Gideon*[1] was decided, criminal procedure was the flagship of constitutional law, criminal defense attorneys were heros, and courts and lawyers were perceived as themselves agents of social justice. Today, there are still heros. But the conventional wisdom, within the academy and the country at large, no longer associates criminal law or procedure with heroism. Indeed, in some quarters, criminal procedure has become the enemy. Increasingly, scholars urge revisionism,[2] popular pundits brand procedural innovations as a loss of "common sense,"[3] and philosophers warn that the "procedural republic" has helped us to lose our way.[4]

Striking is this scholarly skepticism when compared to the disturbing fate of those who spawned this conference: they are vulnerable, poor, friendless; they have never seen a lawyer and they have talked to a judge speaking from a remote televised location. They sit in jail for ten or twenty or thirty days,[5] losing their jobs and their families, only to have the charges ultimately dismissed.[6] Douglas Colbert's

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1. Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (recognizing that an accused's right to counsel is one of the "fundamental principles of liberty and justice").

2. *See, e.g.*, Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281 (1998) (book review) (providing an overview and noting the dangers of one scholar's proposal for criminal procedure reform).

3. *See* HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 35-65 (1996) (arguing that the application of the exclusionary rule frequently leads to illogical results and presents a barrier to justice grounded in technicalities). *See generally* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 11 (1994) (examining our modern legal system and noting that "[i]n the decades since World War II, we have constructed a system of regulatory law that basically outlaws common sense").

4. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4 (1996) (criticizing the "procedural republic" as a form of political philosophy which "asserts the priority of fair procedures over partiular ends").

5. *See* Douglas L. Colbert, *Section Endorses Appointed Counsel at Bail Hearing*, A.B.A. SEC. CRIM. JUST., Summer 1998, at 17, 17 (recounting the case of John Holzan, who had "been in jail 27 days since his arrest on a misdemeanor charge of driving with a suspended license" before finally being released on personal recognizance).

6. *See id.* at 18 (noting that "[i]n Maryland . . . more than one-half of the 195,000 criminal cases prosecuted in the lower criminal court during fiscal year 1997 ultimately

cases raise important questions about a failed legal revolution.[7] For when the charges have been dismissed, what will Colbert's defendants understand about "criminal procedure"? The majesty of *Gideon*? The wisdom of the Warren Court? No doubt, the jailed and abandoned defendant would agree with critics of criminal procedure. How else could he see the "process" except as his *punishment*?

Few in America would approve of "punishment-by-process"—the stock in trade of repressive regimes.[8] And that, in one way, is my point. Rules of criminal procedure have become suspect, both in the scholarly and the popular imagination, because people view them as "special" rights, the stuff of judicial technicality and obfuscation, leading only to the protection of the worst among us. But this popular conception fails to recognize that there are important links, as punishment-by-process suggests, between criminal procedure and our democratic form of government. In what follows, I argue that the Sixth Amendment[9] vision of Gideon may be quite different from the one traditionally portrayed as linking the right to counsel to the right to a lawyer's assistance at trial. Under this vision, the right to counsel does not serve to protect guilty defendants but to ensure equality and democracy for the rest of us. The lawyer is the individual's guarantor of a "right of opposition,"[10] and, as such, is essential to a process of democratization, a process in which all interests (even the government's) are subject to competition.[11]

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concluded without conviction" and "about 1,500 pretrial detainees are in custody because they could not afford to pay a 10 percent bail of $500 or less").

7. *See* Douglas L. Colbert, *Thirty-Five Years After* Gideon: *The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 8-13 (finding a "widespread failure to recognize the right to counsel" when a defendant first "appear[s] for bail before a judicial officer" and that "nonassignment of counsel at the initial appearance is commonplace throughout the nation").

8. *See, e.g.*, Heinz J. Klug, Note, *The South African Judicial Order and the Future: A Comparative Analysis of the South African Judicial System and Judicial Transitions in Zimbabwe, Mozambique, and Nicaragua*, 12 HASTINGS INT'L & COMP. L. REV. 173, 211 (1988) (describing a practice in pre-Mandela South Africa whereby people, often innocent, were arrested and "made to endure a . . . period of punishment by process") (internal quotation marks omitted) (quoting Crewe, *Punishment by Process*, SASH, May 1987, at 19-20). The author wishes to thank her colleague Heinz Klug for bringing this to her attention.

9. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

10. Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 233 (Jon Elster & Rune Slagstad eds., 1988) ("The legally guaranteed right of opposition is . . . a fundamental norm of democratic government; it provides an essential precondition for the formation of a democratic public opinion.")

11. *See* Adam Przeworski, *Democracy as a Contingent Outcome of Conflicts*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 10, at 59, 63 (describing the passage from an au-

Lest this seem an academic proposition, recent events warn of the importance of the right to counsel to the democratic ideal. While the national press has fallen over itself to publicize the latest *Miranda* ruling,[12] the most important criminal procedure development of the decade occurred elsewhere. You can be rich, white, or even a friend of the president[13] and still be whisked away by the police, friendless and without counsel. *Gideon*'s trumpet remains muted. In part, this is because we have forgotten that criminal procedure is for all of us, not just some. We have forgotten that we control the government not to subvert public ends or to inhibit crime control, but to prevent the government from using power to prefer itself and its needs over those of its citizens.

I. SELF-REFERENTIALISM AND THE RIGHT TO COUNSEL

To the average man on the street, there is no doubt something odd, something decidedly odd, about the ways in which lawyers talk about the right to counsel. It is hornbook law, for example, that the Sixth Amendment applies when "adversarial proceedings" have begun.[14] It is also hornbook law that counsel will not be provided until a "critical stage" in the proceedings.[15] Ask the average person whether, when she is thrown in jail, it is an adversarial proceeding, and she will say, "Of course it's adversarial." Ask her whether she needs a lawyer and she'll say, "Of course it's critical." And, yet, conventional legal wisdom about the Sixth Amendment runs to the contrary: the average lay person's idea is not the law of adversarial proceedings or critical stages in the United States.[16]

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thoritarian system to a democratic one as a "process of subjecting all interests to competition, of institutionalizing uncertainty").

12. *See* United States v. Dickerson, 166 F.3d 667, 690-91 (4th Cir.) (holding that federal courts are not required to suppress *Miranda*-defective voluntary confessions), *cert. granted*, 120 S. Ct. 578 (1999); Brooke A. Masters & Tom Jackman, *Justice System Worries About 'Miranda,'* WASH. POST., Feb. 16, 1999, at B1 (discussing the controversy sparked by *Miranda* and reaction to the Fourth Circuit's *Dickerson* ruling).

13. The author is referring to Monica Lewinsky, whose affair with the President was the basis for an independent counsel investigation and subsequent impeachment of the President.

14. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) ("[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

15. *See* United States v. Wade, 388 U.S. 218, 224 (1967) ("In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings.").

16. *See* Colbert, *supra* note 7, at 5 (arguing that an accused's Sixth Amendment right to counsel should extend to her initial bail proceeding and noting that "[m]ost people are

My point is not that lawyers have lost their common sense or that lawyerly language is obscuring, but that these terms may be as illuminating for what they do *not* mean as for what they do. We all know the doctrinal reasons why, to the Sixth Amendment expert, adversarial doesn't really mean adversarial and critical doesn't really mean critical—adversarial or critical to the *defendant*, that is.[17] Indeed, because the doctrine has venerable origins and apparently wise purposes, we tend to forget that, for all our fine words and complex constitutional doctrine, the criminal procedure of the Sixth Amendment, and sometimes the Fifth, does very little to ensure a long and mutually supportive lawyer-client relationship. It neither requires the appointment of lawyers at the earliest stage of proceedings nor demands that the states provide enough lawyers or that the lawyers provided have sufficient time to provide a competent defense. The doctrine has developed largely as a means to exclude tainted evidence and regulate police deception.[18] Put another way, it serves to ensure the reliability of the system (writ large) rather than to protect the individual defendant.

In a sense, we might have expected a chasm between the *common sense* of counsel and the *law* of counsel. Elsewhere, I have argued that much modern constitutional law doctrine has a peculiar flavor of self-referentialism, a way of turning questions about the world into questions about the court.[19] Whether it involves fundamental rights, expectations of privacy, or even *habeas corpus*, the Court too often talks

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skeptical when told that individuals are unrepresented when first appearing for a judicial bail determination").

17. The Supreme Court, in its Sixth Amendment evidentiary exclusion cases, has clearly held that "adversary proceedings" means the beginning of "judicial" proceedings: "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting *Kirby*, 406 U.S. at 689 (plurality opinion)); *see also* Massiah v. United States, 377 U.S. 201, 205-06 (1964) (holding that the Constitution is violated when adversary judicial proceedings have commenced against an individual and, in the absence of counsel, government agents engage in deliberate elicitation of incriminating information). The right to a defense against a criminal "prosecution," as provided in the Constitution, is thus defined in terms of "judicial" involvement in that prosecution.

18. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 25.02, at 437 (2d ed. 1997) (examining the *Massiah* rule and noting that some commentators have determined the underlying issue to be the scope of deceit allowable in governmental undercover work).

19. *See, e.g.*, Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1404-05 (1997) (asserting that the evolution of modern constitutional doctrine reflects "institutional self-doubt . . . about the job of judging [and] the possibility of doctrinal failure").

about its own institutional problems rather than the problems of the people it serves, leaving us in a cycle of ongoing arguments that *appear* to be about us, about the people and their problems, but are really about something else—the court's quest for legitimacy, its concern about its place relative to other institutions, and its reputation among court-watchers. In a certain sense, this institutionalizing of justice is inevitable in a complex world; all constitutional questions are, as my colleague Neil Komesar has argued, about institutional choice.[20] But if that choice is made unthinkingly, if it is made with the idea that only the judiciary's interests are at stake (as opposed to those of the market, of society, or politics), it risks at best diversion and at worst the creation of a constitution for the judges, not the people.

The right to counsel is simply another example of this phenomenon. Indeed, we can see it in the evolution of some of the great opinions on the topic.[21] *Powell v. Alabama*[22] seems, today, an opinion of great courage. It tells us, for example, about the "fundamental character" of the right to a lawyer and its universality as a principle of constitutional law.[23] But these statements, even when they are at their most eloquent, seem as much about the judiciary as about the Scottsboro defendants. After all, the Court in *Powell* used the right to counsel to avoid the real question: the question of race—the question of how and whether a state could convict someone when it was committed to seeing them guilty-by-race. *Powell* did not hold that racism could taint a trial. Instead, it turned racism into a failure of process: the Court reached out to the right to counsel, transforming the "wrong" of racism into the judge's failure to appoint a lawyer. Indeed, even at its most eloquent, the Court seems to place judicial interests ahead of the defendants': for example, in a rather dramatic statement, the Court states that a capital trial without counsel would amount to "judicial murder"[24]—the image of a license to kill is power-

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20. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

21. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (criticizing *Betts v. Brady*, 316 U.S. 455 (1942), for failing to recognize that "appointment of counsel for an indigent criminal defendant is 'a fundamental right, essential to a fair trial'" (quoting *Betts*, 316 U.S. at 471)).

22. 287 U.S. 45, 71 (1932) (holding that the state trial court had a duty to assign counsel for an indigent and illiterate defendant in a capital case, thus paving the way for *Gideon*).

23. *Id.* at 68 ("[I]t [is] clear that the right to the aid of counsel is of this fundamental character.")

24. *Id.* at 72. Specifically, the Court states:

> Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel,

ful but noteworthy, as well, for the Court's emphasis on the danger to it rather than to the defendants.

Every constitutional lawyer knows the reasons why *Powell* linked the Scottsboro defendants' right to a lawyer to the right to a fair trial. To overturn the convictions required a violation of "due process" under the Fourteenth Amendment.[25] But this necessarily *limited* the scope of *Powell*'s protection. The embrace of "due process" and the invocation of a long list of circumstances demanding the defendants' representation ended up restricting the scope of the Court's "right to counsel." Thus, despite all the ringing phrases in *Powell* about the fundamental and universal nature of the right to counsel, it remained the case, after *Powell*, that the states could refuse to appoint counsel. For years after *Powell*, the "fundamental" nature of the right was largely rhetorical. The right to counsel remained a rather porous protection, dependent upon the specific facts and circumstances of individual cases.[26]

Modern era cases have reenacted this drama—giving with one hand what is taken back by another—in a variety of contexts. For example, in *United States v. Wade*,[27] the Supreme Court expanded the right to counsel to require the presence of lawyers at lineups.[28] However, in expanding the right, the court also laid the foundation for limiting it. It justified its requirement that lawyers be present at lineups on the ground that the lineup was a "critical stage" of the proceeding.[29] In distinguishing other investigative techniques, the court laid the groundwork for the analysis that tells states today that they need not provide counsel at bail hearings. Only "critical stages"—those stages that "might derogate from [the defendant's] right to a fair trial"[30]—demand counsel after *Wade*. The fair trial link thus be-

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> with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide.

Id.

25. *See id.* at 71 (holding that a failure to make an effective appointment of counsel was denial of due process).

26. In *Betts v. Brady*, 316 U.S. 455 (1942), for example, the Court "refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, made 'obligatory upon the States by the Fourteenth Amendment.'" *Gideon*, 372 U.S. at 340 (quoting Betts, 316 U.S. at 465).

27. 388 U.S. 218 (1967).

28. *Id.* at 224-27.

29. *Id.* at 237.

30. *Id.* at 226-27.

comes the measure or limit *on* the right to counsel rather than a reason *for* the right to counsel.

Wade's rhetoric is powerful: in almost magisterial terms, the Supreme Court tells us that "the accused . . . need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out."[31] Soon, of course, it was quite clear that the Court did not really mean that the accused "need not stand alone." *Wade* was later limited by *Kirby*[32] and *Ash*,[33] which emphasized the need for a "critical" stage only after "adversarial proceedings" had begun. Thus has the alleged "purpose" of the right to counsel, doctrinalized, come to be the means of limiting the "right to counsel," the way in which *Powell* and *Wade* and *Gideon* makes it possible that states may still refuse to provide counsel in the kinds of cases that Doug Colbert has catalogued.[34]

Justice Black understood this and made it quite clear in his opinion in *Wade*, where he emphasized the risks of the "critical stages" inquiry. He specifically warned that a "fair trial" might lie in the eye of the beholder and thus "might derogate from . . . [a defendant's] right" to counsel.[35] That, as he put it elsewhere, the fair trial link would make the right to counsel a "second-class" right.[36] As he explained in *Wade*:

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31. *Id.*

32. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (plurality opinion) (reasoning that the Sixth Amendment right to counsel does not extend to police conduct occurring prior to "the initiation of adversary judicial criminal proceedings").

33. United States v. Ash, 413 U.S. 300, 321 (1973) (holding that a photographic display, even if conducted post-indictment, is not a critical stage of the proceedings and therefore does not trigger the right to counsel).

34. A similar dance appears in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (expanding *Gideon* to encompass misdemeanor cases: "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial") and *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (limiting *Argersinger*'s right to counsel in misdemeanor cases based on its "imprisonment" rationale: "[N]o indigent criminal defendant [shall] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense").

35. *Wade*, 388 U.S. at 247 (Black, J., dissenting in part and concurring in part) (internal quotation marks omitted) (alteration in original) (quoting *Wade*, 388 U.S. at 228).

36. *See* Gilbert v. California, 388 U.S. 263, 278-79 (1967) (Black, J., concurring in part and dissenting in part). He states:

> [T]here is nothing in the Constitution to justify considering the right to counsel as a second-class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy. The real basis for the Court's holding that the stage of obtaining handwriting exemplars is not "critical," is its statement that "there is minimal risk that the absence of counsel might derogate from his right to a fair trial." The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel," and somehow believes that this Court has the power

> [T]here are implications in the Court's opinion that by a "fair trial" the Court *means a trial which a majority of this Court deems to be "fair" and that a lineup is a "critical stage" only because the Court, now assessing the "innumerable dangers" which inhere in it, thinks it is such.* . . . [I]t is clear from the Court's opinion in *Gilbert v. California* that it is willing to make the Sixth Amendment's guarantee of right to counsel dependent on the Court's own view of whether a particular stage of the proceedings—though "critical" in the sense of the prosecution's gathering of evidence—is "critical" to the Court's own view of a "fair trial." I am wholly unwilling to make the specific constitutional right of counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though thought to be empirical, assessment of the "risk that . . . counsel's absence . . . might derogate from . . . [a defendant's] right to a fair trial."[37]

To Justice Black, the critical stage analysis meant that the Court was balancing away the principles for which *Gideon* stood,[38] and using "words like a 'fair trial' to take the place of the clearly specified safeguards of the Constitution."[39]

Interestingly enough, modern commentary has paid very little heed to Justice Black's concerns. The conventional wisdom typically celebrates the link to trials. It was widely believed, for example, that exclusionary rule cases, like *Mapp*,[40] would have difficulty achieving their goal—deterring illegal searches and seizures—precisely because "they addressed problems beyond the direct control of the courts."[41] By contrast, the right to counsel decisions were haled as fully realizable precisely because they dealt with "matters within the immediate

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> to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial."

Id. (citations omitted).

37. *Wade*, 388 U.S. at 246-47 (Black, J., dissenting in part and concurring in part) (emphasis added) (citation omitted) (quoting *Wade*, 388 U.S. at 228).

38. He explained:

> The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer his trial will be "unfair." The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair, unless the court-created balancing formula has somehow changed it.

Gilbert, 388 U.S. at 279 (Black, J., concurring in part and dissenting in part).

39. *Id.*

40. Mapp v. Ohio, 367 U.S. 643 (1961).

41. JEROLD ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 251 (1997).

and continuing control of the courts."[42] Thus, even if sheriffs and police officers refused to carry out *Mapp v. Ohio*, trial judges and prosecutors presumably could be "entrusted" to follow the dictates of *Gideon* and appoint counsel at appropriate times and places.

This view has had a strong influence on the theory of the right to counsel. Indeed, conventional explanations emphasize the right to counsel as essential to a "fair judicial process" rather than the protection of individuals from State coercion.[43] A leading casebook, for example, urges that the right to counsel serves to protect the reliability of the "guilt-determining" process while individual liberty is protected by the exclusionary rule.[44] Now, this is a very interesting state of affairs. The claim is being made that protections of items seized, for the most part, stand as the great protection of liberty while the right to counsel protects the "process." I suspect that if you asked the average person on the street, they might find that this was a bit backwards—that they would far rather have access to a good attorney when sent to jail than bet on the not-so-often exclusion of evidence at trial. Indeed, I expect that those who might be politically unpopular or social outcasts might care a good deal more about consulting an attorney than about the introduction of evidence. Ask the Scottsboro defendants, were they alive, and I am sure that they would have wanted counsel, not just because of how that lawyer would perform at trial, but because he might have been their only way to communicate that they had been railroaded, targeted for their race, not their offense.

It is not surprising, given this understanding, that many of the great cases about the "right to counsel" have avoided rather simple and, yet presumably important, questions about *precisely when* a defendant should have meaningful access to a lawyer; instead, these cases have focused on the exclusion of evidence at trial. *Miranda*,[45] *Massiah*,[46] *Escobedo*,[47] and *Brewer*[48] all revolve, in one way or another,

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42. *Id.*

43. *See, e.g.*, Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 59 (1991) ("[T]he right to counsel significantly advances 'fair process' and 'dignitary' norms that serve to legitimate the operation of the criminal justice system.").

44. ISRAEL ET AL., *supra* note 41, at 251.

45. Miranda v. Arizona, 384 U.S. 436, 471-72 (1966) (holding that an individual held for interrogation must be informed of his right to have counsel present and his privilege against self-incrimination).

46. Massiah v. United States, 377 U.S. 201, 207 (1964) (stating that the defendant's self-incriminating statements, obtained after his indictment and without benefit of counsel, "could not constitutionally be used by the prosecution as evidence against *him* at his trial").

47. Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (holding that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is

around the right to counsel; none, however, tells you precisely when that right attaches or what it looks like. *Escobedo* told us that the right attached very early in the process but, in a post-*Miranda* world, that has been taken back.[49] *Miranda*, of course, offers a right to appointed counsel, or at least advice on that question, to protect the defendant's right against self-incrimination, but advice about counsel does not mean that counsel is actually provided or access assured.

In part this is because of a trend in which the Sixth Amendment is typically litigated, and considered by the Supreme Court, as a question of evidentiary exclusion. The question of when "adversarial proceedings" have begun, for example, is taught to students, as a general matter, through Supreme Court cases involving the use of particular kinds of evidence at trial. Indeed, some of the most difficult cases involve questions about when the police may "deliberately elicit" confessions, wiretap confederates, or place informants in a defendant's jail cell.[50] Surely, these are important issues, issues that ask us to determine when and how a government may investigate its citizens, but they have almost nothing to do with the aid that a lawyer might give to a client or the client's need for the lawyer. At most, they are about the ways in which police and prosecutors may *interfere with* the still-yet-undefined right to counsel.

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to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer").

48. Brewer v. Williams, 430 U.S. 387, 399, 405-06 (1977) (holding, based on the circumstances of the case, that police violated the defendant's Sixth Amendment right to counsel by eliciting incriminating information from him after the initiation of judicial proceedings and without notice to his counsel).

49. *Escobedo* applied the Sixth Amendment to a pre-indictment interrogation—a case in which a defendant repeatedly asked for his lawyer and the lawyer, although in the station house, was denied access. *Escobedo*, 378 U.S. at 479-81. Later, in *Kirby v. Illinois*, 406 U.S. 682 (1972), the Supreme Court would "take back" *Escobedo* as a Sixth Amendment case and reconstrue it as a case that "like *Miranda*," was essential to "guarantee . . . the privilege against self-incrimination" under the Fifth Amendment. *Id.* at 689 (internal quotation marks omitted) (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)).

50. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (stating that when "police and their informant [take] some action . . . that was designed deliberately to elicit incriminating remarks," defendant's Sixth Amendment rights were violated); United States v. Henry, 447 U.S. 264, 274 (1980) (holding that self-incriminating statements made by an accused, while under indictment, when police "intentionally creat[e] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel," is a violation of the Sixth Amendment right to counsel); *Massiah*, 377 U.S. at 206 (holding "that the petitioner was denied the basic protections [of the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel").

It is not surprising, in a world in which evidentiary exclusion was the remedial focus, that courts' institutional concerns would come to the fore. But it should be. For this focus has led to outcomes and emphases that, I think, from the average lay person's perspective could only seem decidedly odd. For example, although the Court has developed a complex set of rules and regulations governing when evidence will be excluded as a violation of the Sixth Amendment, it has sometimes refused to protect the lawyer/client relationship as such. Ask a defendant whether he would find more protection from a rule that limited post-indictment investigatory efforts of police or if the police were required to inform him that a lawyer was offering his services, and no doubt you will hear answers directly contrary to those given by the Supreme Court.[51]

If the principal purpose of criminal procedure were to protect courts, then this upside-down world would make perfect sense. It would make perfect sense to start the right to counsel at *judicial* proceedings rather than when the defendant sits in jail; it would make perfect sense to worry more about *evidentiary* exclusions than about whether lawyers really assisted clients; it would make perfect sense to believe that the right to counsel depends upon critical stages of the *proceedings* rather than the risk of imprisoning the innocent or unpopular. But that is not what most lawyers or most people think: they think, rightly, that lawyers are their allies and advocates. They think, as the Scottsboro defendants might have, that their lawyer is their only chance at equal justice; that he was *their* government.

II. THE RIGHT TO COUNSEL AND LIMITED GOVERNMENT

At the beginning of this essay, I urged that criminal procedure is not simply procedure for procedure's sake but a protection of democratic political structure. That sounds a bit fancy, but the history is quite down to earth and, indeed, represents (I believe) a rather old tradition in the field of criminal procedure and one with important implications today.

The notion that criminal procedure is the criminal law of the police has a very old pedigree and has important implications for modern criminal procedure. In his stunning and prescient dissent in *Olmstead v. United States*,[52] Justice Brandeis wrote:

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51. *See* Moran v. Burbine, 475 U.S. 412, 423-24 (1986) (holding that even deliberate deception of an attorney by the police does not change application of *Miranda* waiver rules).

52. 277 U.S. 438 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967).

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[53]

Worn out by overuse, perhaps, this passage nevertheless is worthy of substantial scrutiny for, in it, Brandeis offers us a political—and I would argue substantive—theory of criminal procedure. For Brandeis is not, as is commonly understood, seeking merely to limit the exercise of will by police, nor to elaborate upon the expressive purposes of law. He is linking criminal procedure and constitutional structure. It is the very "existence of the government"[54] that Brandeis claims is at stake. Indeed, he later predicts "terrible retribution"[55] if the government may break the law in the name of enforcing it. To some, no doubt, this may seem hyperbole—surely the proverbial constable's blundering cannot bring down a government. Left unarticulated, yet implicit, is Brandeis's assumption that a government that breaks laws becomes *better* than its citizens; that it betrays the fundamental tenet of democratic self-government according to which the government is the agent, rather than the master, of the people. After all, what is the definition of an authoritarian regime but the bending of established procedures for the sake of a political or wealthy elite.[56] Brandeis's prediction that the very "existence of the government"[57] was at stake was no exaggeration; it was a statement of political faith in a democracy's dependence upon the idea of a government as the servant of its citizens.

This message of equality has played an important role in the history of criminal procedure, particularly when it comes to the question of race. Long before the Warren court's decisions, the Supreme Court sensed the dangers of a government that used its police machinery selectively against some citizens. As early as *Powell v. Ala-*

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53. *Id.* at 485 (Brandeis, J., dissenting).

54. *Id.*

55. *Id.*

56. *See* Przeworski, *supra* note 11, at 60 (arguing that the "essential feature of [authoritarian] regimes is that someone [or some group] has an effective capacity to prevent political outcomes that would be highly adverse to their interests" and that "the power apparatus in an authoritarian system exercises not only procedures but also substantive control over decisions").

57. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

bama,[58] police sanctioned racism was conceived, by the Court, as a failure of procedure.[59] This would come to be a strategy followed closely by Earl Warren.[60] Rightly, Warren was worried that the State was using the criminal justice system to demoralize, disenfranchise, and otherwise demean blacks, reenacting in more civilized garb a terrible history of state-approved coercion and violence we now know as slavery's legacy.[61]

Warren's revolution aimed to increase the transaction costs of racism and thus to deter the use of the police as a tool of the southern white aristocracy. Rather than attempting to single out racism by looking for bad racial motives, Warren, in a move characteristic of the politician, attempted to link the rights of the minority to the rights of all—not pitting blacks and whites against each other or viewing racism as a tortious wrong, but demanding that all be subject to the same procedures. By increasing the costs of policing and prosecution, and by empowering their institutional competitors (lawyers), the hope was that the costs, and visibility, of racism would also increase. But, of course, the political price of this (its generalization) was also its undoing: across-the-board procedures also increase the cost of crime control generally. It was not surprising, then, that political support for this attempt to shift the costs of racism to the majority would come under attack as soon as the public perceived the costs of crime to outweigh the costs of racism. Nor, in some sense, should it be surprising that the Court's own enthusiasm for this approach would wane. For once the institution's reputational benefits no longer appeared tied to saving the poor and downtrodden (and secretly fighting racism), its

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58. 287 U.S. 45 (1932).

59. *See supra* notes 22-24 and accompanying text. *Powell* was not the only early case involving egregious use of the criminal justice system against African Americans. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 227-35 (1940) (involving the confessions of four Blacks who were interrogated continuously for a week with the last session lasting all night before confessions were signed); Brown v. Mississippi, 297 U.S. 278, 279 (1936) (involving confessions which were "extorted by officers of the State [using] brutality and violence").

60. *See* Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245 (1993) ("As Charles Ogletree has suggested, much of the *Warren* Court's 'criminal procedure' reform more properly should be understood as constituting a branch of race law." (citing Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990))); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones.").

61. *See* Nourse, *supra* note 19, at 1440 & n.177 (noting that disenfranchisement has often been linked to crime in the history of the oppression of African Americans). Indeed, in discussing criminal procedure, it is all too often forgotten that felons are, by law, often prevented from voting.

own institutional costs (of generating a complex set of cases creating a constitutional tort law for police and administering it under a controversial exclusionary rule) became quite clear. In the face of these two developments, the Court's criminal procedure decisions have satisfied few, on left or right, with the exception, I suspect, of the Court itself.

For decades, academics have assumed that the courts are essential to the protection of criminal procedure rights. If I am right about the dangers of institutional self-referentialism, it should not be surprising, in the end, to see that courts are subject to constraints too, just as are political institutions. But if this is true, then the new criminal procedure will have to be a debate that is far more sensitive to the virtues and vices of institutional choice. It may well be, for example, that in some cases the balance is best struck outside the courts, in local communities or in administrative agencies.[62] Indeed, it may be that we need to think of new ways—other than procedure itself—to link the interests of defendants and police, by turning to substantive law,[63] for example, or by looking at the protections offered by constitutional provisions other than those typically employed.[64] At the same time, it is also true that "reformers" cannot forget the role that criminal procedure does, and should continue to play, in barring the use of state violence to enforce social norms of inequality and superiority.

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62. *See generally* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (arguing for a new system of criminal procedure more responsive to communities' needs).

63. Linking the rights of the potential defendant to the rules governing *all* members of society provides a natural resistance to the claim that the defendant's rights are simply "special" rules for criminals. For example, the earliest English criminal procedure decisions used trespass rules to restrict the government's use of the search and seizure power. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-99 (1995) (describing this history of the Fourth Amendment). Today, however, this idea of linking state law to criminal procedure has been lost. A state may violate state or federal law in conducting a search and, yet, conduct a "reasonable" search under the Fourth Amendment. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 452-55 (1989) (O'Connor, J., concurring) (rejecting the notion that the legality of a search under federal (air traffic) rules was relevant to Fourth Amendment determination). For a different, and important, argument about the relationship of state substantive criminal law and criminal procedure, see Stuntz, *supra* note 60, at 6 ("Constitutionalizing procedure, in a world where substantive law and funding are the province of legislatures, may tend to encourage bad substantive law and underfunding. But constitutionalizing some aspects of substantive criminal law and defense funding would not tend to encourage bad procedure, or bad anything else.").

64. For example, the Takings Clause has been ignored by traditional criminal procedure literature. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). When the State wrongfully imprisons or holds its citizens, it seems far from a stretch to argue that the citizen's time and labor (and thus his "property") has been "taken" without "due compensation." *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 331-34 (1985) (advocating an expansive view of the concept of property).

If any of this is correct, the right to counsel should not be understood simply as procedure for procedure's sake. Nor is the right to counsel to be preferred simply to achieve fairer or even more accurate trials. The importance of the lawyer in these circumstances is not someone to try a case (most cases are never tried), but someone to stand with the individual citizen unaligned to the forces that laid him low and resist claims of the natural and inevitable superiority of government. Can a citizen, stowed away in jail, believe that he is "equal" before the law, when he cannot prove that the authorities are wrong?[65] When the law is the citizen's enemy, and procedure his punishment, his government is by definition above him, propped up by authority, not consent.

The right to counsel is at least as much about controlling politics as about fair trials, as much about reducing the influence of social norms of inequality on governments as about critical stages in judicial procedure. Justice Black knew this. And he wrote it, in *Gideon.* While much of the opinion is spent interring earlier precedent, near the end Black expands upon his theory of the right to counsel. He tells us first that it is simply "obvious" that "any person haled into court, who is too poor to hire a lawyer," cannot be assured a "fair" trial.[66] But why is this so? Black's immediate answer is *not* about the aid that a lawyer may provide at trial. He tells us that "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[67] Not surprisingly, from here, Black appeals to democracy. He tells us that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[68] From the very creation of our constitution, Justice Black tells us, the states and the nation have each sought to ensure that "every defendant stands *equal* before the law."[69]

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65. By emphasizing the role of equality, I am not urging that the law of criminal procedure should aim to put the defendant and the government on an "even-playing field." No rule of criminal procedure can do that. Nor am I suggesting that rules of criminal procedure can equalize wealth or eliminate racism. Again, no rule of criminal procedure, alone, can achieve those ends. Rules of criminal procedure, however, may provide the means by which the citizen can subject the government's interest "to competition," to test its claims for consistency and to alert us to cases in which the government's power is being used to protect government itself or protect some citizens against others (largely by incorporating social norms of inequality into law).

66. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

67. *Id.*

68. *Id.*

69. *Id.* (emphasis added).

Gideon is not about procedure for procedure's sake, adversarial proceedings or even critical stages. *Gideon* is about the ultimate agency problem in a republic—governing the governors so that the people govern themselves. May we continue in that understanding of *Gideon* a short thirty-five years after its decision, for through it, we may remember the wisdom and importance of the right to counsel.