1968

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THE RIGHT TO ADEQUATE REPRESENTATION IN THE CRIMINAL PROCESS: SOME OBSERVATIONS

by

James R. Craig*

A LITTLE less than four decades ago the United States Supreme Court began in earnest the task of regulating particulars of state criminal procedure through the two principal constitutional referents of due process and equal protection. Since that time the Court's decisions have wrought significant changes in the constitutional norms of criminal procedure at both federal and state levels. Few of the norms that have been given constitutional support by the Court's pronouncements are strangers to American tradition. They have been found in the rather disordered confluence of ideas and rules concerning limitations on governmental power in imposing criminal sanctions that is commonly called the accusatory, adversary system. Generations of Americans have felt pride in that system, and have pointed to it as a reflection of the best and most humane qualities of American civilization. But it has become abundantly clear that the precepts of the system have been poorly reflected in the actual administration of the great bulk of criminal sanctions. As the Court has given constitutional underpinning to traditional ideas and norms, it has increased the actual and potential conflict between norms and practices.

By doing so it has reinforced healthy contemporary movements for reappraisal of the criminal process in light of current social conditions and competing claims of social utility. Comprehensive and systematic inquiries, such as those by the President's Commission on Law Enforcement and Administration of Justice and the American Bar Association Project on Minimum Standards for Criminal Justice, have begun to produce a wealth of information and ideas that are necessary for knowledgeable reevaluation. Furthermore, the journals of law and social science, as well as popular publications, have begun to reflect a growing interest and concern about the problems of crime and the methods of law enforcement. What that reappraisal may bring in the way of changes in the configuration of procedural norms remains to be seen. Whatever the immediate outcome, it is not likely to dampen continuing debate about appropriate ends and

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means of the criminal process, for the process serves deeply ingrained and contradictory psychological needs. And if the lessons of history are meaningful, the future will bring continuing conflict between norms and practices.

At the center of the current conflict is the lawyer for the accused. The defense lawyer is not only a principal conceptual element of any theoretical accusatory, adversary system; he is also a *sine qua non* of the system’s implementation. The challenge he can provide apparently must be present if the gap between norms and practices is to be bridged on a significant scale. It is thus generally conceded that the removal of important limitations on the right to counsel in state criminal proceedings, by the unanimous 1963 decision of the Supreme Court in *Gideon v. Wainwright*, laid the foundation for fundamental changes in the practices of the criminal process. The Court’s decisions following *Gideon* demonstrate increasing reliance on adversary challenge to make the process work in accordance with the norms.

Most of the initial questions about *Gideon* and other right-to-counsel decisions have been focused on obvious first level implications. To what classes of prosecutions does the right to counsel extend? At what stages must counsel be provided? What financial standards may be used to determine the existence of the right? Under what conditions is the right effectively waived? What are the consequences of failure to observe the right at various stages? And do the holdings have retroactive application? Answers to these questions, although some are far from complete, have begun to emerge.

Increasing attention is now being turned to the more subtle implications of the decisions. If the Constitution requires more than “providing warm bodies with law degrees,” then how much more? How “good” must counsel be in order to satisfy minimum constitutional requirements? Prodded by growing numbers of claims that incompetent or ineffective counsel gave inadequate representation, the courts have begun to grapple with these questions. So far they have given little helpful guidance, but they have demonstrated that words like “adequate,” “competent,” and “effective” are ambiguous and open-ended.

The further articulation of representational standards will clearly affect the vitality and extent of adversary challenge and the pace of reform in the practices of the criminal process. It seems worthwhile in this discussion

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*The debate is partially a reflection of a two-sided psychological response to crime and punishment. Professor A. S. Goldstein, focusing on the criminal trial, puts it this way: [T]he criminal trial serves complex psychological functions. In addition to satisfying the public demand for retribution and deterrence, it permits the ready identification of the same public, now in another mood, with the plight of the accused. Both demand and identification root deep in the view that all men are offenders, at least on a psychological level. And from the moment the offender is perceived as a surrogate self, this identification calls for a ‘fair trial’ for him before he is punished, as we would have it for ourselves.*


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to review past trends and to attempts to identify and place in perspective some of the principal problems that must be faced in developing those standards.

I. EARLY STAGES OF THE RIGHT TO REPRESENTATION

Not until 1932, in its "cautiously forward-thrusting opinion" in *Powell v. Alabama,* the Supreme Court interpret the due process clause of the fourteenth amendment to require the appointment of counsel in state criminal proceedings. Although the actual holding in the case was severely limited, the rationale set the tone for the right-to-counsel decisions that have followed and is still instructive in discerning the future.

Petitioners in *Powell* were a group of young Negro boys who had been convicted of the rape of a white girl and sentenced to death. The short trials had been held within a matter of a few days after the alleged rape. No lawyer had come forward to represent the defendants, and the trial judge, in an action characterized by the Court as "little more than an expansive gesture," had appointed the entire Scottsboro, Alabama, bar to represent them at their arraignment. No particular lawyer was designated to represent the defendants until the morning of the first trial.

In determining whether this procedure met the requisites of due process, the Court reviewed the historical development of the right to counsel. In England, at the time of the American Revolution, there were significant restrictions on representation by retained counsel. But in the United States

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8 287 U.S. 45 (1932).
9 Curiously, in England representation was first permitted in misdemeanor prosecutions; unlimited aid of retained counsel was initially refused to those accused of treason or felony. 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 698-700 (8th ed. 1927); 5 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 192 (3d ed. 1945). Persons indicted for treason were allowed counsel, by statute, after 1695. 1 T. COOLEY, supra, at 698. Justice Schaefer of the Supreme Court of Illinois has wryly observed:

*Schaefer, supra* note 1, at 2. Not until 1836 was the right accorded in England, again by statute, to defendants accused of felonies other than treason. 1 T. COOLEY, supra, at 698-700.

Thus, at the time of the American revolution, English criminal procedure still contained a strong influence of the early inquisitorial system of the continent.

In . . . various ways the criminal procedure of the common law was . . . influenced by the continental ideas . . . . All classes agreed that a stern criminal law was necessary to insure the safety of the state, and the security of life and property. We cannot wonder therefore that some of the rules of a procedure, which was in all its parts designed to secure these objects, should be copied. Fortunately it was not possible to copy these rules in their entirety . . . . It is true that the prisoner was prevented from calling witnesses and preparing his defence; that he was deprived of the help of counsel, and repeatedly questioned both before and during his trial. It is true that torture was administered in some cases to make him disclose what he knew; and that the court did not start with any presumption in favour of his innocence.

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those restrictions were quite uniformly rejected. The Court had little trouble concluding that failure to permit a criminal defendant to be represented by retained counsel would be a denial of a hearing and thus denial of due process. That being so, failure to accord reasonable time and opportunity to retain counsel would also be a denial of due process, the Court reasoned. In light of the special circumstances in Powell, there had been insufficient chance for the defendants to obtain their own counsel, and a violation of the due process requirement.

But the Court went further. "A logical corollary from the constitutional right to be heard by counsel" was the right to appointed counsel "when necessary." That obligation upon the state was not fulfilled merely by making a lawyer available at the time of trial.

All that it is necessary now to decide . . . is that 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 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 a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Although there have been those who would interpret the Powell decision narrowly to require only a meaningful appointment, most courts and commentators have concluded that the Court was concerned with something far more basic—a hearing at which the quality of the defendant's

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10 At least twelve of the original states recognized, by constitution or statute, the right to be represented by retained counsel in serious criminal prosecutions. 287 U.S. at 64, 65. The sixth amendment to the Constitution provided that the right would exist in criminal prosecutions by the federal government.

11 The Court's eloquent statement has been widely quoted:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case . . . a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

287 U.S. at 69.

12 The special circumstances referred to by the Court were "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives." Id. at 71.

13 Id. at 72. To support its conclusion, the Court observed that:

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases.

Id. at 73.

14 Id. at 71 (emphasis added).

representation met some minimum standard. But under the rationale of Powell, the quality of representation could not be challenged on constitutional grounds unless, in a given case, there was a constitutional right to the assistance of counsel. The severe factual limitations placed by the Court on its holding hardly made the right seem pervasive.

Six years later, in Johnson v. Zerbst, the Court made clear that the right to appointed counsel in the federal courts was not subject to the circumstantial limitations of Powell. The sixth amendment guarantee, that "in all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," deprived the federal courts of power "in all criminal proceedings" to convict one who neither had nor waived assistance of counsel. In Johnson the critical issue was whether the defendant had waived his right at the federal trial. The determination whether there had been a waiver was said to depend, "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

In 1942 the Court was asked to extend the guarantee of the sixth amendment through the due process clause to state prosecutions. It refused. To the majority in Betts v. Brady the right to counsel provided by the fourteenth amendment's due process clause was a concept "less rigid and more fluid" than that of the sixth amendment, which applied as such only in federal prosecutions. In considering allegations of denial of the right to counsel in state prosecutions, the courts were to appraise "the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

It is familiar history that the special circumstances test of Betts created serious problems of interpretation and application. The decisions in the twenty years after Betts were neither consistent nor compellingly reasoned. Nevertheless, it became fairly clear that in any capital case counsel was required. And in non-capital cases, the trend of decisions was toward a more liberal interpretation of the special circumstances test. Youth or lack of normal mentality of the defendant, unusually technical legal questions, and errors at trial that would not normally have occurred had

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16 304 U.S. 418 (1938). Elbert P. Tuttle, now Judge of the United States Court of Appeals for the Fifth Circuit, was counsel for the defendant-petitioner.
17 U.S. Const. amend. VI.
18 304 U.S. at 463. The right in federal courts was held to extend to appeal as well as to trial. Ellis v. United States, 356 U.S. 674 (1958); Johnson v. United States, 352 U.S. 565 (1957).
19 304 U.S. at 464.
20 316 U.S. 455 (1942). There was an emphatic dissent by Justices Black, Douglas and Murphy.
21 Id. at 462.
26 See, e.g., Rice v. Olson, 324 U.S. 786 (1941).
there been counsel were commonly held sufficient to give constitutional dimensions to denial of counsel.

The requirement of counsel was not limited to the trial arena. It was held in Townsend v. Burke that absence of counsel at the sentencing hearing, given prejudicial circumstances, was a denial of due process. And in Chessman v. Teets failure to assign counsel to assist in settling a complex record for appeal was held error. It had been assumed by some that a plea of guilty was an absolute waiver that would prevent the right-to-counsel question from arising. That question was before the Court in Rice v. Olson. First finding special circumstances creating a right to counsel, the Court held:

A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel.

The Court also in time restricted the waiver possibilities in contested cases. Failure to request counsel was not a waiver of the right. Carnley v. Cochran set out the test that "the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."

By the early 1960s dissatisfaction with the special circumstances test of Betts had grown widespread. Commentators and members of the Court were strenuously urging that it be discarded. Then, on June 4, 1962, the Court granted certiorari in Gideon v. Cochran, appointed a lawyer to represent the petitioner, and requested that opposing counsel brief and argue the question: "Should this Court's holding in Betts v. Brady . . . be reconsidered?"

II. GIDEON AND THE PRESENT ERA

By the time Gideon was ready for decision, a new respondent had been

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28 334 U.S. 736 (1948).


30 354 U.S. 156 (1957).

31 24 U.S. 786 (1943).

32 Id. at 788-89. In Rice the Court thought that the issue of waiver was adequately joined in a state habeas petition by the allegation that petitioner had neither by word nor action waived his right. In two other guilty-plea cases, Carter v. Illinois, 329 U.S. 173 (1946), and Foster v. Illinois, 332 U.S. 134 (1947), absence of waiver was not inferred simply from failure of a limited record to disclose an affirmative offer of counsel. See Carnley v. Cochran, 369 U.S. 506, 515-16 (1962).


34 Id. at 516.


38 The counsel chosen by the Court was Abe Fortas, of the District of Columbia bar, now Mr. Justice Fortas of the Supreme Court.

39 370 U.S. at 908.
substituted. Twenty-two states had filed *amicus* briefs urging that the special circumstances test be discarded; only two, other than the state in which the petitioner had been convicted, asked that *Betts*’ rule be retained. In *Gideon v. Wainright* the Court expressly overruled *Betts*. But the sometimes vague, sometimes contradictory language of the opinion left the Court’s rationale in doubt. It was unclear whether all of the demands of the sixth amendment, including counsel in prosecutions for misdemeanors, or perhaps even less serious offenses, were being incorporated as due process requirements; or whether the Court was only saying that in non-capital felony cases, the type of prosecution under review in *Gideon*, defendants’ circumstances could not be used to limit the right. Also in doubt was whether *Gideon*’s rule was to have retroactive application.

The retroactivity question soon received an affirmative answer. But the types of prosecutions to which *Gideon*’s rule applies are not yet fully defined. There has been considerable disagreement in the lower courts on the right to counsel in misdemeanor prosecutions, but so far the Supreme Court has not passed on the matter. However, decisions of the United States Court of Appeals for the Fifth Circuit, whose territory includes those states that have generated the greater portion of right-to-counsel cases in the past, have unequivocally extended the benefits of *Gideon* to misdemeanor prosecutions. Whether petty offenses, such as minor traffic violations, are covered remains completely problematical. It is unlikely that the Court will ever attempt to make hard and fast delimitations in this area. To base *Gideon*’s protections on local felony-misdemeanor-petty offense classifications would leave too much to form, and hardly would square with subsequent decisions by the Court extending the rule to areas not normally classified as criminal, although within a broad definition of the criminal process, such as juvenile delinquency commitment proceedings.

40 372 U.S. 335 (1963). For a fascinating analysis of the decision and surrounding circumstances, as well as a report of *Gideon*’s subsequent re-trial (this time with counsel) and acquittal, see A. Lewis, *Gideon’s Trumpet* (1964).

41 See Bennett, *Right to Counsel—A Due Process Requirement*, 23 La. L. Rev. 662 (1963), for a good, representative analysis of *Gideon* shortly after it was decided.

42 See Doughty v. Maxwell, 376 U.S. 202 (1964) (per curiam).


44 See Mr. Justice Stewart’s dissents, on denials of certiorari where the issue was raised, in Winters v. Beck, 385 U.S. 907 (1966), and De Joseph v. Connecticut, 383 U.S. 982 (1966); *In re Gault*, 387 U.S. 1, 78 n.1 (1967) (Stewart, J., dissenting).


47 Similar offenses are classified differently in various jurisdictions. Too, punishments for misdemeanors often overlap those for felonies. See Comment, *supra* note 43, at 601.

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Gideon was not an isolated event. The trend of decisions focusing the constitutional spotlight ever more sharply on the lawyer for the accused moved apace.

In Douglas v. California, decided the same day as Gideon, it was determined that an indigent was entitled to appointed counsel at the first level of non-discretionary appeal from a state conviction. California procedure permitted the first-level appellate court to make an independent investigation of the record and to deny appointment of counsel "if in their judgment such appointment would be of no value to either the defendant or the court." Curiously, there was no mention of Gideon in the opinion. Equal protection was the tune, if not the title:

[I]t is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' . . . Absolute equality is not required; lines can be and are drawn and we often sustain them. . . . But where the merits of the one and only appeal an indigent has as of right are decided without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Of course, equal protection ideas are inextricably interwoven with "fairness" concepts that are normally associated with due process, and distinctions between rich and poor are the very essence of the problem of adequacy of representation.

In 1961 a unanimous Court had reversed the conviction of one who had been denied counsel at arraignment, where he had entered a not-guilty plea. No blanket requirement of representation at all hearings called arraignments under state procedures was set down. But the Alabama arraignment there under review was "a critical stage" at which certain defenses, such as insanity, had to be asserted or they might be forever lost. It was held that appointment of counsel was necessary at that critical stage without regard to proof of prejudice. Similar analysis was used shortly after Gideon in White v. Maryland to reverse a conviction where the unrepresented defendant had pleaded guilty at preliminary hearing. At a subsequent arraignment, with appointed counsel, the defendant had pleaded not guilty, but the guilty plea at preliminary hearing had been introduced in evidence at trial, albeit without objection.

The following term brought new attention to pre-trial access to counsel. Massiah v. United States and Escobedo v. Illinois marked extremely im-

35 Id. at 355.
36 Id. at 356-57.
37 It was put thusly by the Court in Gideon:
[1]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.
important departures from prior views concerning pre-trial police investigations. In Massiah the defendant, indicted for a federal narcotics violation, retained his own lawyer and was released on bail after pleading not guilty. Afterwards, a co-defendant agreed to cooperate with officials in obtaining evidence and permitted a hidden radio transmitter to be installed in his car. Incriminating statements made by the defendant to his co-defendant in the absence of counsel and in the assumed privacy of the car were overheard by agents and testified to at trial. This evidence was deemed constitutionally inadmissible, not because it was the product of compulsion, the traditional test, but because the procedure failed to satisfy the demands of the sixth amendment that access to counsel not be denied at a critical stage.57 In Escobedo, as in Massiah, the defendant had his own lawyer. However, despite repeated requests, they were not permitted to see each other during defendant’s post-arrest interrogation. An incriminating statement elicited during that interrogation was held improperly admitted at trial. Denial of assistance of counsel at a critical stage, where interrogation ceased to be general and became accusatory, was the rationale.58

In view of previous decisions, there was little thought that these requirements would be limited to situations in which the accused had been able independently to retain his own lawyer. The cases have been widely seen as presenting severe obstacles to further use of interrogation in law enforcement.59 That concern was rational and serious; interrogation had always been an extremely important tool in crime solution, and as Mr. Justice Jackson had remarked in a prior case, it was thought that “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”60 The wake of confusion left by the opinions encompassed doubts about whether they would be retroactive, how and when a suspect had to be informed of his right, what kind of waiver would be operative, and whether a “fruit of the poisonous tree” doctrine would require exclusion of tangible evidence found as a result of an inadmissible statement.61

With Miranda v. Arizona,62 the Court put to rest some of the confusion and wrote some black-letter rules for police guidance. Reversing the conviction, based on a confession obtained during custodial interrogation without advice of rights to silence and counsel, the Court de-emphasized the apparent sixth amendment rationale of Escobedo and turned to the fifth amendment privilege against self-incrimination which had

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57 "The holding in Massiah might be explained as an extension of the adversary principle: if it is improper for the government to compel the accused to help convict himself, it may also be considered unfair for the accused to be tricked into convicting himself." The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 221 (1964).
58 See the excellent discussion of both decisions, id. at 217-23.
61 See, e.g., Comment, supra note 46, at 687-89.
been made applicable in state prosecutions by *Malloy v. Hogan* in 1964. Nevertheless, the lawyer was still near the center of attention, for the Court laid down the requirements that, in the absence of "other fully effective means" to safeguard the right to silence, statements obtained during custodial interrogation are admissible only if the prosecution proves that before making the statement the accused was informed of his right to silence, of the potential use in evidence of anything he might say, of his right to consult with counsel and to have counsel present during interrogation, and of the right to appointed counsel if there were any doubt of his ability to obtain counsel with his own resources. Furthermore, an intelligent waiver must be proved if the accused agrees to interrogation without counsel. Finally, even if a valid waiver was made, interrogation must cease and consultation with counsel must be allowed at any time if either are requested. Still open were such questions as when custody begins, whether a spontaneous statement, not the product of interrogation, made in the absence of the required warnings would be admissible and whether nontestimonial evidence obtained as a result of an inadmissible statement would be admissible.

Recognizing that few states had previously applied such comprehensive standards for custodial interrogation, the Court ruled that *Escobedo* and *Miranda* would only be applied prospectively, to cases in which trial began after the decisions. Likewise, only prospective application was given to the June 1967 decisions in *United States v. Wade* and *Gilbert v. California,* which extended the representational requirement to lineups.

The self-incrimination rationale of *Miranda* was held inapposite in the lineup cases, the Court adhering to the established fifth amendment distinction between testimonial or communicative evidence and physical evidence. But the now familiar sixth amendment critical-stage rationale was thought to govern.

"In addition to counsel's presence at the trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. . . . The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." The issue, then, was whether the lineup was a critical stage at which counsel's absence might compromise the trial. Detailing potentialities of unre-

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65 See 384 U.S. at 526 (White, J., dissent).
68 388 U.S. 263 (1967).
69 *Stovall v. Denno,* 388 U.S. 293 (1967), ruled that the new standards would only apply to lineups occurring after the decisions.
liability of eyewitness identifications, possibilities of intentional or unintentional suggestion to witnesses at lineups, and difficulties of in-court reconstruction of what occurred at a lineup, the Court classified the lineup a critical stage.

Given the critical stage classification, it was held that counsel, already appointed in both Wade and Gilbert at the time the lineups were held, should have been notified. And absent intelligent waivers, the lineups should not have been held without the presence of counsel. In answer to concern that the requirement of counsel might forestall prompt identifications, the Court left open two possibilities: that substitute counsel or regulatory elimination of risks of abuse and impediments to meaningful trial confrontations might cause a lineup to be classified non-critical.

In Gilbert a per se exclusionary rule was fashioned for testimony about the lineup identification. Its admission, unless harmless beyond a reasonable doubt, rendered the proceeding invalid. Wade principally dealt with in-court identifications that might have been tainted by the illegal lineup. Under Wade, admission of such identifications would render the hearing a nullity unless it could be shown by the prosecution that the in-court identifications had an independent origin or that their admission was harmless error.

How far the critical-stage rationale elaborated in Wade and Gilbert will extend remains to be seen. Undoubtedly, it has a greater potential for expansion than did the self-incrimination rationale of Miranda. It has been suggested that the Court's emphasis on safeguarding testimonial reliability at trial could result in a requirement that defendant's counsel be present at interrogation of witnesses, particularly co-suspects, and at pre-trial witness identification of photographs. There are also theoretical problems with victim identification of a suspect apprehended nearby and soon after the commission of an offense. One limitation was, however, suggested by the Court to deny critical-stage classification to procedures for fingerprint, blood, clothing, and hair analyses; errors in these types of scientific procedures could be corrected satisfactorily with cross-examination and expert witnesses at trial. Moreover, the limitation implicit in the Court's consideration of the wide-scale possibilities of intentional or unintentional abuse of the lineup may prevent critical-stage classification of situations in which police are still open-mindedly seeking to determine the identity of the offender and have not become so convinced of the suspect's guilt that they might fail to use satisfactory precautions against unreliable identifications.

In another recent decision filling in the contours of the critical-stage concept, the Court held the Gideon requirement of counsel to extend to deferred sentencing hearings, and by necessary implication, to initial sentencing hearings. The case, Mempa v. Rhay, concerned a state probation

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73 See The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 181-82 (1967).
72 See Comment, Lawyers and Lineups, 77 Yale L.J. 390, 394-95 (1967).
70 389 U.S. 128 (1967).
revocation hearing at which sentence, initially deferred, was imposed. The opinion leaves no doubt that denial of counsel at sentencing is improper, and it hardly forecloses the extension of the right-to-counsel to probation revocation hearings where sentencing is not to take place.

III. Effectiveness of Representation

The decisions reported and discussed in the previous section were principally concerned with the situations in which the accused may not be denied the presence of a lawyer. That grouping really presents an artificial sub-slice of the larger question of adequacy of representation, if adequacy is used, as it is in this discussion, to refer to the whole problem of determining how much vitality adversary challenge should have in our criminal process. Other decisions relating to adequacy of representation, to be discussed in this section, are commonly grouped under the heading "effectiveness of representation." That grouping is likewise artificial, but it has functional utility to the extent that it focuses attention on the quality of the lawyer's services. The common classification scheme is useful for analysis if not too much pressure is put upon it.

Powell v. Alabama declared that the right to appointed counsel was not accorded through "appointment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." The Court has had little more to say, directly, about the effectiveness question, although ideas encompassed by that broad statement are at the roots of the critical-stage cases discussed above, particularly Wade and Gilbert, in which the Court was concerned about the ability of counsel to prevent prejudice at trial if he had not observed the circumstances of the lineup. Nevertheless, the expansive, fair-trial-oriented view of the right to counsel consistently displayed by the Court since Powell lends to the statement a presage of potentially far-reaching inquiry into extrinsic and intrinsic factors affecting the quality of challenge provided by the lawyer. Existence of some sort of effectiveness requirement under state or federal law has been generally conceded for a good while.


For a much more comprehensive review of such decisions than can be given here, see Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 NW. U. L. REV. 289 (1964); Comment, Effective Assistance of Counsel for the Indigent Defendant, 78 HARV. L. REV. 1434 (1965); Comment, Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness, 27 LA. L. REV. 784 (1967); Comment, Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings, 20 SW. L. J. 136 (1966); Comment, Effective Assistance of Counsel, 49 VA. L. REV. 1531 (1963); Comment, Effective Representation—An Evasive Substantive Notion Masquerading as Procedure, 39 WASH. L. REV. 819 (1964).

See Michel v. Louisiana, 350 U.S. 91 (1956) (reviewing allegations of incompetence); White v. Ragen, 324 U.S. 760 (1945) (holding allegations that counsel refused to confer with accused prior to trial, failed to call witnesses, and pleaded accused guilty stated prima facie case of violation of right to "effective aid and assistance of counsel"); Glasser v. United States, 315 U.S. 60 (1942) (holding conflict of interest denied effective assistance of counsel); Avery v. Alabama, 308 U.S. 444, 446 (1940) (referring to constitutional requirement of "due appointment of competent counsel").
Early lower court decisions on effectiveness of counsel often drew distinctions between retained and appointed counsel, with the work of the retained counsel being virtually immune from review. That seems now, at least doctrinally, to be a thing of the past. The distinction was supported, or explained, on two discrete grounds. The latter in time was that the state action required to energize the fourteenth amendment prohibitions was not present where review of the work of retained counsel was sought. That concept was subject to the obvious criticism that what was really being claimed was that the trial at the hands of the state was unfair, although caused by something over which the state ostensibly had no direct control. A useful analogy existed in the mob influence cases, where the existence of the requisite state action was not questioned. Further, the state action theory was attacked by the argument that the necessary state action could be found in the fact that attorneys were licensed by the state. But the state action concept of old, no matter what its past vitality, has little influence today. Perhaps the more viable explanation of the distinction was the earlier one that referred to a principal-agent relationship between defendant and defender. That explanation was forcefully attacked as simply unrealistic in fact in most cases. Whatever the rationale, if the distinction had not been discarded before Gideon, Massiah and Escobedo, it would seem now to be effectively foreclosed.

Courts have been hesitant to engage in hindsight measurement of quality of representation where the allegations are that counsel was insufficiently skillful or energetic. But in other situations, where standards are more objective and familiar, and where reference is to extrinsic factors impeding effectiveness, the story has been different. In cases of physical intimidation and even social or economic pressuring of defense counsel, failure of a court to afford adequate time for investigation and preparation of a case, appointment of a large and undirected group of counsel, and the like, there has been willingness to heed the claim of ineffective counsel. Interference by the prosecution with the privacy of the attorney-client relationship by intercepting or monitoring communications has brought sharp judicial condemnation; in these cases no specific proof of prejudice to representation is required. Conflicts of interest on the part of counsel have likewise been held sufficient to cause ineffective representation, but prejudice and non-waiver must be proved if the conflict was

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81 See, e.g., Porter v. United States, 298 F.2d 461 (1st Cir. 1962); Craig v. United States, 217 F.2d 355 (6th Cir. 1954). The Supreme Court of Indiana had a pithy way of putting it: "The right is not defeated merely because an accused himself employs incompetent counsel who affords inadequate representation." Abraham v. State, 228 Ind. 179, 185, 91 N.E.2d 358, 361 (1950).
85 See generally Waltz, supra note 77, at 296-301.
87 See, e.g., Hawk v. Olson, 326 U.S. 271 (1945); Avery v. Alabama, 308 U.S. 444 (1940).
not caused by court-imposed representation of multiple parties. These types of claims shade off almost imperceptibly from those upheld in Powell, and it should not be surprising that, if proof problems can be overcome, they should be adequate to demonstrate constitutional weaknesses in the conviction.

Difficulties of a much greater magnitude are presented by claims of ineffective assistance because of things done or not done by the lawyer that may have been error, or that may look that way when reviewed subsequently in a less crisis-ridden situation and with time for careful reflection. Judges, constantly reminded by higher courts of their own propensity to err, are fully aware that lawyers share that trait. They know that to require error-free representation would be to set an impossibly high standard. Furthermore, what may look like error may have been a wise strategic choice. On the other hand, not every apparent error is the result of acceptable professional mistake or the product of intelligent, strategic weighting of alternatives in a crisis situation. Some are quite clearly the result of gross deficiencies in preparation, skill, experience or effort. Particularly where apparent errors related to matters of overriding importance, where prejudice was almost certainly to result, and where possible strategic or tactical justification was slim, the representation falls short of that which would be justified by reference to strategy or the impossibility of perfection.

Aware of the serious obstacles to drawing that distinction satisfactorily, some courts initially flirted with the thought that since minimum levels of education and skill are required for entry to the legal profession, a law license should carry with it an almost irrebuttable presumption of competence. Such an escape from the rigors of hard analysis was not likely to last long, and it did not. Aside from being hopelessly unrealistic, it failed to square with a constitutional mandate that was directed at the particular, not the general. Recognition that a generally competent lawyer can spectacularly fail to perform up to par in a particular case was enough to lay to rest the adjective “irrebuttable.”

But setting standards for acceptable performance has challenged the full extent of judicial creativity and ability. As so often happens when the law runs headlong into a question it is not yet prepared to answer, the question is “answered” with a tautology. A good example is the following statement by Judge Wisdom in McKenna v. Ellis, decided in 1960: “[W]e interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged effective by

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90 See, e.g., Glasser v. United States, 315 U.S. 60 (1942).
91 See, e.g., State v. Kelch, 95 Wash. 277, 163 P. 757 (1917). The President of the Dallas Crime Commission, in a public letter of criticism to a federal district judge who had upset a conviction on the basis of ineffective assistance of counsel, is reported to have urged the same result: We question whether or not any attorney licensed to practice by the Texas Bar or the bar of any other state should not be considered an effective attorney. Surely the bar is adequate to determine who can effectively practice law, and therefore it is our feeling any licensed attorney should be considered effective. Dallas Morning News, Dec. 20, 1967, at 4D, col. 5. Comments by the Supreme Court leave no doubt that an irrebuttable presumption of effectiveness would be constitutionally impermissible. See Michel v. Louisiana, 350 U.S. 91, 101 (1955).
92 280 F.2d 592 (5th Cir. 1960) (emphasis by the court).
hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.\textsuperscript{83} Somewhat more instructive, but less in keeping with the spirit of current constitutional interpretations by the Supreme Court, are standards requiring that counsel's conduct make the trial "a farce and a mockery of justice, shocking to the conscience of the court," if the aid given is to be found ineffective.\textsuperscript{84}

Concern about increasingly virulent attacks on effectiveness of assistance is, of course, felt as strongly by the courts as by the bar. The focus on the importance of the lawyer's services, increasingly sharpened by \textit{Gideon} and its progeny, has given a new avenue of potential relief to jailhouse lawyers, whose energy seems never to slack. But it is too easy to succumb to the temptation to see every attack on lawyer competence as "sour grapes," completely unfounded in fact. Not all of the claims of counsel ineffectiveness are put forward at post-conviction stages by convicts \textit{pro se}; a surprisingly large number are made by subsequently appointed or retained counsel. There has been wide recognition that legal representation in the criminal process, and particularly that available to indigents, has sometimes been of far less than acceptable professional quality.\textsuperscript{85}

In an attempt to find a balance between impatience with burgeoning ineffectiveness claims and uncertainty about the quality of defense sometimes given by appointed counsel, Judge Coleman in 1965, in \textit{Williams v. Beto},\textsuperscript{86} set out to give some guidelines. The focusing principle for Judge Coleman was that a defendant represented by appointed counsel was entitled "to expect a devotion at least equal to that expected from compensated counsel of an accused's own choosing."\textsuperscript{97} To the extent that the right to effective representation, whatever its contours, applies to retained as well as appointed counsel, Judge Coleman's principle deals with only part of the problem, but a very important part. He elaborated:

Court appointed counsel must be unswervingly faithful in the discharge of their duties to indigent clients.

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Court appointed counsel is no different to any other lawyer. He is still a lawyer, he is still practicing law, and he is no less confronted by difficult decisions of tactics and strategy. He cannot stand still and do nothing. That indeed might be the best evidence of incompetency, or infidelity, or ineffectiveness, or all three. He must decide as his knowledge, experience, and talents best permit, and then move ahead. When he does this, that is all any lawyer can do, and the client has no right to complain of the absence of a miracle.\textsuperscript{88}

At least one judge, of the District of Columbia Circuit, has found it difficult to maintain the balanced perspective implicit in the above statement. Concurring in a summary affirmance of a conviction in 1965 the

\begin{itemize}
\item \textsuperscript{83} \textit{Id}. at 199.
\item \textsuperscript{84} \textsuperscript{9} \textit{Davis v. Bomar}, 344 F.2d 84, 89 (6th Cir. 1965).
\item \textsuperscript{85} \textit{See}, e.g., \textit{ASS'N OF THE CITY OF NEW YORK, EQUAL JUSTICE FOR THE ACCUSED 64-68 (1959); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 59-64 (1967).}
\item \textsuperscript{86} \textit{354 F.2d 698 (5th Cir. 1965).}
\item \textsuperscript{87} \textit{Id}. at 705.
\item \textsuperscript{88} \textit{Id}. at 705-06.
\end{itemize}
judge observed:

Such "Disneyland" contentions as that absence of counsel at the police line-up voids a conviction are becoming commonplace. Some arise from the hard experience of court appointed lawyers who, having served diligently without compensation, later find themselves subjected to vicious and unwarranted attacks by their ex-clients for failing to raise some bizarre point conceived by the "legal experts" in prison. Having found that the indigent client's sense of gratitude is readily dulled by incarceration, some court appointed counsel find it expedient to protect themselves by raising every point, however [sic] absurd, which indigent appellants suggest. 99

Perhaps it was not so unreasonable, after Escobedo, for the attorney to raise the point. The Supreme Court in Wade, two years later, did not think so.

Given very conservative standards and the reluctance of judges to cause lawyers professional embarrassment, cases in which assistance is held ineffective are not likely to become numerically significant. Nevertheless, some convictions are being upset on ineffective counsel grounds, and this has been causing increasing dismay on the part of the criminal defense bar. Usually, in such a case, a spate of factors showing less than normally expected competence is demonstrated. 100 But the failure to prevent a major prejudicial error of constitutional dimensions has in some cases triggered a finding of ineffectiveness. For example, in People v. Ibarra, 1 defendant's counsel failed to object to the introduction of crucial evidence apparently obtained in violation of reasonable search and seizure principles. Counsel's remarks at trial demonstrated he was unaware that he could challenge the evidence. Judge Traynor's opinion dealt with the matter in this way:

Counsel's failure to research the applicable law precluded the exercise of judgment on his part and deprived defendant of an adjudication of what was clearly the stronger of the two defenses available to him. There is no merit in the contention that counsel's failure to object . . . may have reflected a considered judgment . . . . In any event, the record leaves no room for speculation. Counsel's statement to the court makes perfectly clear that his decision reflected, not judgment, but unawareness of a rule of law basic to the case; a rule that reasonable preparation would have revealed. Counsel's failure to object precluded resolution of the crucial factual issues supporting defendant's primary defense. It thereby reduced his trial to a farce and a sham. 102

Most of the decisions so far have dealt with allegations of ineffectiveness at the trial stage. A potentially far greater impact throughout the larger spectrum of the criminal process comes from testing of effectiveness in convictions resulting in guilty pleas, which comprise the overwhelming majority of criminal convictions. 103 The standard for judging the consti-

100 See, e.g., MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Ex parte Larkin, 420 S.W.2d 918 (Tex. Crim. App. 1967).
102 34 Cal. Rptr. at 867, 386 P.2d at 491.
103 In some jurisdictions as many as ninety per cent of convictions are obtained through guilty plea. See President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 134 (1967).
tutional validity of a guilty plea has traditionally been whether or not it was "voluntarily and understandingly made." Searching for the limits of that standard has been fully as difficult as giving content to a similar standard in the long and familiar line of extra-judicial confession cases that preceded Escobedo and Miranda.

In 1941 the Court in Smith v. O'Grady held that a conviction in a state court upon a guilty plea would be in violation of due process if the defendant had been tricked or misled by the prosecutor and had therefore pleaded guilty to a more serious offense than he thought. Unrepresented, the defendant had allegedly understood that he was to receive a sentence of not more than three years in exchange for his pleas to a burglary charge; he pleaded to burglary with explosives, an offense which carried a minimum penalty of twenty years imprisonment. A primary concern of the Court was that the defendant had been denied "any real notice of the nature of the charge against him," but dictum in a subsequent opinion in the same year indicated that any deception or coercion by the prosecutor leading to a guilty plea would render the plea invalid. Misrepresentation to the defendant of the nature of the charge by his own attorney was held by the Seventh Circuit in United States v. Davis to invalidate the plea. No reference was made by the court in that case to the effectiveness of representation, but the decision suggests that a mistake by counsel in explaining the nature of the charge might render a plea involuntary and without understanding, whether or not the mistake was serious enough to justify a holding of ineffective assistance.

Prosecutorial promises of leniency present more serious problems. Most guilty pleas result from out-of-court negotiations between prosecutors or their agents and defendants or their lawyers. This bargaining process is undoubtedly critical to the operation of the system, which simply does not have the resources to determine guilt in each case with a full-blown trial, even if that were desirable. The plea bargaining process which accounts for the great majority of convictions is, thus, largely invisible. Often there is an elaborate charade at the time of the plea, with defendant, prosecutor and defense counsel all solemnly telling the judge, who knows better, that no promises have been made in return for the plea.

If a prosecutorial promise, an inducement to the plea in the sense of being a quid pro quo, were to render the plea legally involuntary, there might be no valid pleas. In Shelton v. United States, the Fifth Circuit, en banc, refused to interpret voluntariness so liberally. The petitioner there had entered a guilty plea allegedly in exchange for a promise of a one-year sentence, which he did in fact receive. The applicable rule was stated thusly:

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*Busby v. Holman, 356 F.2d 75, 77 (5th Cir. 1966).*

*312 U.S. 329 (1941).*

*Id. at 334.*

*Walker v. Johnston, 312 U.S. 275 (1941).*

*212 F.2d 264 (7th Cir. 1954).*

*See generally D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (1966).*

*246 F.2d 171 (5th Cir. 1957) (en banc), rev'd on rehearing 242 F.2d 101 (5th Cir. 1957), rev'd, 356 U.S. 26 (1958) (per curiam).*
A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribery).\(^{11}\)

The decision was subsequently reversed by the Supreme Court in a short per curiam opinion, with a notation that the Solicitor General had admitted that the confession might have been improperly obtained.\(^{12}\) The reversal left the Shelton standard in some doubt. Subsequently the Fifth Circuit has been using a less specific standard: "The crucial issue appears to be whether, with all of the facts before him, including the advice of competent counsel, the plea was voluntary."\(^{13}\)

Representation by counsel at the time of a plea has in most cases been seen by the courts as increasing the likelihood that the plea was voluntarily and understandingly made, and rarely has the claim of ineffective assistance of counsel been heeded in these situations.\(^{14}\) There have, however, been several decisions taking a different tack. The troubled relationship between voluntariness and effective assistance of counsel in such cases is shown by Edwards v. United States,\(^{15}\) a 1957 decision in the District of Columbia Circuit. The petitioner there alleged that his counsel, apparently appointed, having failed to investigate the admissibility of incriminating evidence and a confession in the possession of the prosecution, had led him to believe that there was nothing to do but plead guilty. The allegations at least made doubtful the admissibility of the confession. In holding these allegations insufficient to justify a hearing, the majority explained that the effectiveness of representation was immaterial where a guilty plea had been entered, except to the extent that it might bear on voluntariness. And failure of counsel to investigate and bring to the attention of the defendant possible dilatory or evidentiary defenses was not thought by the court to affect the voluntariness of the plea. Judge Bazelon, dissenting, thought otherwise: if counsel had advised the plea on the assumption that the government had a strong case, without investigating the basis for it, the defendant was deprived of effective assistance of counsel. Apparently Judge Bazelon saw the voluntariness issue and the effective assistance issues as separate ones.

Similar issues were before the Fifth Circuit in Bell v. Alabama\(^{16}\) in 1966. The habeas petitioner alleged that he had given a confession under coercion, before an attorney was employed to represent him. The attorney allegedly failed to investigate the validity of the confession before recom-

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\(^{11}\) 246 F.2d at 572 n.2.  
\(^{13}\) Martin v. United States, 256 F.2d 345, 349 (5th Cir. 1958). See Brown v. Beto, 377 F.2d 950, 954 (5th Cir. 1967).  
\(^{14}\) See, e.g., Brown v. Beto, 377 F.2d 950 (5th Cir. 1967); Busby v. Holman, 356 F.2d 75 (5th Cir. 1966).  
\(^{15}\) 256 F.2d 707 (D.C. Cir. 1958).  
\(^{16}\) 367 F.2d 243 (5th Cir. 1966).
mending that, because of the confession, a guilty plea was the best course of action. These allegations were held sufficient to require a hearing. Judge Tuttle first held that a guilty plea induced by a coerced confession would be invalid. As to the effectiveness of counsel claim, Judge Tuttle took the applicable principle from the opinion in Jones v. Cunningham, a 1962 Fourth Circuit case involving similar allegations:

Especially striking is the petitioner's assertion that the court-appointed lawyer, after the most superficial contact with the case and without making inquiry into the circumstances, counselled surrender because the defendant had given a confession—a confession allegedly made under stress and coercion. No legal representation is worthy of the name if the lawyer makes no investigation of the background of the client's plea... or the extra-judicial confession which induced the plea.  

Decisions like those in Bell and Jones may be harbingers of more careful and critical review of the work of counsel in guilty plea situations.

IV. PROBLEMS AND PROSPECTS

Adversary challenge in the criminal process has been made much more vital, both doctrinally and practically, since the 1932 decision in Powell, with the past decade bringing an almost geometric growth in its importance. Moreover, the decisions reviewed in the previous sections of this discussion hardly suggest that the trend has run its course. Where the decisions will lead is something that time alone will tell.

Heightened reliance on adversary challenge may have growing impact in doctrinal areas that have not previously been seen as directly affected by right-to-counsel questions. There have already been obvious examples in the interrogation and line-up cases. Similarly, the Court's recent decisions in Pointer v. Texas and Douglas v. Alabama, prohibiting admission of testimonial evidence under circumstances in which the accused could not cross-examine the witness, were surely influenced by the right-to-counsel developments, although expressly decided on the basis of the sixth amendment right to confrontation of witnesses. Perhaps the best example is Kent v. United States, where the Court held that in a juvenile court hearing on waiver of juvenile jurisdiction the right to counsel carried with it the requirement that counsel be permitted access to the probation officer's report that had been submitted privately to the judge; the rationale was that the rights to a hearing and counsel would be "meaningless—an illusion, a mockery—unless counsel is given an opportunity to function." The real matter at issue was, of course, how counsel was to function. He could have been an advocate for his client, presenting to the court relevant information and arguments, without knowing what was contained in the report. But with access to the report he was in a better position to function as an adversary of the state—to question, explain,
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criticize the foundations of the report. The Court chose the latter role. By
doing so, it implied, among other things, that access to pre-sentence re-
ports by probation officers may be a constitutional dimension of the right
to counsel at sentencing.\textsuperscript{123}

Other developments seem likely with respect to the reliability of waivers,
a problem which is particularly acute in the interrogation area. When
Escobedo and Miranda were handed down, there was widespread feeling
not only that the police would be badly hampered in their legitimate work,
but also that the supply of lawyers would be inadequate to satisfy the de-
mand. Initial indications are that neither fear has been borne out in prac-
tice. The most comprehensive study so far was done by a group of editors
of the Yale Law Journal in New Haven in the summer of 1966.\textsuperscript{144} Of
course, the situation in other cities may be different, but it seems reasonable
to hypothesize that the New Haven experience will not be greatly differ-
tent from those elsewhere. In general, the Yale study demonstrated that
Miranda had minimal impact. The great majority of defendants, told of
their right to counsel, neglected the offer and let the interrogation proceed.
The Court warned, in Miranda, that the prosecution would be subject to a
"heavy burden" in showing knowing and intelligent waiver of the privi-
lege against self-incrimination and the right to retained or appointed coun-
sel.\textsuperscript{125} The Yale study and other inquiries\textsuperscript{126} suggest that even when the
warnings required by Miranda are clearly given, without attempts to make
them appear unimportant, most suspects still do not have a realistic under-
standing of the nature and function of the rights at stake. Similar results
will likely arise in the Wade and Gilbert line-up cases. The immediate
prospect is, then, that these right-to-counsel decisions may prove largely
irrelevant in the criminal process. It seems doubtful that the
Court will be satisfied with that result. Perhaps with time there will come
growing sophistication about these rights on the part of suspects, but it
would not be surprising to see the Court draw new requirements designed
to increase the efficacy of the Miranda warnings and the Wade safeguards.
In either case, there may be far greater real demand for legal services
at these stages than at present. Of course, in any situation to which the
right to appointed counsel is extended there is the possibility that waivers
will be made with insufficient comprehension of the importance of the
rights waived. Growing judicial attention to the value of legal services
would seem to justify a prediction that waivers will be less readily accepted
as time goes on.

Making the required quantity and quality of legal services available
will be no simple matter. It seems likely that public defender systems, or
sophisticated assignment systems, or a combination of the two, will ulti-

\textsuperscript{123} See Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821
(1968).

\textsuperscript{124} See Project, Interrogations in New Haven: The Impact of Miranda, 76 Yale L.J. 1519
(1967).


\textsuperscript{126} See, e.g., Faculty Note, A Postscript to the Miranda Project: Interrogation of Draft Pro-
testors, 77 Yale L.J. 500 (1967).
mately be required in the urban areas in which the crime problem is and will remain most severe. Agencies for continuing legal education and the law schools, in which training in criminal law has been badly neglected in the past, must also respond creatively if the demand is to be met. The Supreme Court has challenged the nation to discover whether or not the adversary concept of criminal justice, generally accepted and revered in theory, can be acceptable in practice. The question deserves an answer.