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BETTS V. BRADY TWENTY YEARS LATER: THE RIGHT TO COUNSEL AND DUE PROCESS VALUES

Yale Kamisar*

"Only where the unfairness is of greater substance than that which incidentally and ordinarily results from the failure of a defendant to have legal advice . . . do we get to the inquiry of whether there has been a failure of due process."[†]

I. HEREIN OF THE ABSOLUTE RIGHT TO COUNSEL— IF YOU CAN AFFORD IT

Q. I am quite distressed by talk that the landmark case of *Mapp v. Ohio*¹ "suggests by analogy"² that the Court may now overrule *Betts v. Brady*.³ For whether one talks about the fourth or the sixth amendment, there is much to be said for Justice Harlan's dissenting views in *Mapp*. "[W]hatever configurations . . . have been developed in the particularizing federal precedents" should not be "deemed a part of 'ordered liberty,' and as such . . . enforceable against the States . . . [W]e would not be true to the Fourteenth Amendment were we merely to stretch the general principle [of due process] . . . on a Procrustean bed of federal precedents."⁴

* Professor of Law, University of Minnesota. I am indebted to my colleagues, Professors Jesse H. Choper, John J. Cound, and Terrance Sandalow, for their valuable suggestions.

[†] United States *ex rel.* Farnsworth v. Murphy, 254 F.2d 438, 442 (2d Cir.), *vacated per curiam*, 358 U.S. 48 (1958).

¹ 367 U.S. 643 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25 (1949). *Mapp* has evoked a wealth of literature. See, e.g., Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961); Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practice*, 34 ROCKY MT. L. REV. 150 (1962).

² Unpublished address by Attorney General Robert F. Kennedy, American Bar Association Convention, Aug. 6, 1962, p. 5. For the view that the overruling of *Wolf* is an a fortiori case for overruling *Betts*, see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

³ 316 U.S. 455 (1942). Except in capital cases, whether the failure to assign counsel to an indigent defendant violates fourteenth amendment due process "is to be tested by an appraisal of the totality of facts." *Id.* at 462.

⁴ 367 U.S. at 678-79. Since the earlier *Wolf* case seemed to equate perfectly the

A. Evidently a *majority* of the Court didn't think there was *enough* to be said for Harlan's position.

Q. That may be, but it hardly follows that a majority will remain unpersuaded when *Betts v. Brady* is reconsidered this Term.⁵ For the views set forth in the *Mapp* dissent apply with even greater force to the right to counsel problem. After all, the fourth amendment does speak of *unreasonable* searches and seizures, of warrants issued upon *probable cause*. This is the very stuff fourteenth amendment due process is made of. Within the broad confines of the concepts laid down in the fourth amendment, common sense may yet come to the fore, the needs and demands of the public may yet play a decisive role.⁶ Contrast this with the specificity of the right to counsel clause. Here we deal with a particular command, not general principles.

A. I find the language and history of the sixth amendment much less compelling and confining than you do. Evidently, I am not alone. Why else is there controversy, even now, over when the sixth amendment right to counsel "begins"?⁷ At arraignment

substantive protection against invasions of privacy afforded by the fourteenth amendment with that furnished by the fourth (although it declined to implement this right by excluding evidence obtained in violation of it) [see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 6-11 (1950); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1101-08 (1959)], *Wolf* itself is subject to similar criticism: "The term 'unreasonable search and seizure' covers a multitude of sins. It runs the gamut from relatively technical or trivial infractions to flagrant, deliberate and persistent ones. . . . There is much to be said, therefore, for an approach which would only apply the fourth amendment's protection . . . to the states in some situations and not in others, one which would have caused the Court in *Wolf* to stop and ask: Is this the kind of illegal search that our polity will not endure?" Kamisar, *supra* at 1105.

⁵ Last June, in granting a writ of certiorari to the Supreme Court of Florida in *Gideon v. Cochran*, the United States Supreme Court requested counsel "to discuss the following in the briefs and oral argument: 'Should this Court's holding in *Betts v. Brady* . . . be reconsidered?'" 370 U.S. 908 (1962).

⁶ See, e.g., Inbau, *More About Public Safety v. Individual Liberties*, 53 J. Crim. L., C. & P.S. 329, 330-31 (1962): "State law enforcement officers can live with the exclusionary rule [in search and seizure cases] a lot easier than they could with a *McNabb-Mallory* rule By modernizing the laws of arrest and search and seizure, either by legislative enactments or court decisions (as the California and Illinois courts have done), there will be far fewer occasions for the police to violate the law as a matter of practical necessity; and there will be less need for the courts to reject incriminating evidence."

⁷ See generally Allison, *He Needs a Lawyer Now*, 42 J. AM. JUD. Soc'y 113 (1958); Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771 (1961); Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559, 587-90 (1951); Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24 (1960); Slovenko, *Representation for Indigent Defendants*, 33 TUL. L. REV. 363, 369-71 (1959); Note, 16 RUTGERS L. REV. 573 (1962).

time? Preliminary hearing? Immediately after arrest? Indictment? Why else is there uncertainty, even now, about when the indigent federal defendant's right to assigned counsel "ends"?⁸ Before preparation of a petition for certiorari? Filing papers collaterally attacking a federal conviction?

Does the sixth amendment right to counsel "in all criminal prosecutions" cover juvenile proceedings?⁹ Extend to "persons charged with . . . picking flowers or disturbing stalactites in national parks, or scrawling their names upon monuments in national cemeteries . . . or exceeding speed limits upon federal roads"?¹⁰ Does the problem raised by the alleged right to a court-appointed psychiatrist, accountant or some other expert needed to aid the defense become a simple one, permitting of but a single, obvious solution, if the claim is bottomed on a denial of the "effective assistance of counsel" under the sixth amendment, rather than on the "due process" or "equal protection" clauses?¹¹

Professor Herbert Wechsler observed in his recent Holmes lecture:

"I know, of course, that it is common to distinguish, as Judge Hand did, clauses like 'due process,' cast 'in such sweeping terms that their history does not elucidate their contents,' from other provisions of the Bill of Rights addressed to more specific problems. But the contrast, as it seems to me, often implies an overstatement of the specificity or the immutability these other clauses really have—at least when problems under them arise. . . . I argue that we should prefer to see the other clauses of the Bill of Rights

⁸ See generally Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

⁹ See generally McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN. L. REV. 843 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 568-73 (1957).

¹⁰ Doub & Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. PA. L. REV. 443, 445 (1959).

¹¹ See *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting), *vacated*, 352 U.S. 565 (1957) ("It might, indeed, reasonably be argued that for the government to defray such [pre-trial investigation] expenses is essential to that assistance by counsel which the Sixth Amendment guarantees"); *United States v. Brodson*, 136 F. Supp. 158, 164 (E.D. Wis. 1955), *rev'd on other grounds*, 241 F.2d 107 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957) ("without the assistance of an accountant the defendant is denied effective assistance of counsel The effective assistance right 'cannot be discharged as though it were a mere procedural formality'"). See generally Cross, *"The Assistance of Counsel for His Defense": Is This Becoming a Meaningless Guarantee?*, 38 A.B.A.J. 995 (1952); Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93, 100-01 (1953); Goldstein & Fine, *The Indigent Accused, the Psychiatrist and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1086-90 (1962); Note, 58 COLUM. L. REV. 832, 837-38, 851-53 (1958).

read as an affirmation of the special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of a century long past, with problems very different from our own. To read them in the former way is to leave room for adaptation and adjustment if and when competing values, also having constitutional dimension, enter on the scene."¹²

Indeed, *Johnson v. Zerbst*¹³ is ample proof that we have read the sixth amendment "to leave room for adaptation and adjustment":

"The right to 'have the assistance of counsel' was considered, I am sure, when the sixth amendment was proposed, a right to defend by counsel if you have one, contrary to what was then the English law. That does not seem to me sufficient to avert extension of its meaning to imply a right to court-appointed counsel when the defendant is too poor to find such aid."¹⁴

Moreover, we can overrule *Betts v. Brady*, or at least greatly modify it, *without* stretching the fourteenth amendment "on a Procrustean bed of federal precedents." It is clear that even indigent federal defendants charged with misdemeanors (at least the more serious ones) have an absolute right to assigned counsel;¹⁵ it is equally clear that under the *Betts* rule only the indigent state defendant charged with a capital crime enjoys such an absolute right.¹⁶ There is a good deal of ground in between. We could, for example, extend the fourteenth amendment right to all crimes

¹² WECHSLER, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 24, 26-27 (1961).

¹³ 304 U.S. 458 (1938). "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at 463.

¹⁴ WECHSLER, *op. cit. supra* note 12, at 25. See also FREUND, *THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE* 50-51 (1961): "One may hope that a majority of the Court will turn to the view that the appointment of counsel is as indispensable to the just and even-handed administration of the criminal law in the state courts as in the federal courts. It would be helped to reach this conclusion by avowing frankly that the Sixth Amendment does not furnish the real reason for the requirement in the federal courts. . . . If the right to have counsel appointed in the federal courts is acknowledged to rest on a pervasive sense of justice, it should be extended to state prosecutions as an element of due process of law." For a comprehensive historical consideration of the sixth amendment provision on counsel, see BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-36 (1955) (hereinafter cited as BEANEY).

¹⁵ See note 13 *supra*.

¹⁶ See *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948); *Bute v. Illinois*, 333 U.S. 640, 676 (1948).

punishable by as much as five or three years imprisonment.¹⁷ Or all "major felonies." Or all felonies, period.

Q. Then you agree that today, no less than twenty years after *Betts* was handed down, there is little to be said for "formulating the guarantee [of counsel] into a set of hard and fast rules" without regard to "qualifying factors";¹⁸ and much to be said for utilizing instead "a concept less rigid and more fluid" than the sixth amendment.¹⁹

A. No, not any more. Not after the Court has spoken so eloquently about the *absolute, unqualified* right to counsel—if you can afford it.

Q. You would still be grumbling if the Court had done otherwise.

A. Of course I would, but that's beside the point. I would still be grumbling if the Court had not progressed beyond the common-law origins of the due process confession rule, which equated "involuntary" confessions with those "probably untrue";²⁰ if, in order to protect against—and to discourage resort to—forbidden interrogation practices, it had not excluded improperly obtained confessions, however corroborated, however "probably true."²¹

¹⁷ Maryland Court Rules now require the appointment of counsel in all cases punishable by five or more years imprisonment, Rule 719b; New Hampshire has long required the assignment of counsel to indigent defendants in all felony cases punishable by three or more years in prison. N.H. REV. STAT. ANN. § 604:2 (1955). As Professor Slovenko has pointed out, *supra* note 7, at 366 n.18, "in France no accused can appear at a Court of Assize, which has jurisdiction over offenses punishable by death or by imprisonment exceeding five years, without the assistance of a *défenseur*."

¹⁸ *Betts v. Brady*, 316 U.S. 455, 462 (1942).

¹⁹ *Ibid.*

²⁰ See § 3 WIGMORE, EVIDENCE §§ 822, 823 (3d ed. 1940).

²¹ See, e.g., *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Watts v. Indiana*, 338 U.S. 49, 50 n.2 (1949).

Brown v. Mississippi, 297 U.S. 278 (1936), the first fourteenth amendment confession case, had been on the books but a short time when Professor Charles T. McCormick, drawing on state as well as federal cases, asked: "Can we not best understand the entire course of decisions in this field as an application to confessions both of a privilege against evidence illegally obtained . . . and of an overlapping rule of incompetency which excludes the confessions when untrustworthy?" McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 457 (1938). The post-*Brown* development and application of these two standards are discussed in Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 233-40 (1959); Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78, 106-13; Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954).

I regard the "official discipline"²² or "police methods"²³ test for admitting confessions a welcome addition to the "trustworthiness" test, but this hardly detracts from the fact that the development of this *second* constitutional standard left the Court without a rational basis for permitting the use of "real" evidence seized in violation of due process.²⁴ So it is with the question at hand. That I applaud the decisions of the Court delineating the absolute right to be heard through counsel *when one can afford to hire his own* does not depreciate the significance this development bodes for those who *cannot* afford to do so. As I view it, this development does no less than remove any "basis in neutral principle"²⁵ for qualifying the right to *assigned* counsel. After all, when a defendant is unable to invoke the aid of counsel to present his case or to attack the State's, *whatever the reason* (his own poverty or the state's interference with efforts to secure legal services he can pay for), the integrity of the process of ascertaining guilt is *equally impaired*.²⁶

Consider *Chandler v. Fretag*.²⁷ There, the only reasons advanced for stamping the right of petitioner, "to be heard through his own counsel," "unqualified"²⁸ were the stirring words of Justice Sutherland in *Powell v. Alabama*:

"Even the intelligent and uneducated layman has small and sometimes no skill in the science of law He lacks both the skill and knowledge adequately to prepare his defense, even though he has 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

²² MAGUIRE, EVIDENCE OF GUILT 127 (1959). See also *id.* at 109.

²³ Paulsen, *supra* note 21, at 429.

²⁴ The only basis found in the *Wolf* briefs for treating confessions obtained in violation of due process differently from other evidence obtained in violation of due process is the unreliability of the former. True, coerced confessions are generally the product of more serious invasions of "privacy" or "dignity" than illegal searches or seizures. This may be a good ground for regarding fourth amendment rights *not* "basic to a free society," but hardly a good ground for withholding the *remedy of exclusion*, once the conclusion is reached—as it was in *Wolf*—that they are "implicit in the concept of ordered liberty." See generally Kamisar, *supra* note 4, at 1096-1100, 1117-21.

²⁵ See WECHSLER, *op. cit. supra* note 12, at 21-23, 27.

²⁶ For an incisive discussion of this procedural due process value, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957).

²⁷ 348 U.S. 3 (1954).

²⁸ *Id.* at 9.

conviction because he does not know how to establish his innocence."²⁹

Why does "the danger of conviction because he does not know how to establish his innocence" diminish one iota because the defendant happens to be indigent? How does the *need* for a lawyer lessen one bit when the defendant cannot afford to hire his own? What is there about the quality of indigency that endows one so afflicted with the "skill and knowledge" to prepare a defense, qualities his more financially able brethren—even the "intelligent and educated" among them—lack?

The rule of *Betts v. Brady* becomes still less defensible when you consider the recent case of *Ferguson v. Georgia*,³⁰ holding, in effect, that a state may not deny a criminal defendant the right to have his own counsel guide him on direct examination.³¹ *Why not?* Because "the tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely."³² Because otherwise defendant's right to tell his side of it becomes "a trap into which

²⁹ 287 U.S. 45, 69 (1932), quoted with approval in *Chandler*, 348 U.S. at 9-10. (Emphasis added by Court in *Chandler*.)

³⁰ 365 U.S. 570 (1961).

³¹ Georgia is the only state—and apparently the only jurisdiction in the common-law world—to retain [by statute, GA. CODE ANN. § 38-416 (1954)] the common-law rule that a criminal defendant is incompetent to testify under oath in his own behalf at his trial. Another Georgia statute [GA. CODE ANN. § 38-415 (1954)] does allow a defendant to make an unsworn statement, but the statement is not treated as evidence or like the testimony of ordinary sworn witnesses; nor (as the Georgia courts have interpreted it) may counsel examine his client on direct examination except in the discretion of the trial judge.

In *Ferguson*, appellant's lawyer called him to the stand, but the trial judge sustained the prosecutor's objection to his lawyer's attempt to guide him by asking questions. The Supreme Court of Georgia affirmed, reiterating that "counsel for the accused cannot, as a matter of right, ask the accused questions or make suggestions to him when he is making his statement to the court and jury." 215 Ga. 117, 119, 109 S.E.2d 44, 46-47 (1959). Appellant did not challenge the constitutionality of the incompetency statute itself, but only the Georgia courts' construction of the statute permitting the accused to make an unsworn statement. As interpreted, contended appellant, he was denied "the guiding hand of counsel at every step in the proceedings against him," as required by *Powell v. Alabama*. The Supreme Court, per Mr. Justice Brennan, agreed.

Although appellant was charged with a crime punishable by death, the Court explicitly declined to limit the holding to capital cases: "[I]n effectuating the provisions of [the statute authorizing unsworn statements], Georgia, consistently with the Fourteenth Amendment, could not, in the context of [the incompetency statute], deny appellant the right to have his counsel question him to elicit his statement. . . . Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a non-capital offense, or represented by appointed counsel. For otherwise, in Georgia, 'the right to be heard by counsel would be of little worth.' *Chandler v. Fretag*." 365 U.S. at 596.

³² *Id.* at 594.

none but the most cool and self-possessed could place himself with much prospect of coming out unharmed."³³

Why is it—how can it be—that the “tensions of a trial” assume constitutional magnitude *only* when the accused is fortunate enough to have his own lawyer? Again, what is it about the quality of indignity that invests one so humbled with the coolness and self-possession that his richer or luckier fellow-defendants lack?

Q. I am astounded at the mileage you manage to get out of *Chandler* and *Ferguson*. As you yourself have pointed out, these cases simply reaffirm and apply the language in *Powell v. Alabama*, decided ten years *before* the *Betts* case. If the *Powell* language didn't prevent *formulation* of the *Betts* rule in the first place, why should post-*Betts* approval and application of the *Powell* language warrant *overruling* that decision twenty years later?

A. The *Betts* case itself did *not* reaffirm the language in *Powell* about defendant's unqualified right to be heard through his own counsel. Indeed, by implication at least, *Betts* seems to modify significantly the *Powell* language to this effect. The whole thrust of *Betts* is that in applying the concept of due process we should avoid “the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules”;³⁴ yet *Chandler* and *Ferguson* apply just such a rule. The appropriate question, *Betts* tells us, is not simply whether there was “want of counsel in a particular case”; but whether, considering the totality of the circumstances, such “want” rendered the trial “offensive to the common and fundamental ideas of fairness and right.”³⁵ Yet *Chandler* and *Ferguson* well illustrate that want of one's own counsel in *any* case, at *any* stage, on *any* issue, constitutes a per se violation of “fundamental fairness.”

Coming after *Powell*, as they do, *Chandler* and *Ferguson* are not surprising—if you *forget* that *Betts* was handed down in the interim. That's my problem. It's one thing to view the right to one's own counsel as unqualified in *Powell*—*before Betts* was ever written. It's quite another thing to reaffirm and apply this principle in *Chandler* and *Ferguson*—just as if *Betts* were never written.

³³ *Id.* at 595, quoting with approval Cooley, J., in *Annis v. People*, 13 Mich. 511, 519 (1865).

³⁴ 316 U.S. at 462.

³⁵ *Id.* at 473.

Your comments to the contrary, notwithstanding, I have not yet gotten as *much* mileage out of *Chandler* and *Ferguson* as I might. You see, not only can't I square these cases with the *Betts* rule, but I consider them a fortiori reasons for overruling *Betts*. If it is difficult to see why an indigent defendant needs a lawyer less than other defendants, it is easy to see why he needs one *more*. Suppose all defendants, rich and poor alike, were denied counsel. Some could hire investigators. Many more, on their own, could probably locate and interview one or more potential defense witnesses. Not so with the indigent defendant. The deficiencies of the bail system will operate to deprive most of them even of their physical freedom prior to trial.³⁶ Thus, not only will they be unable to pour any *money* into the search for evidence, but, however ill-equipped they are to do so, most of them "will also be unable to throw *themselves* into the search."³⁷

Moreover, if it is difficult to see why "the tensions of a trial" render an uncounselled, indigent defendant less "unfit to give his explanation properly and completely" than a defendant such as *Ferguson* who *does have* the aid of counsel at all *other* phases of the case, it is easy to see why the former is likely to experience *much greater* tensions. After all, *Ferguson* had the guiding hand of counsel *most of the time*. His lawyer undoubtedly interviewed him, investigated the facts, researched the law, and *went over* his client's version of the case with him—all this, *before he took the stand*. Nevertheless, the Court seemed to agree that "when the average defendant is placed in the witness chair and told . . . that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, *he has been set adrift in an uncharted sea with nothing to guide him*."³⁸ The Court also seemed to share the view that notwithstanding his *considerable* legal assistance prior to taking the stand, "an innocent man, charged with a heinous offence, and against whom evidence of guilt has been given is much more likely to be *overwhelmed by his situation*, and embarrassed, when called upon for explanation, than the offender, who is hardened in guilt; and

³⁶ See generally ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 112, 129-31 (1947); Samuels, *Bail: Justice for Far from All*, N.Y. Times, Aug. 19, 1962, § 6 (Magazine), p. 13; Note, 106 U. PA. L. REV. 693 (1958) (New York study); Note, 102 U. PA. L. REV. 1031 (1954) (Philadelphia study).

³⁷ Kamisar, *supra* note 2, at 64-65.

³⁸ 365 U.S. at 593, quoting with approval from Gray, *The Defendant's Statement*, 7 GA. B.J. 432, 433 (1945). (Emphasis added.)

... it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances."³⁹

How much more frightening, more perilous, is the predicament of the defendant who has no lawyer to consult with *before* he takes the stand—who is “going it alone” *all the way*?

Q. Come, come, the rational distinction between granting the defendant who can afford it an absolute right to counsel and requiring the defendant who cannot to show “special circumstances” is readily apparent. You need only keep in mind that the disadvantage suffered by the uncounselled indigent is “not imposed by the state, but results from the financial situation in which [he] . . . finds himself.”⁴⁰ There is all the difference in the world between warning the state that its officers must *refrain* from interfering with the exercise of the right to counsel and requiring the state *affirmatively to provide* counsel.⁴¹

A. Your emphasis on the lack of direct state responsibility for a Betts would be well placed if we were dealing with, say, the prohibition against cruel and unusual punishment. Although the amount of mental anguish and physical pain is identical in both situations, an abortive electrocution which results from unforeseen mechanical difficulties does not bar a second try,⁴² whereas “death by installments”⁴³ deliberately staged by prison officials in order to torture the condemned man undoubtedly would violate due process. Again, you would be right if we were considering, say, the protection against unreasonable searches and seizures. Absent “collusion,”⁴⁴ I take it that *Mapp v. Ohio* does not prevent

³⁹ 365 U.S. at 595-96, quoting with approval Cooley, J., in *Annis v. People*, 13 Mich. 511, 519-20 (1865). (Emphasis added.)

⁴⁰ *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951) (financial inability of defendant to retain his own psychiatrist does not constitute denial of equal protection).

⁴¹ Cf. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956).

⁴² *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). The four dissenters adopted what Professor Edmond Cahn has called a “consumer perspective,” *i.e.*, the Court should view the matter not with an “imperial or official perspective” but from the standpoint of “a consumer of government and law,” in this instance, the criminal defendant. See CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 17-42 (1961), particularly at 29-32, 37-39.

⁴³ To borrow a phrase from Mr. Justice Burton’s dissent in *Louisiana ex rel. Francis v. Resweber*, *supra* note 42, at 474.

⁴⁴ Until its abolition in *Elkins v. United States*, 364 U.S. 206 (1960), considerable temptation to and opportunity for federal-state collusion was furnished by the “silver platter” doctrine in search and seizure cases, *i.e.*, the doctrine that evidence illegally seized by state police can be used in federal prosecutions if the searching officers had

a prosecutor from using relevant physical evidence wrongfully—even forcibly—seized by private citizens.⁴⁵

In other words, the extent to which the state has “affirmatively”

no “working arrangement” with federal authorities but simply handed the evidence over to them on a “silver platter.” See generally Kamisar, *supra* note 4, at 1165-90. These dangers still exist in other areas. For example, absent proof of a “working arrangement,” federal agents may elicit incriminating statements from federal suspects held illegally by state or city police. *Coppola v. United States*, 365 U.S. 762 (1961), *affirming per curiam* 281 F.2d 340 (2d Cir. 1960); *Anderson v. United States*, 318 U.S. 350 (1943). For a discussion of *Coppola*-type illegal detentions and the *McNabb-Mallory* rule, see Kamisar, *supra* at 1183-85.

To some extent these dangers are posed by the decision in *Burdeau v. McDowell*, 256 U.S. 465 (1921), that so long as the United States did not have a hand in the invasion of defendant's privacy, it may retain for use in federal prosecutions evidence wrongfully seized by private individuals. While the magnitude of the problem of private-federal collaboration is evidently much smaller than that of state-federal collaboration, it could become quite significant with the emergence of a powerful aggressive organization along the order of the American Protective League of World War I or the Anti-Saloon League of prohibition days. See generally Black, *Burdeau v. McDowell—A Judicial Milepost on the Road to Absolutism*, 12 B.U.L. REV. 32 (1932).

⁴⁵ It is difficult to see how or why *Mapp* impairs the rule of *Burdeau v. McDowell* discussed in note 44 *supra*. *Mapp* simply applies the federal rule of exclusion to the states, and the right of privacy effectuated by the federal rule has long been viewed “as a restraint upon the activities of sovereign authority and . . . not . . . a limitation upon other than governmental agencies,” 256 U.S. at 475. Cf. *Sackler v. Sackler*, 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (evidence obtained by a private individual in violation of state statute prohibiting unreasonable searches and seizures admissible in his civil action), *reversing* 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962). The lower court decision, relying on *Mapp* for its formulation of a new exclusionary rule, is criticized in 46 MINN. L. REV. 1119 (1962); 110 U. PA. L. REV. 1043 (1962); 8 UTAH L. REV. 84 (1962).

One of the student comments considers and rejects an analogy to *Shelley v. Kraemer*, 334 U.S. 1 (1948): “In *Shelley* the lower court was asked to compel a private citizen to do an act which would be unconstitutional for the state to perform, whereas in the instant case the court was merely asked to give evidentiary status to illegally seized information.” 46 MINN. L. REV. 1119, 1124-25 (1962).

“[T]he courts have consistently admitted evidence wrongfully acquired by private individuals in both civil and criminal actions [citing many cases]. Until the present decision [by the trial court in *Sackler*], the sole suggestion of a departure from this practice had been the Michigan Supreme Court's 1958 statement in *Lebel v. Swincicki* [354 Mich. 427, 93 N.W.2d 281 (1958)]—a wrongful death action arising from an automobile accident—that it was error to admit testimony based on the analysis of a blood sample taken from the defendant in violation of a Michigan constitutional prohibition of unreasonable searches and seizures.” 110 U. PA. L. REV. 1043, 1044 (1962).

It can be—and has been—argued that there is more to be said for excluding evidence illegally seized by private persons in a *civil suit* than in a *criminal prosecution*: “Individuals may feel that committing a minor criminal trespass and even possibly suffering a small criminal penalty is far outweighed by the hope of obtaining crucial evidence for a civil trial of major significance. In addition, one who establishes a civil claim by securing evidence unlawfully, directly benefits from his own wrongdoing, whereas in criminal convictions the primary benefit flows not to the party committing the wrong, but to the public as a whole.” 8 UTAH L. REV. 84, 87 (1962). However, the Supreme Court has drawn a constitutional distinction between “civil”—even “quasi-criminal”—proceedings on the one hand and “criminal” prosecutions on the other, applying the fourth amendment only to “criminal” defendants. See Kamisar, *The Wire-tapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 918-21 (1960).

or "directly" contributed to the defendant's plight is most significant when we deal with a criminal procedural due process value *other* than the reliability of the guilt-affixing process, one aptly described as "insuring respect for the dignity of the individual."⁴⁶ But when we consider the right to counsel problem, we are talking about the "fairness" of the guilt-determining process itself; we are addressing ourselves to the goal of "reducing to a minimum the possibility that any innocent individual will be punished."⁴⁷ The degree to which the state is "affirmatively" or "directly" responsible for the impairment of *this* due process value is hardly crucial. Whether or not the state did something or failed to do something, an unfair trial is still an unfair trial.

Q. An interesting theory. It's a pity there are so many Supreme Court cases against you.

A. Really?

Q. Certainly. "Fairness," *i.e.*, preserving the integrity of the guilt-determining process, entitles the accused to be "free of the damaging and untrustworthy influence of coerced confessions and testimony knowingly perjured."⁴⁸ Let's pause a moment to consider these cases.

It is by no means clear that a confession "coerced by private persons, without color of state action, and introduced in evidence by the state"⁴⁹ offends due process. Indeed, in an incisive concurring opinion handed down a decade ago, Justice Jackson, joined by Justice Frankfurter, voiced relief that "there is no need to resolve such difficult questions" as whether (absent "collusion" between law enforcement officials of both jurisdictions) the courts of one state may admit into evidence a coerced confession secured by the police of another state.⁵⁰ If your analysis is sound, why the hesitation, the doubts? *Whoever* extracted the coerced confession—local police, officials of a foreign jurisdiction, or a vigilante committee—a coerced confession exerts the same "untrustworthy influence," does it not?

A. It is difficult to visualize a case where neither the police

⁴⁶ Kadish, *supra* note 26, at 347.

⁴⁷ *Id.* at 346.

⁴⁸ *Ibid.*

⁴⁹ A hypothetical raised in Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304, 1310 (1951).

⁵⁰ *Gallegos v. Nebraska*, 342 U.S. 55, 70 (1951).

nor the prosecution have any reason to suspect that the confession on which the State relies was coerced by private parties. It is almost impossible to conceive of such a case, *after* the defendant raises this objection at the trial. Of course, if representatives of the state are unaware of the defendant's mistreatment, and they remain in the dark because he fails to alert them, *i.e.*, he does not object to the admission of the confession, the conviction *should be* sustained. Defendant had his chance in court and chose not to raise the point.

Q. When are you going to stop fighting the problem long enough to come up with an answer?

A. I am simply pointing out that the only reason the situation you hypothesize poses any "problem" at all is that it has not arisen and is quite unlikely to arise.

Q. Let's take a case where, unbeknown to the State, members of the Ku Klux Klan are holding defendant's wife and child as hostages. Since they threaten to kill his dear ones if he repudiates a confession they beat out of him earlier, again unbeknown to the State, defendant does not object to the admission of the evidence.

A. I answer unhesitatingly that if those facts can be established the conviction must fall. Interest has focused on whether the "police methods" approach (*i.e.*, coerced confessions should be excluded in order to deter improper police methods in obtaining the confessions) may operate to exclude confessions extracted by the State which have been sufficiently corroborated to satisfy the "trustworthiness" test. Regardless, the *converse* is certainly true. It may be my shortcoming, but this one is so easy it's hardly worth talking about. After all, I suppose *nobody* has suggested that the "police methods" test has *displaced* the "trustworthiness" test; the dispute has turned simply on whether the newer test has supplemented the older one.

Two years after Justice Jackson raised the self-styled "difficult question" you referred to a moment ago, he furnished, it seems to me, a resounding answer:

"[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be

illusory and deceptive evidence. A forced confession is a false foundation for any conviction"⁵¹

Whether or not you share Jackson's view that "untrustworthiness" is or ought to be the *sole* basis for excluding a confession—and, as I have already observed, a majority of the present Court certainly does not—how can you quarrel with the proposition that a challenged confession must *at least* pass *this* test?

Q. Is a coerced confession a "false foundation for *any* conviction" when *private citizens* have elicited it? Suppose, in the Ku Klux Klan hypothetical I gave you, the confession was wrung from the defendant by stark physical violence, but even apart from this, evidence of guilt is overwhelming, *e.g.*, twenty bishops witnessed the crime and so testified. Under those circumstances, does the use of the confession still warrant reversal?

A. I would have to say, probably not.

Q. Fine. I think this is a fatal concession on your part, but I'll come back to it later. First, I want to trot out the perjury cases. Here, there is no room for speculation about the necessity of state complicity. The law is clear and it is hopelessly against you.

You will recall that Professor Kadish is careful to allude—as he must—to the impairment of the guilt-determining process by the use of "testimony *knowingly* perjured,"⁵² *i.e.*, false testimony induced by or known to be such by the *prosecution*. Ever since *Mooney v. Holohan*,⁵³ when the effect of perjured testimony was first presented as a due process problem, it has been clear that more than the mere use of such tainted testimony is needed to violate the federal constitution:

"[T]he requirement of due process . . . cannot be deemed to be satisfied . . . if a State has *contrived* a conviction . . . through a deliberate deception of court and jury by the presentation of testimony known to be perjured. *Such a contrivance by a State* to procure the conviction . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that

⁵¹ *Stein v. New York*, 346 U.S. 156, 192 (1953).

⁵² See text at note 48 *supra*. (Emphasis added.)

⁵³ 294 U.S. 103 (1935).

of administrative officers in the execution of its laws, may constitute *state action* within the purview of the Fourteenth Amendment."⁵⁴

The real controversy in this area has turned on whether the introduction of perjured testimony violates due process only when obtained, as a majority of the Court, per Justice Frankfurter, put it in *Hysler v. Florida*⁵⁵ twenty years ago, "by the active conduct or the connivance of the prosecution,"⁵⁶ or whether inducement or knowledge by *some other state official* suffices. A recent Third Circuit holding that deliberate perjury by a *police officer* offends due process⁵⁷ has been described—by a "liberal" commentator—as a "somewhat novel decision."⁵⁸ Why? Because no member of the *prosecution staff* was aware of the false testimony. This should give you some idea of the uphill struggle you face.

A. The only thing I find surprising about the Third Circuit decision is that there is any doubt about it. Throughout his *Hysler* opinion, Justice Frankfurter uses "responsible officials," "state authorities" and "responsible state officials" interchangeably with "prosecutor";⁵⁹ the unanimous opinion by Justice Murphy in *Pyle v. Kansas*,⁶⁰ handed down the very next Term, does likewise;⁶¹ the *Mooney* case itself, you will recall, spoke of "state action" *generally* and regarded the action of prosecutors *as well as* "administrative officers"—presumably police officers—as "state action."⁶² In any event, the matter seems to have been settled by the recent case of *Napue v. Illinois*,⁶³ where the Chief Justice formulated the *Mooney-Hysler-Pyle* rule as banning convictions "obtained through use of false evidence, known to be such by *representatives of the State*."⁶⁴ Quite significantly, the *only* lower federal court authority cited in direct support of this proposition was the "somewhat novel" Third Circuit decision.

⁵⁴ *Id.* at 112-13. (Emphasis added.)

⁵⁵ 315 U.S. 411 (1942).

⁵⁶ *Id.* at 413.

⁵⁷ *Curran v. Delaware*, 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959).

⁵⁸ Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 483 (1960). Considering the state of the law, this *description* of *Curran* is warranted; it does not connote disapproval of the case by Professor Reitz.

⁵⁹ 315 U.S. at 413, 418, 421.

⁶⁰ 317 U.S. 213 (1942).

⁶¹ *Id.* at 214, 216.

⁶² See text at note 54 *supra*.

⁶³ 360 U.S. 264 (1959).

⁶⁴ *Id.* at 269. (Emphasis added.)

Q. The matter is far from settled. Indeed, the weight of authority is against the Third Circuit.⁶⁵ But I see no point in prolonging this skirmish simply to avoid the main battle. Whether or not complicity of the *prosecutor* is a necessary condition to the finding of unconstitutionality, it is quite clear—you yourself have said as much—that the complicity of *some* state official is a prerequisite. What about that? How can you possibly square this “state action” requirement (however you define it) with the rationale you advanced a while back? Whether the State solicited the false testimony—or the enemies of the defendant did—or the friends of the victim—whether or not the State knew at the time that the testimony was false—isn’t the guilt-determining process *equally* impaired by the use of perjured testimony?

A. A well-established rule that the use of false testimony induced by or known to be such by the State violates due process hardly signifies it is equally well established that *absent* State complicity the use of such testimony does *not* and *cannot* offend due process. The Supreme Court has never so held.

Q. Yes it has, in denying petitioner coram nobis relief in *Hysler*.

A. Despite the fact Hysler *did* allege that false testimony was induced by the prosecution?⁶⁶ There *is* considerable language in the opinion which supports your reading of the case. However, when you consider that the petition evidently relied on “conclusions” rather than “specific facts,” as Florida law required;⁶⁷ and that the Florida Supreme Court passed on the credibility of the allegations and found “‘Hysler’s proof’ . . . insufficient ‘to make the showing of substantiality which, according to the local procedure . . . was necessary in order to obtain the extraordinary relief . . . ,’ ”⁶⁸ you can see why the case may appropriately be isolated and all but forgotten. The Court seems to have done precisely that when, quite recently, it looked back at *Hysler* as holding “only that a state standard of specificity and substantiality

⁶⁵ See, e.g., *Wild v. Oklahoma*, 187 F.2d 409 (10th Cir. 1951); *Holt v. United States*, 303 F.2d 791 (8th Cir. 1962) (alternative holding); *United States v. Jakalski*, 237 F.2d 503 (7th Cir. 1956) (alternative holding).

⁶⁶ See 315 U.S. at 413, 421; and the excerpts from Hysler’s petition in the appendix to Mr. Justice Black’s dissenting opinion. *Id.* at 428.

⁶⁷ *Id.* at 416.

⁶⁸ As Mr. Justice Black pointed out in his dissent; *id.* at 424.

in making allegations of federal constitutional deprivations would be respected."⁶⁹

Q. Yes, but the "insubstantiality" of the allegations was based on a "proper skepticism" that state authorities either induced or knew of any false testimony.⁷⁰

A. And also on a wider skepticism—considering the corroborating testimony "both of numerous witnesses and Hysler himself,"⁷¹ "the fact that this repudiation came four years after leaden-footed justice had reached the end of the familiar trail of dilatory procedure,"⁷² "that repudiations and new incriminations like Baker's on the eve of execution are not unfamiliar as a means of relieving others or as an irrational hope for self,"⁷³ and other factors—that any testimony was false at all.

Even if I am wrong about *Hysler*, it is not amiss to note that 1942 was a long, long time ago, as constitutional-criminal procedure goes. Since then, federal constitutional protection afforded state defendants against transgressing local law enforcement officials has expanded rapidly.⁷⁴ Much more in keeping with the current outlook of the Supreme Court than *Hysler* is the four-man dissent in *Durley v. Mayo*.⁷⁵ Petitioner Durley alleged that his conviction rested on perjured testimony which was a product not of "state action" but of a private agreement between his two co-defendants.⁷⁶ A majority of the Court concluded that the state court's denial of Durley's petition may have rested on an adequate state ground, and thus dismissed for lack of jurisdiction. But the

⁶⁹ *Napue v. Illinois*, 360 U.S. 264, 271 (1960).

⁷⁰ See 315 U.S. at 418-20.

⁷¹ *Id.* at 414.

⁷² *Id.* at 417.

⁷³ *Id.* at 422.

⁷⁴ See generally Allen, *supra* note 21; Lewis, *Historic Change in the Supreme Court*, N.Y. Times, June 17, 1962, § 6 (Magazine), p. 7; Schaefer, *supra* note 41; Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

Moreover, a rule upsetting "private perjury" state convictions would add to federal-state friction, but a rule invalidating state convictions of uncounselled indigents would soon remove a federal-state irritant. Since the prosecution, by definition, is unaware of the "private perjury," a rule vitiating convictions so obtained could not obviate the problem, but would undoubtedly encourage litigation, especially by means of collateral attack. The "private perjury" cases are "sick" cases which a legal system cannot wholly avoid. Not so prosecutions of uncounselled indigent defendants. This *can* be put to an end by a rule which invalidates the resulting convictions. Here, a prophylactic rule can be fully effective.

⁷⁵ 351 U.S. 277 (1956).

⁷⁶ Petitioner's allegations are discussed in Mr. Justice Douglas' dissenting opinion. *Id.* at 286-87.

four dissenters had little trouble in finding a violation of due process once the merits of the case were reached.⁷⁷

Q. Yes, *because* the testimony of the co-defendants "was the only evidence linking petitioner with the crimes charged";⁷⁸ *because*, disregarding the alleged false testimony, "no competent evidence remains to support the conviction."⁷⁹ What result if there had been ample *untainted* evidence to support the verdict of guilty?

A. I would have to say that an affirmance would be in order.

Q. Fine. One more question. Would ample *untainted* evidence also warrant an affirmance if the perjured testimony were induced by or knowingly used by the *prosecution*?

A. I think not. Although this question has never authoritatively been answered, I think that here, as in the coerced confession cases,⁸⁰ the mere use of such untainted evidence—regardless of other evidence of guilt—would necessitate reversal. Although the Court did not employ such terminology in the recent perjury case of *Napue v. Illinois*, what it *did* in that case, it seems to me, was to move to the very brink of a "rule of automatic reversal."⁸¹

Q. Yes, the automatic rule the Court applies when a confession coerced by *state officials* has been introduced into evidence, but—as you agreed awhile back—not one it would apply if the confession were coerced by *private citizens*.

A. That's right. Where there is no complicity on the part of the State, the weight of the whole record *might* make the use of

⁷⁷ *Id.* at 290-91.

⁷⁸ *Id.* at 286.

⁷⁹ *Id.* at 291.

⁸⁰ See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 621 (1961); *Payne v. Arkansas*, 356 U.S. 560, 567-68 (1958); *Malinski v. New York*, 324 U.S. 401, 404 (1945). See generally Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 339-54 (1954).

⁸¹ See text at notes 101-02 *infra*. See also Magruder, C.J., concurring in *Coggins v. O'Brien*, 188 F.2d 130, 139 (1st Cir. 1951): "I take it that a constitutional claim is not to be defeated merely because there may have been other evidence, untainted, sufficient to warrant a conviction; that the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rely on the untainted evidence, and chooses to 'button up' the case by the known use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it."

perjured testimony or even an "involuntary" confession nonprejudicial, *e.g.*, where your twenty bishops have testified impressively on the same matter.

Q. Why do you qualify your answer by *excepting* "complicity on the part of the State"? Why this double standard? Isn't the *effect* on the guilt-determining process the same, regardless of the source of responsibility for the tainted testimony? Don't you see, the perjured testimony and involuntary confession cases completely obliterate the sharp distinction you drew earlier between the due process value of "insuring respect for the dignity of the individual" and the value of "reducing to a minimum the possibility that any innocent individual will be punished."⁸² The perjury and confession cases amply demonstrate that *regardless of which value is at stake*, the degree to which the state is "affirmatively" or "directly" responsible for the plight of the accused is crucial.

Even if you are right, even if the use of coerced confessions or perjured testimony *may* violate due process, whether or not the state had a hand in the sorry business, what comfort is this to you? So long as you admit that such error will not necessarily require reversal—this will depend on the overall record—whereas if the state is to blame the error *will invariably necessitate reversal*, where does this get you? Nowhere, but right back to *Betts v. Brady*. After all, when the state is not responsible for defendant's "want of counsel," such disadvantage also *may* violate due process—again depending upon the whole record.

A. The next thing I know you'll be telling me *Betts* marks a great *advance* in criminal procedure, because it settles this point, whereas it remains to be authoritatively established in the confession and perjury fields.

Q. I was getting there.

A. I must admit the argument you put forth has a certain appeal—at first sight. Too bad that a second, closer look finds it illusory and deceptive.

Q. You don't say?

A. The fallacy lies in lumping together the activities of differ-

⁸² Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1957).

ent officials—police, prosecutors, judges and legislators—under the single heading of “state action.” For it makes a big difference whether we are talking about the action of police or prosecutor in particular, or state action generally.⁸³ You see, the “rule of automatic reversal” in the confession cases and, let us assume, the perjury cases as well, does not illustrate the importance of *state conduct* as much as it establishes the crucial nature of *state misconduct*, i.e., improper tactics by *law enforcement officials*.

Let me put it another way. As you might expect, methods which offend “certain decencies of civilized conduct”⁸⁴ or which the Court brands “repulsive”⁸⁵ are not often *authorized* by state law. Rather, they typically constitute violations of local law, as well as the federal constitution.

In this connection, it may be helpful to dwell on that famous (or infamous) stomach-pumping case, *Rochin v. California*.⁸⁶ The conviction was reversed *only* because of offensive police *methods*. The case may be viewed as a “pure” example of disrespect for man’s “dignity” or “privacy” or “individuality,”⁸⁷ for it is hard to see how the police misconduct posed any threat to the integrity of the guilt-determining process whatsoever. “[I]t is possible for real evidence to be placed in a house without the occupant’s approval or his knowledge, but it would take a rash man indeed to try to disassociate himself from the contents of his stomach.”⁸⁸

Most procedural due process cases, however, are “hybrids.” This is true of the perjured testimony and coerced confession cases generally. Here, typically *two* factors work together to topple the conviction: the disputed evidence is unreliable *and* it is the fruit of blameworthy conduct on the part of police or prosecutor. When you remove one factor from the equation, as you have done by positing cases where law enforcement officials cannot be blamed for either the acquisition or use of the tainted evidence,

⁸³ Not, however, if the “consumer perspective” were the prevailing one. See the discussion in note 42 *supra*.

⁸⁴ *Rochin v. California*, 342 U.S. 165, 173 (1952).

⁸⁵ In *Irvine v. California*, 347 U.S. 128 (1954), which saw a 5-4 majority uphold a conviction based on incriminating conversations heard via a concealed microphone illegally installed in petitioner’s home, Mr. Justice Frankfurter, author of the *Rochin* opinion, in his dissent protested: “[W]hat is decisive here, as in *Rochin*, is additional aggravating conduct which the Court finds repulsive.” *Id.* at 144-45. For a penetrating and delightful discussion of the *Irvine* case, see Westin, *The Supreme Court*, in *THE USES OF POWER 117-70* (Westin ed. 1962).

⁸⁶ 342 U.S. 165 (1952).

⁸⁷ See the discussion of this due process value-goal in Kadish, *supra* note 82, at 347.

⁸⁸ Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1120 (1959).

then isn't it readily apparent that a *greater impairment* of the guilt-determining process is needed to "bring the result below the Plimsoll line of 'due process' "?⁸⁹ Even if the Court were not to apply the "rule of automatic reversal" when law enforcement officials extract and use "involuntary" confessions, even if it does not invoke such a principle to cover those cases where there is state responsibility for the use of perjured testimony, it is easy to see why a *lower probability* that such tainted evidence will convict an innocent person suffices when police-prosecutor misconduct is present than when it is not.

Q. I would be much more impressed with this analysis if the Court had made use of it. But the reason for "the rule of automatic reversal" is to be found elsewhere. Justice Whittaker observed for the Court:

"[The prosecution] suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."⁹⁰

Note well that no significance at all is attached to the presence or absence of law enforcement misconduct. Whether or not state officials extracted the confession, whether or not the prosecution knew about it, the reasoning is equally applicable.

A. Come, come. There wouldn't be much fun or profit in this business if we were confined to what courts *say*, and were not free to consider what they *do*. The Court has been reluctant to spell out that the function of the "automatic reversal" rule involves disciplining of police-prosecutor activity, perhaps because of loud cries that the courts should not "police the police."⁹¹ But this is

⁸⁹ Cf. Frankfurter, J., concurring in *Fikes v. Alabama*, 352 U.S. 196, 199 (1955). The "plimsoll line" is the load line on the sides of British merchant vessels, to indicate the line of submergence permitted by law. It can be argued that "above" rather than "below" the plimsoll line more aptly describes that due process has not been satisfied, but there is ample authority for describing an overloaded ship as one loaded below the plimsoll mark. See generally Field, *Frankfurter, J., Concurring*, 71 HARV. L. REV. 77, 80 n.18 (1957).

⁹⁰ *Payne v. Arkansas*, 356 U.S. 560, 567-68 (1958).

⁹¹ See, e.g., Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., C. & P. S. 85 (1962); Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L., C. & P.S. 329 (1962); McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L., C. & P. S. 266 (1961); Peterson,

what the Court is *doing*. The only good reason for overturning a conviction whenever a coerced confession is introduced at the trial—even though the testimony of your twenty bishops covers the same matter—is to be found in the “police methods” rationale which now underlies the constitutional ban against coerced confessions.⁹²

This is well illustrated by *Stein v. New York*,⁹³ where a majority, per Justice Jackson, the leading antagonist of the “police methods” or “deterrent” approach to coerced confessions,⁹⁴ took some healthy swings at the “automatic reversal” principle.⁹⁵ This greatly distressed several members of the Court, notably Justice Frankfurter, champion of the “deterrent” approach to confessions.⁹⁶

Alarmed at what he feared was a “retrogressive step in the administration of criminal justice,” Justice Frankfurter in his dissent cast aside the fictions and articulated the *real* reason—and the *best* reason—for the “automatic reversal” principle:

“By its change of direction the Court affords new inducement to police and prosecutors to employ the third degree, whose use the Wickersham Commission found ‘widespread’ more than thirty years ago . . .

“It surely is not self-deluding or boastful to believe that the series of cases in which this Court reversed convictions because of such abuses helped to educate public opinion and to arouse in prosecutors and police not only a wholesome fear but also a more conscientious feeling against resort to these lazy, brutal methods. . . .

“But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured

Restrictions in the Law of Search and Seizure, 52 NW. U.L. REV. 46 (1957); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955). But see Kamisar, *Some Reflections on Criticizing the Courts and “Policing the Police,”* 53 J. CRIM. L., C. & P.S. 453 (1962).

⁹² Cf. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 426-27 (1954).

⁹³ 346 U.S. 156 (1953).

⁹⁴ See, e.g., *Watts v. Indiana*, 338 U.S. 49, 58, 60 (1949) (Jackson, J., concurring in the result in *Watts* and dissenting in the companion cases of *Harris v. South Carolina* and *Turner v. Pennsylvania*).

⁹⁵ 346 U.S. at 189-92.

⁹⁶ See, e.g., his opinions for the majority in *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Watts v. Indiana*, 338 U.S. 49, 50 n.2 (1949).

on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree."⁹⁷

Fortunately, Justice Frankfurter's hopes turned out to be sounder than his fears. Justice Jackson's language in *Stein* did mark only "a temporary, perhaps an *ad hoc*, deviation from a long course of decisions,"⁹⁸ after all. But make no mistake about it. If Jackson's views had prevailed, we would indeed have witnessed a "retrogressive step."

It would seem that a prosecutor is significantly more sensitive to reversal on appeal than a policeman.⁹⁹ Thus, the real damage which would have been wrought by an abandonment of the "automatic reversal" principle would not have been a dilution of the deterrent effect of the confession doctrines on the *police*, considerable though this might have been, as much as the immeasurable diminution of the force of these doctrines on the *prosecution*:

"Under such circumstances the problem for the prosecution concerned about reversal would not be to avoid the use of coerced confessions but only to insure their verification by independent evidence. The prosecution might then be encouraged to supplement other evidence by introducing a coerced confession in order to guarantee a conviction. On review, it could defend the conviction on the ground that it was warranted by the independent evidence."¹⁰⁰

When, as I think it will do sooner or later, the Court authoritatively establishes that the *knowing use* of perjured testimony likewise "automatically" works a reversal, it may not explicitly base such a doctrine on the "disciplinary" or "deterrent" feature of procedural due process. For example, it may say instead that even where the falsehood only bears upon the credibility of a single witness, and the State may point to much "untainted" tes-

⁹⁷ 346 U.S. at 201-03.

⁹⁸ Frankfurter, J., dissenting, *id.* at 201. Doubts raised by *Stein* have been put to rest by *Payne v. Arkansas*, 356 U.S. 560, 567-68 (1958); *Spano v. New York*, 360 U.S. 315, 324 (1959); *Culombe v. Connecticut*, 367 U.S. 568, 621 (1961) (majority opinion by Frankfurter, J.).

⁹⁹ See Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 461-62 (1948); Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 78 (1957); Waite, *supra* note 91, at 194. Rules of evidence do significantly influence police attitudes and practices when the courts make the attorney general or district attorney care enough to make the police care too. See Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., C. & P. S. 171, 179-82 (1962).

¹⁰⁰ Meltzer, *supra* note 80, at 354.

timony to the same effect, so many "subtle factors" are operating, that one can *never be sure* that the testimony of that one witness did not have an effect on the outcome of the trial.¹⁰¹

This reasoning may ring true for many cases, even most, but it simply does not warrant reversal in *all* cases where perjured testimony is knowingly used, however overwhelming the other untainted evidence. It does not satisfactorily explain upsetting a conviction when, for example, the perjured testimony is confirmed in every respect by the testimony of twenty bishops. Whatever the Court's linguistics when and if it formulates a rule of "automatic reversal" in the perjury cases, whether or not it will dwell on the police or prosecutor *misconduct* in the case, misconduct by officers of the law will nevertheless be the decisive factor. Whether or not the Court spells it out, the true rationale will nevertheless run along the lines of Judge Fuld's recent opinion for a unanimous New York Court of Appeals:

"The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor should have corrected the trial testimony given by Mantzinos and the impression it created. . . .

*"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict. . . . We may not close our eyes to what occurred; regardless of the quantum of guilt or the asserted persuasiveness of the evidence, the episode may not be overlooked. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."*¹⁰²

¹⁰¹ Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959): "The principle that a State may not knowingly use false evidence . . . to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

¹⁰² *People v. Savvides*, 1 N.Y.2d 554, 556-57, 136 N.E.2d 853, 854-55, 154 N.Y.S.2d 885, 887 (1956). Judge Fuld's italicized language signifies the portion quoted with approval in *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). The word "fair" in the last line, "preventing . . . a trial that could in any real sense be fair," is not without its

Q. I fail to see where this analysis gets you. Even if you are right, what have you accomplished other than to supply me with a ready explanation for the absolute right to counsel when you can afford it and the qualified right when you cannot? We must not be content with what the *Court* said in *Chandler* and *Ferguson* any more than in the perjured testimony and coerced confession cases. Here, too, the linguistics about "prejudice" to the contrary notwithstanding, the true rationale runs deeper. In *Betts*, want of counsel posed a threat only to the reliability of the guilt-determining process; in *Chandler* and *Ferguson* a second factor was also at work: *state interference* with defendant's right to have the assistance of his own counsel.

A. What do you mean by "state interference"? You conjure up the spectacle of two husky assistant prosecutors double-teaming defense counsel at the door to the courthouse. What are we really talking about? In *Chandler* the *trial judge* denied petitioner's request for a continuance to enable him to obtain counsel on the "habitual criminal" accusation. In *Ferguson*, relying on many state precedents to the effect that defense counsel cannot, as a matter of right, guide his client when he is making his unsworn statement, the *trial judge* sustained the State's objection to counsel's attempt to question the accused at this time. This hardly calls for the "disciplinary" or "deterrent" feature of procedural due process found in *Rochin*, *Mapp*, *Mooney* or *Napue*. This is trial error, plain and simple. Not state *misconduct* in the sense of the illegal search or coerced confession cases, or in any other meaningful sense. Not a "rational basis" for distinguishing *Betts* from *Chandler* the way "private" perjured testimony and coerced confession cases can be distinguished from the "police-prosecutor" variety.

Q. The lack of funds to find a missing document or discover a missing witness also increases the possibility that an innocent man may be convicted. "Want" of a hand-writing expert or a ballistics expert or a chemist or a biologist also "impairs" the integrity of the guilt-determining process. Surely the federal constitution does not compel a state to furnish an indigent all these aids, too.

ambiguity. In this context, I submit "fair" means not reliable or trustworthy but "fair" in the sense of "fair play," *i.e.*, respect for certain decencies of civilized conduct whether or not there is a substantial risk that an innocent man may be convicted.

The "rational basis" you seek is all around you. It is supplied by the contingencies of life itself. The state may not *erect* hurdles in the path of an accused financially able to minimize the risk that he will be wrongfully convicted. That's *Chandler*. But absent "special circumstances" the state need not *remove* the financial barriers confronting the indigent accused so the risk is minimized for him too. That's *Betts*. It's not so much a question of the presence of *state action* as it is the availability of *private funds*. As Henry Cecil's registrar observed:

"You want a full-scale action, with counsel and solicitors on both sides and all the rest of it, do you? That's what Magna Carta gives you. . . . But it's expensive. Magna Carta says nothing about not being expensive. To no one will we sell—well, there are no bribes in this country—to no one will we deny—to no one will we delay, justice. Nothing about not charging, is there?"¹⁰³

II. *Griffin v. Illinois*: HOW WIDE THE HOLDING?

A. I'm not much of an authority on the Magna Carta. I do know there's a good deal about "not charging" in *Griffin v. Illinois*:

"Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . . In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹⁰⁴

Q. This is not the first time Justice Black has "painted with

¹⁰³ CECIL, *DAUGHTERS IN LAW* 117 (1961).

¹⁰⁴ 351 U.S. 12, 17-19 (1956) (opinion of Black, J.).

a broad brush."¹⁰⁵ He has also said—for a majority of the Court—that the right of an accused to have the assistance of counsel for his defense “is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty”;¹⁰⁶ that “if the constitutional safeguards it [the sixth amendment] provides be lost, justice will not ‘still be done.’”¹⁰⁷ If this isn’t fourteenth amendment due process talk, I don’t know what is. But Black said this in a case holding only that an indigent *federal* defendant has an absolute right to assigned counsel—and four years *later* a majority of the Court decided the fourteenth amendment due process question against him.¹⁰⁸ This illustrates nicely that “the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside”;¹⁰⁹ that a rereading of an opinion with “due contrition” often reveals “all sorts of cracks and crevices and loopholes.”¹¹⁰ *Griffin*, I venture to say, furnishes but another illustration.

Oh, I don’t deny you can gain some solace from the language in *Griffin*—if you take it out of context and read it “with the literalness of a country parson interpreting the first chapter of Genesis.”¹¹¹ But surely you must agree that this language *cannot* be taken literally. Persons charged with crimes *always have and always will* “stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot.”¹¹² Economic burdens attendant upon the exercise of a privilege *never have and never will* bear equally upon all. “[W]hile the exclusion of ‘indigents’ from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees.”¹¹³

¹⁰⁵ Mr. Justice Harlan, dissenting, so characterized Black’s opinion. *Id.* at 34.

¹⁰⁶ *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

¹⁰⁷ *Ibid.*, quoting Cardozo, J., in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937): “[T]he immunity from compulsory self-incrimination . . . might be lost, and justice still be done.”

¹⁰⁸ *Betts v. Brady*, 316 U.S. 455 (1942), Justices Black, Douglas and Murphy dissenting.

¹⁰⁹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 29 (1921).

¹¹⁰ *Ibid.*

¹¹¹ *Cf. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT* 32 (1955).

¹¹² Burton, J., dissenting in *Griffin*, 351 U.S. at 28-29.

¹¹³ Harlan, J., dissenting, *id.* at 35. *Cf. Byrd v. Sexton*, 277 F.2d 418 (8th Cir.), *cert. denied*, 364 U.S. 818 (1960), where, in an action for an alleged civil rights violation, plaintiff unsuccessfully contended that imposition of an annual \$8 high school “enrollment fee” deprived her, *inter alia*, of equal protection of the laws.

A. No doubt Griffin *was* "deprived" of a college education and proper medical and dental care and many other services. But—

"[B]asic legal services are not of the same order, in our theory of government. . . . The provision of applied justice is an essential function of the state even under the most conservative political theory. . . . A state which provides its citizens with medical care we term a welfare state. It has *extended* the role of government to provide for the social welfare of its people. . . . But a state which 'does no more than to provide *all* its citizens with applied justice is *not* extending the role of government to novel fields but rather only giving all men that which is the most basic function of government, the provision of legal process.'"¹¹⁴

No doubt, too, even so far as legal services go, an indigent defendant suffers many handicaps in defending against a criminal charge, but "to recognize shortcomings . . . is far from admitting that they should furnish the excuse for enlarging or perpetuating them."¹¹⁵ The point made in connection with a Griffin's inability to achieve full appellate review holds equally for a Bett's inability to enjoy the benefit of counsel:

"In this respect the indigent defendant *can* be made to 'stand on an equality before the bar of justice.' This Court should most certainly give no sanction to a patent discrimination against the indigent because it is powerless to eliminate all of his disadvantages."¹¹⁶

I confess I am not sure just how far *Griffin* goes. But I think I do know this much. Wherever the outer boundaries be, the availability of counsel falls well within them. Whatever else *Griffin* covers, it deals with the adequacy and effectiveness of appellate review:

"No matter how intelligent or educated, a layman does not have the know-how to analyze the evidence and evaluate it, much less the special ability necessary to search out errors or argue points of law, even if he happens to recognize them. Thus, effective submission of an appeal requires more than possession by the defendant of a transcript of the minutes of

¹¹⁴ Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 16 (1957).

¹¹⁵ Brief for Petitioners, p. 32, *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹¹⁶ *Id.* at 33.

the trial. Any kind of effective presentation demands the aid of a lawyer. . . ."¹¹⁷

If you want a decent portrait painting, pigment, oil, brushes and canvas help. But what good are they without an artist?

Now, surely the need for counsel *prior* to conviction and sentencing is far greater than at any post-conviction stage. Suppose an accused were forced to choose between availing himself of legal services at the trial or on appeal? Any doubt about his decision? Indeed, is there much point—aside from teasing him—in affording an indigent defendant adequate review, yet denying him the basic tools with which to build the record *to be reviewed*?¹¹⁸

Q. I'm sorry, but you are still reading *Griffin* for much more than it is worth. The case does not deal with the "adequacy" or "effectiveness" of appellate review in the sense you use these terms. Rather, it is concerned simply with the *availability* of review.

Griffin's sad predicament was that under Illinois law he could not obtain appellate review of alleged trial errors, *e.g.*, admissibility and sufficiency of evidence, *at all* without furnishing the appellate court with a bill of exceptions and he couldn't do this without buying a stenographic transcript of the trial proceedings.¹¹⁹ Oh, *theoretically* he could clear this hurdle by means of "the so-called bystanders' bill of exceptions or the bill of exceptions prepared from someone's memory in condensed and narrative form and certified to by the trial judge,"¹²⁰ but the State of Illinois conceded that "nobody has heard of its ever being actually used in a criminal case in Illinois in recent years. . . . There isn't any way that an Illinois convicted person in a non-capital case can obtain a bill of exceptions without paying for it."¹²¹

¹¹⁷ Fuld, J., dissenting in *People v. Breslin*, 4 N.Y.2d 73, 81, 149 N.E.2d 85, 90, 172 N.Y.S.2d 157, 164 (1958).

¹¹⁸ See GELLHORN, *AMERICAN RIGHTS* 24 (1960) ("very close resemblance" between *Griffin* and right-to-counsel case); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956) (*Griffin* "analogy to the right to counsel is close indeed"); Willcox & Bloustein, *supra* note 114, at 23 ("realistically," application of *Griffin* to counsel cases "should be inevitable").

A *Griffin*-like argument was anticipated by two distinguished lawyers as soon as *Betts* was handed down: "If defendants with means have the right to employ counsel to represent them where accused of serious crime, it is difficult to maintain that indigent persons are in fact accorded the equal protection of the laws when that right is denied them because they are not in possession of funds." Letter from Benjamin V. Cohen and Erwin N. Griswold to the Editor of the N.Y. Times, Aug. 2, 1942, § 4, p. 6E, col. 7.

¹¹⁹ 351 U.S. at 13-16.

¹²⁰ *Id.* at 14 n.4 .

¹²¹ *Ibid.*

Thus, the Court was confronted with a rule which "effectively" denied indigent defendants "full" or "adequate" appellate review in a *jurisdictional* sense, not a *qualitative* one. Allegations with respect to certain *kinds* of trial errors could not be *considered at all* by an appellate court if petitioner were too poor to afford a stenographic transcript. Again, in this *jurisdictional* sense, "there can be no equal justice where the *kind* of trial or appeal a man gets depends on the amount of money he has."¹²²

In this respect, Griffin's brief—which *relies on and reasons from* the *Betts* rule—is most illuminating:

"In one notable area, the Court has been alert to prevent the indigence of the defendant from prejudicing him before the courts. A series of cases, beginning with *Powell v. Alabama* . . . have made it clear that the States may not jeopardize the right of a defendant to a fair trial by denying him counsel simply because he cannot afford to retain counsel from his own funds. The rule is not absolute, but it is prejudice to the defendant which is the touchstone. That will not be permitted, and the circumstances in each case will be examined to determine whether the defendant was prejudiced by the failure of the State to make counsel available. *Betts v. Brady*. . . .

"The very nature of the rule with respect to counsel demonstrates the principle for which we contend. The indigent must not be prejudiced by his indigence. If the Court, after examining the proceedings, is satisfied that justice has been done—that the indigent defendant who cannot retain counsel has been accorded the same standard of justice as the defendant who retains his own counsel—the action of the State will not be disturbed. Indigence remains, as it should, 'a neutral fact—constitutionally an irrelevance.'

"In contrast, here, the indigent is prejudiced. . . . Indigence is not neutral; it is the critical fact, the very basis upon which defendants such as these petitioners are prevented from securing the benefits of full appellate review of their conviction. . . .

"[T]he disadvantages of the impecunious defendant in the trial court—with regard to bail, or to the inadequacies in the presentation of his case, or to his sentence—are no doubt compensated for in considerable degree by the trial judge. At least, the opportunity for him to do so is always present. *Here*, even were it so disposed, *the Illinois Supreme Court*

¹²² See text at note 104 *supra*. (Emphasis added.)

is powerless to mitigate in any way the discrimination in appellate rights. Without a transcript of the evidence or a bill of exceptions, no review of the proceeding in the trial court is possible; it is simply and finally non-existent."¹²³

What more proof do you want that *Betts* is perfectly reconcilable with *Griffin*?

A. Come on! What did you expect Griffin's lawyer to do? Urge the overruling of *Betts* in order to win his case? "In law, as in war or football or even love, the direct frontal assault on a prepared and fortified position is only rarely a successful maneuver."¹²⁴ A crusader might have attacked the *Betts* rule boldly, but fortunately Griffin had a lawyer¹²⁵—and he "distinguished the offending precedent boldly."¹²⁶

If I wanted to play your game, I could turn around and say that the State of Illinois "conceded" that if Griffin won *Betts* must fall, that *Griffin* is an a fortiori case for overruling *Betts*:

"Although this Court holds the right to counsel in capital cases is absolute, it consistently holds that there is no such categorical right in non-capital cases, it being necessary affirmatively to show 'substantial prejudice' by denial of the right. . . .

"Yet there can be no doubt that throughout the civilized world there is a far more profoundly 'felt necessity' for the right to advocacy in that nisi prius hearing in which due process does guarantee the absolute right to counsel in capital cases, the guaranty being contingent in non-capital cases upon the affirmative showing of 'special circumstances,' than is any 'felt necessity' for appellate review, whether in capital or non-capital cases and whether absolute or contingent.

"The right to evidence is far more important than the right to appellate review of that evidence! Indeed, without evidence to be reviewed, review is usually futile. This, in fact, is the very burden of petitioners' thesis; for they emphasize the need of a stenographic transcript to preserve such evidence as is presented."¹²⁷

Q. All right. Let's forget about the *Griffin* briefs. What about Justice Black's opinion? He takes pains to point out:

¹²³ Brief for Petitioners, pp. 30-33. (Emphasis added.)

¹²⁴ WIENER, *EFFECTIVE APPELLATE ADVOCACY* 89 (1950).

¹²⁵ See *id.* at 232-34.

¹²⁶ See *id.* at 112-13.

¹²⁷ Brief for Illinois, pp. 5, 8.

"We do not hold . . . that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases."¹²⁸

As Judge Qua has observed, these remarks suggest that "the *Griffin* case provides a rule for transcripts *parallel* to that for counsel in *Betts v. Brady*—that transcripts must be provided *if necessary* to an adequate non-discriminatory appeal just as counsel must be provided if necessary to an adequate hearing."¹²⁹

Look at it this way. A state could not *condition* the right to deny guilt and stand trial on the presence of defense counsel and then refuse to furnish counsel to those financially unable to hire their own. This is *Griffin*. Nor, I take it, could a state *condition*, say, the defense of insanity on the presence of some favorable psychiatric testimony, yet not provide such experts when an indigent defendant attempts to raise this defense. Again, this is *Griffin*. But so long as a defendant is allowed access to the courts (whether or not he has a lawyer), and permitted to raise any defense a rich man can (whether or not he has the experts a rich man can afford to hire), the equal protection clause does not entitle him to a lawyer or an expert witness simply because it would be "nice" or "helpful" to have one. He is entitled to such aids only if otherwise the criminal proceedings are "so apt to result in injustice as to be fundamentally unfair."¹³⁰ This is the *Betts* rule.

I need not dwell on *expert* witnesses. The same point holds true for witnesses generally. Not only can't an indigent defendant track down a potential defense witness at government expense,

¹²⁸ 351 U.S. at 20. Consider, too, Mr. Justice Harlan's dissent: "Is an indigent defendant, who has not shown that he is unable to obtain full appellate review of his conviction by a narrative bill of exceptions, constitutionally entitled to *the added advantage* (emphasis added) of a free transcript . . . for use as a bill of exceptions? I need hardly pause to suggest that such a claim would present no substantial federal question. The Court, however, either takes judicial notice that as a practical matter the alternative methods of preparing a bill of exceptions are inadequate or finds in petitioners' claim an allegation of *fact* that their circumstances were such as to prevent them from utilizing the alternative methods." *Id.* at 32.

¹²⁹ Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 150 (1957). (Emphasis added.)

¹³⁰ *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948) (test for right to assigned counsel in non-capital cases). Cf. *Bush v. Texas*, 353 S.W.2d 855 (Tex. Ct. Crim. App.), *cert. granted*, 371 U.S. 859 (1962) (indigent not entitled to a competent independent psychiatrist or otherwise to have psychiatric evidence as to his present sanity made available).

but even when he knows the witness's precise whereabouts, he has no absolute right to *summon* him at government expense. This is left to the wide discretion of the trial court.¹³¹ Indeed, even in *federal* prosecutions, the marshal may demand funds from defendant *in advance* in order to defray the expenses of the witness and, consistently with the right to compulsory process under the sixth amendment (let alone fifth amendment due process), refuse to make the service without the advance payment.¹³²

A. Are you telling me that an indigent defendant can be forced to stand trial *without* key defense witnesses, because he's financially unable to pay the requisite costs and fees?

Q. Key witnesses, no. *Not* because anything in the federal constitution assures a poor man the same effective presentation of his defense he could make if he were a rich man. *Only* because *at some point* poverty works such a hardship, so impairs the guilt-determining process, that the government must step in to assure *fundamental, essential* fairness. This is your "key witness" case. This is *Betts v. Brady* all over again.

If the holding in *Griffin* were as broad as you claim it is, the poor man would have the constitutional right to summon at government expense any witness who might be *at all helpful*, not just those whose testimony might be crucial. The point you won't meet is that he clearly does not have this absolute right. Even in *federal* prosecutions, the poor man's right to secure defense witnesses is *qualified*, in effect, whereas the rich man's is not.

Thus, although the costs of process and the fees of witnesses subpoenaed for an indigent federal defendant may be paid by the government, the indigent must support his motion for the issuance of a subpoena by affidavit in which, *inter alia*, he "shall show that the evidence of the witness is material to the defense [and] that the defendant cannot safely go to trial without the witness."¹³³

¹³¹ See, e.g., *Goldsby v. United States*, 160 U.S. 70, 73 (1895); *Wallace v. Hunter*, 149 F.2d 59, 61 (10th Cir. 1945); *Neufeld v. United States*, 118 F.2d 375, 385 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 798 (1942); *Gibson v. United States*, 53 F.2d 721 (8th Cir. 1931), *cert. denied*, 285 U.S. 557 (1932). Cf. *Rains v. State*, 173 Neb. 586, 114 N.W.2d 399, *petition for cert. filed*, 31 U.S.L. WEEK 3130 (U.S. Oct. 16, 1962) (No. 502). The state court held that absent a showing as to what material evidence would be adduced, it was no denial of due process or equal protection to deny the financially able defendant's motion to take deposition of a state prisoner whose testimony was asserted to be material to defense, although the prosecution was permitted to produce another state prisoner to testify against the defendant at trial.

¹³² *Brewer v. Hunter*, 63 F.2d 341 (10th Cir. 1947); *Duy v. Knowlton*, 14 Fed. 107 (C.C.D. Ind. 1882).

¹³³ FED. R. CRIM. P. 17(b).

The trial court may limit the number of defense witnesses to be subpoenaed at government expense¹³⁴ or deny the motion altogether.¹³⁵ Indeed, until fairly recently, *no procedure existed* whereby an indigent could procure at government expense the attendance of witnesses found in another district and more than 100 miles away from the place of trial.¹³⁶

The witness cases demonstrate, once again, that so long as certain *minimum* standards are met, the *quality* of a man's defense *does* depend on the amount of money he has. They demonstrate that the state need not equalize economic conditions so that a poor man may enjoy certain rights as *fully* as a rich man.

A. So *Griffin* adds nothing to the right to counsel problem.

Q. That's right. A state cannot "shut off means of appellate review for indigent defendants";¹³⁷ a state "cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed."¹³⁸ That's *Griffin*. That's all. How does this aid your cause? That's also *Cochran v. Kansas*,¹³⁹ decided three weeks *before Betts v. Brady*!

In *Cochran*, as in the later case of *Dowd v. Cook*,¹⁴⁰ the Court held that prison rules which deny prisoners access to appellate courts deprive them of the equal protection of the laws. Note well:

"[T]he prison rules in *Cochran* and *Dowd* forbade only the *prisoner* from maintaining his appeal. Presumably, the prisoners in these cases, if they had been able to afford it, could have pursued their appeals through attorneys. That they did not do so probably indicates their financial inability to do so. Thus, in the earlier cases as well as in *Griffin*, poverty was a significant element in the finding that equal protection had been withheld."¹⁴¹

¹³⁴ See, e.g., *O'Hara v. United States*, 129 Fed. 551 (6th Cir. 1904).

¹³⁵ See cases cited in note 131 *supra*.

¹³⁶ See 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2042 & n.7 (1951).

¹³⁷ Frankfurter, J., concurring in *Griffin*, 351 U.S. at 23.

¹³⁸ *Ibid.*

¹³⁹ 316 U.S. 255 (1942).

¹⁴⁰ 340 U.S. 206 (1951).

¹⁴¹ Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 156 (1957).

That a unanimous Court (per Justice Black, author of the *Betts* dissent) handed down *Cochran* the same Term a majority declined to extend the "absolute" right to counsel to indigent state defendants well demonstrates that the need to afford indigent defendants access to trial or appellate courts falls far short of a requirement that they be furnished with counsel, expert witnesses or other aids once they *gain access* to the courts. *Griffin* is also an access case. It does not overrule or undermine the *Betts* rule any more than did *Cochran* forestall its promulgation in the first place.

Nor does the post-*Griffin* case of *Smith v. Bennett*¹⁴² affect the *Betts* rule. *Smith*, you will recall, holds that to make the availability of state habeas corpus contingent on the payment of a filing fee results in denying an indigent prisoner the equal protection of the laws. Does it follow that an indigent prisoner who tests the *state's* right to detain him is then entitled to the services of a lawyer to effectuate his habeas corpus rights in the *state's* courts? Hardly. Why, "to date the decisions have not imposed upon the *federal* district courts an absolute duty to appoint counsel whenever an indigent files papers collaterally attacking a *federal* conviction. . . . None of the [federal] circuits appears to regard the appointment of counsel as mandatory in such cases."¹⁴³

To sum up, "the presence of counsel [in *Betts*] is not a *sine qua non* to access to the courts, as was the availability of the transcript in the *Griffin* case,"¹⁴⁴ or, one might add, the availability of counsel in *Cochran*, or the payment of a filing fee in *Smith v. Bennett*. *Betts* and *Griffin* are easily reconcilable. "[T]he state, having provided a road, need not guarantee that every man have equally as good a car to drive down it."¹⁴⁵

A. This glib approach has aptly been branded a "sophisticated legal fiction":

" 'Law addresses itself to actualities,' said Justice Frankfurter in the *Griffin* case [351 U.S. at 23], and this theme runs through Black's and Frankfurter's opinions. Can it be supposed that these devoted and clear-sighted justices, and those

¹⁴² 365 U.S. 708 (1961).

¹⁴³ Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 799-800 (1961). (Emphasis added.)

¹⁴⁴ Comment, 55 MICH. L. REV. 413, 420 (1957).

¹⁴⁵ Comment, 1959 DUKE L.J. 484, 486. It should be pointed out, however, that others are fonder of this metaphor than its creator, for he goes on to suggest that this distinction is only "superficially" palatable. *Ibid.*

who concurred with them, will not say there is a difference in kind between giving a convict no hearing at all and giving him a hearing under a killing handicap? Will not the failure to provide an adequate hearing, like the failure to provide an adequate appeal, run afoul of both the equal protection and due process clauses?"¹⁴⁶

Q. "Killing handicap"? "Failure to provide an adequate hearing"? I've heard some question-begging in my time, but I must say this wins the prize. If *Betts* is soundly premised, if lack of counsel is sometimes but *not always* a "killing handicap," then there is a real difference between no hearing at all and one without counsel. If so, I take it *Griffin* does not apply. On the other hand, if *Betts* was misconceived, if lack of counsel is *necessarily* a "killing handicap," if ipso facto it renders a hearing "inadequate" or "unfair," then we don't need the equal protection clause. Due process will do just fine. *Either* way you come out, *Griffin* doesn't add a thing.

III. HEREIN OF THE INDIGENT'S ABSOLUTE RIGHT TO ASSIGNED COUNSEL—IN CAPITAL CASES

A. All right, let's get back to fourteenth amendment due process. You have been telling me that the state need not "equalize" the plight of the indigent accused by furnishing him the aids a rich man would enjoy. The state, your argument runs, has an affirmative duty to assure *essential, fundamental* justice—no more. This falls far short of assuring the indigent the best of all possible defenses. To put it another way, the state need only supply the indigent defendant with "necessities," not "luxuries."

Fine. Let's take it from there. What about the indigent's right to assigned counsel in *capital* cases? Here there is a "flat" requirement of counsel. Here the concept of due process is *not* "less rigid and more fluid" than the sixth amendment.¹⁴⁷ Why not?

On the basis of what you yourself have said there can be but one answer: here, at least, the Court has recognized that "want of counsel" *necessarily* deprives an indigent defendant of *minimal* fairness. Now, I cannot see—and I challenge you to find—any rational basis for distinguishing capital cases from non—

Q. Hold on! This was true *before* the *Betts* case. This is

¹⁴⁶ Willcox & Bloustein, *supra* note 114, at 24.

¹⁴⁷ *Betts v. Brady*, 316 U.S. 455, 462 (1942).

Powell v. Alabama.¹⁴⁸ If *Powell* failed to head off *Betts* in the first place, why—

A. *You hold on.* This is *not* the *Powell* case. "All that it is necessary now to decide, as we do decide," the Court said then, "is that in a capital case, *where the defendant is . . . incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like*, it is the duty of the court . . . to assign counsel for him as a necessary requisite of due process of law."¹⁴⁹ Thus, *Powell*, too, may be said to reflect a "fluid" approach. The *Betts* rule was wrong from the start, but initially it was at least internally consistent.

Indeed, although there is earlier dicta about the indigent capital defendant's unqualified right to counsel,¹⁵⁰ the first holding to this effect seems to be the very recent capital case of *Hamilton v. Alabama*.¹⁵¹ There, a unanimous Court observed that "when one pleads to a capital case without benefit of counsel, we do not stop to determine whether prejudice resulted" for "the degree of prejudice can never be known."¹⁵²

Now, what is there about a maximum sentence of twenty years or life imprisonment that enables us to ascertain the degree of prejudice in *those* cases? That puts "want of counsel" *above* the plimsoll line of due process? As Justice Douglas, author of the unanimous *Hamilton* opinion, has himself observed elsewhere: "[T]o draw the line between this case [taking indecent liberties with a child, punishable by 20 years imprisonment] and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel. Yet it is the *need* . . . that establishes the real standard for determining whether the lack of counsel rendered the trial unfair."¹⁵³

One can push further. One can argue that a prosecution for murder (the most prevalent capital offense) *generally* produces *less* need for counsel than do prosecutions for a number of non-capital felonies. The average man charged with murder usually knows whether or not he struck the blow or fired the shot that

¹⁴⁸ 287 U.S. 45 (1932).

¹⁴⁹ *Id.* at 71. (Emphasis added.)

¹⁵⁰ See *Bute v. Illinois*, 333 U.S. 640, 674, 676 (1948); *Uveges v. Pennsylvania*, 335 U.S. 437, 440-41 (1948).

¹⁵¹ 368 U.S. 52 (1961).

¹⁵² *Id.* at 55.

¹⁵³ *Bute v. Illinois*, 333 U.S. 640, 682 (1948) (dissenting opinion).

killed the deceased. He usually has some notion that the fact he killed "accidentally" or in self-defense means that he is unjustly accused. "Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy are likely to place the unrepresented defendant in a *far more helpless position*."¹⁵⁴

I need not go this far, however. I need only point out that a capital case does not produce a *greater* need for skilled representation in the guilt-determining process than do non-capital cases. This much is easy. What is a "capital offense"? The answer varies from state to state. No crime—not even murder—is everywhere punishable by death.¹⁵⁵ Most serious felonies, *i.e.*, kidnapping, rape, robbery, burglary, arson, train-wrecking, a variety of assault, are *somewhere* punishable by death.¹⁵⁶

How can any rational man argue that an unrepresented defendant charged with rape, robbery or arson in State X is *necessarily* in a more helpless position than a fellow-indigent charged with the *same* crime in State Y? How can a rational man deny that *either* the "flat" requirement of assigned counsel in capital cases or the "special circumstances" test in non-capital cases is patently wrong? Now that the absolute right to assigned counsel in capital cases is settled law, how can any rational man fail to "feel too much the force of consistency not to take this added step"¹⁵⁷ of extending the right to other felony cases?

Q. You know, now that I think about it, I'm delighted that you brought up the capital cases. For you have given me an insight

¹⁵⁴ Allen, *The Supreme Court, Federalism, and Criminal Justice*, 8 DE PAUL L. REV. 211, 230 (1959). (Emphasis added.)

¹⁵⁵ Sellin, *The Death Penalty* 1-3, in MODEL PENAL CODE 220 (Tent. Draft No. 9, 1959). Cf. *Kinsella v. United States*, 361 U.S. 234, 244 (1960) (Congress cannot authorize military trials for overseas civilian dependents—even in noncapital cases): "Another serious obstacle to permitting military prosecution of noncapital offenses, while rejecting capital ones, is that it would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections."

¹⁵⁶ Sellin, *supra* note 155, at 4.

¹⁵⁷ L. Hand, J., concurring in *In re Fried*, 161 F.2d 453, 465 (2d Cir.), *cert. granted*, 331 U.S. 804, *writ dismissed on motion of petitioner*, 332 U.S. 807 (1947) (pre-trial suppression of involuntary confession). Cf. *Kinsella v. United States*, 361 U.S. 234, 242 (1960) (discussed in note 155 *supra*): "The Government . . . says that the trial of . . . a person for a noncapital crime is 'significantly different' from his trial for a capital one . . . and that, therefore, there must be a fresh evaluation of the necessities for court-martial jurisdiction and a new balancing of the rights involved. . . . [T]hese necessities add up to about the same as those asserted in capital cases and which the concurrence in second *Covert* held as not of sufficient 'promixity, physical and social . . . to the "land and naval forces" . . . as reasonably to demonstrate a justification' for court-martial prosecution."

I should have had a long time ago. If the only value-goal present in the due process right to counsel cases were the reliability of the guilt-affixing process, then it would indeed be difficult to square the *Betts* rule with the unqualified right to assigned counsel in capital cases or, for that matter, the absolute right to counsel if you can afford it. But the "rigid" approach manifested in *Hamilton* and *Chandler* and *Ferguson* does not evidence the unsoundness of the *Betts* rule; it only demonstrates the unsoundness of your starting premise. An absolute right to assigned counsel is warranted in the capital cases not because the danger of unjust conviction looms any larger but because the awesome finality of the death sentence makes want of counsel *more* "offensive to a decent respect for the dignity of man."¹⁵⁸

The unqualified right to counsel when one can afford it also suggests the presence of that second due process value-goal: "the preservation of the intrinsic dignity and worth of the individual."¹⁵⁹ Again—although the *need* for counsel may be the same—it is more *offensive* to "the community's sense of fair play and decency"¹⁶⁰ for the state actively to block or frustrate the efforts of a defendant financially able to fully enjoy "his day in court" than for the state simply to decline to wipe out a defendant's economic disadvantage so that he may fully avail himself of "his day in court."

In short, to use your terminology, *Hamilton*, *Chandler* and *Ferguson* do not constitute "pure" examples of threats to the integrity of the guilt-determining process. Rather, like the perjured testimony, coerced confession and most procedural due process cases, they, too, are "hybrids."¹⁶¹

A. Why, then, is the presence or absence of the death penalty without significance in perjured testimony and coerced confession cases? Why, then, don't we limit the "automatic rule of reversal" in coerced confession cases to prosecutions for a capital offense and demand a showing of prejudice in other felony cases? Why, then, don't we require a *greater impairment* of the guilt-determining process when perjured testimony is introduced in non-capital cases than in capital ones?

¹⁵⁸ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring).

¹⁵⁹ Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 357 (1957).

¹⁶⁰ *Rochin v. California*, 342 U.S. 165, 173 (1952).

¹⁶¹ See text following note 88 *supra*.

Take *Rochin*, the "pure" example of disrespect for man's dignity" or "individuality."¹⁶² Are you suggesting that forcible stomach-pumping would have to be more "shocking" or less "repulsive," depending on whether the victim of such brutality faced a maximum sentence of ten or twenty years or a possible death sentence?

Q. You yourself supplied the answer to this one a while back. All these cases involve police-prosecutor misconduct. This warrants the "disciplinary" or "deterrent" automatic rule of reversal. Since the failure to provide an indigent defendant with counsel does not constitute state misconduct, that rule isn't applicable.

A. I cannot believe that whether or not a confession coerced by or perjured testimony induced by *private citizens* vitiates a conviction turns on the length of the sentence the defendant might receive.

Q. Look at it another way. A distinction between capital and non-capital cases in the coerced confession, perjured testimony or search and seizure cases finds no support in history. The same cannot be said for the right to assigned counsel. Before the Revolution, most of the few colonies which recognized such a right did so only in capital cases.¹⁶³ Seven months before the ratification of the sixth amendment Congress provided for the assignment of counsel in cases of "treason or other capital crime."¹⁶⁴ Need I remind you that "the life of the law has not been logic: it has been experience"?¹⁶⁵

A. If you're so strong on history, why stop with colonial experience? Why not go back a bit farther—when the *less* serious the offense the *greater* the right to counsel?¹⁶⁶ Indeed, with the exception of treason cases—perhaps because "members of Parliament were themselves prospective defendants" in such cases and had a "lively appreciation of what procedure would be appropriate"¹⁶⁷—until 1836 an English defendant was not *permitted to retain* counsel in the fullest sense in felony cases (most of which

¹⁶² 342 U.S. at 173.

¹⁶³ See BEANEY 18.

¹⁶⁴ *Id.* at 28.

¹⁶⁵ HOLMES, *THE COMMON LAW* 1 (1881).

¹⁶⁶ See BEANEY 8.

¹⁶⁷ Schaefer, *supra* note 118, at 2.

were punishable by death).¹⁶⁸ Need *I* remind *you* that Holmes also said: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if . . . the rule simply persists from blind imitation of the past."¹⁶⁹

Now, let's test your suggestion that the *Betts* rule can be squared with the unqualified right to counsel in other situations so long as one takes into account the "dignity" or "individuality" due process value. Reconsider *Ferguson v. Georgia*.¹⁷⁰ Defense counsel cross-examined all seventeen witnesses for the State; indeed he subjected five to re-cross-examination.¹⁷¹ In addition, he objected to the admission of a written confession and real evidence.¹⁷² Moreover, as the State of Georgia pointed out, "there was nothing to prevent counsel from questioning his client prior to trial, and advising him as to what points to emphasize in such a statement."¹⁷³ Under these circumstances, how can you possibly regard the inability of defense counsel to ask his client questions or make suggestions when he gave his statement *more "offensive"* than the plight of *Betts*? After all, *Betts* had to cope with difficult problems of jail identification, hearsay and self-incrimination, none of which he came close to understanding.¹⁷⁴ After all, *Betts* had no legal assistance at any stage, at any time. He had to go it alone *all the way*.

What you are really saying, what you *must* be saying, is this: No matter how educated and intelligent the accused,¹⁷⁵ no matter

¹⁶⁸ See BEANEY 8-9; 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341 (1883).

¹⁶⁹ HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920).

¹⁷⁰ 365 U.S. 570 (1961).

¹⁷¹ Record, pp. ii-iii.

¹⁷² *Id.* at 7, 9-11.

¹⁷³ Brief for Georgia, p. 13.

¹⁷⁴ The phrase "jail identification" refers generally to the problems of providing requisite safeguards incident to the identification by outsiders of an already incarcerated accused. For an extensive discussion of the *Betts* record, see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

¹⁷⁵ Cf. *Glasser v. United States*, 315 U.S. 60 (1942). The Court ruled that defendant—an experienced lawyer and former assistant United States attorney—was deprived of the sixth amendment "assistance of counsel" when the trial judge, though advised of the possibility that conflicting interests might arise, appointed defendant's counsel to represent a co-defendant as well. "The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right But it is by no means conclusive." *Id.* at 70. Presumably the same approach would govern where a legally trained indigent state defendant was prosecuted for a capital offense or, *regardless of the charge*, was fortunate enough to have his own lawyer.

how simple the case, no matter how much assistance defense counsel has rendered generally, to permit an indigent capital defendant to remain unrepresented—even for a brief period—to deny the aid of counsel to *any defendant* fortunate enough to have a lawyer—even for a brief interval in a misdemeanor case—is *more* of an affront to the dignity and worth of man than compelling a Betts to defend himself against a major felony charge as best he can without any counsel at any stage, at any time. Are you *sure* you want to debate this point?

IV. WHERE TO DRAW THE LINE?

Q. I wouldn't mind so much if all you were asking was that we extend the unqualified right to assigned counsel from capital offenses to "serious" or "major" felonies but—

"To deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: 'Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it.' And indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner, logic would require the furnishing of counsel in civil cases involving property."¹⁷⁶

A. It seems a sufficient reply to say that this type of reasoning could be used to condemn any principle whatever, because there is no principle which does not become troublesome if it is extended far enough. "[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law,"¹⁷⁷ but the "wedge" objection "would make it impossible to draw a line, because the line would have to be pushed farther and farther back until all action became vetoed."¹⁷⁸

If it is fitting and proper to treat as guilty of murder "a gaoler who voluntarily causes the death of a prisoner by omitting to sup-

¹⁷⁶ *Betts v. Brady*, 316 U.S. 455, 473 (1942).

¹⁷⁷ *Holmes, J.*, in *Irwin v. Gavit*, 268 U.S. 161, 168 (1925).

¹⁷⁸ WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 315 (1957).

ply that prisoner with food, or a nurse who voluntarily causes the death of an infant entrusted to her care by omitting to take it out of a tub of water into which it has fallen,"¹⁷⁹ it is no less appropriate to do so, even though, by persistence in the principle when some of the circumstances are changed, a man would be punished as a murderer who "does not go fifty yards through the sun of Bengal at noon . . . in order to caution a traveller against a swollen river"¹⁸⁰ or a surgeon would be so treated "for refusing to go from Calcutta to Meerut to perform an operation."¹⁸¹

We need look no farther than *Griffin*—where precisely the argument you now advance was unsuccessfully made¹⁸²—to find support for the view that if justice requires and practicalities permit the taking of a first step, then the first step is fair and feasible—wherever a second or third step may lead us.

Q. Where do you propose to draw the line?

A. One good place would be where much of the law *already* draws it, *i.e.*, the felony-misdemeanor distinction.¹⁸³

¹⁷⁹ Lord Macaulay, *Note M*, at 53, in INDIAN LAW COMMISSIONERS' PENAL CODE (1837).

¹⁸⁰ *Id.* at 56.

¹⁸¹ *Id.* at 53.

¹⁸² See, *e.g.*, Brief for Illinois, p. 9, *Griffin v. Illinois*, 351 U.S. 12 (1956): "Petitioners' logic would compel compulsory stenography before every justice of the peace, police court or magistrate if the State's appellate practice permits review of convictions based upon such transcripts."

At this point I cannot resist relating the account in PHILLIPS, FELIX FRANKFURTER REMINISCES 102 (1960), of Professor Frankfurter's oral argument in *Bunting v. Oregon*, 243 U.S. 426 (1917) (sustaining state legislation limiting work in manufacturing establishments to no more than ten hours a day):

"During the course of the argument McReynolds said to me, 'Ten hours! Ten hours! Ten! Why not four?' . . . Then I moved down towards him and said, 'Your honor, if by chance I may make such a hypothesis, if your physician should find that you're eating too much meat, it isn't necessary for him to urge you to become a vegetarian.'

"Holmes said, 'Good for you!' very embarrassingly right from the bench. He loathed these arguments that if you go this far you must go further."

¹⁸³ See, *e.g.*, MODEL PENAL CODE § 1.05, comment at 7 (Tent. Draft No. 2, 1954): "This section reflects the important decision to retain the felony-misdemeanor classification which is so pervasive in existing law. While the retention of these categories has some disadvantages, in that the felony concept tends to be used for many, varied, unrelated purposes, their abandonment involves so large a dislocation of procedure that the gain would not offset the loss."

Some thirty years ago the American Law Institute proposed that "before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause." ALI CODE OF CRIMINAL PROC. § 203 (1931 Official Draft). The statutes or court rules of thirty-seven states now provide for the assignment of counsel—regardless of "special circumstances"—in at least all cases where an indigent is charged with a felony, usually at or before arraignment. For a summary of the provisions of the forty-eight states as of 1958, see the appendix following p. 95 in SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED (1959).

In an appendix to his concurring opinion in *McNeal v. Culver*, 365 U.S. 109, 119-22

For example, "the common law approach to a solution of the problem [the use of deadly force to effect an arrest]—which underlies much, though not all of the existing law—is based on the distinction between felony and misdemeanor; deadly force is authorized where necessary to prevent the escape of one fleeing from arrest for felony, but not for misdemeanor."¹⁸⁴ Moreover, many states permit a private citizen to kill in the course of resisting an attempt to commit a felony involving bodily security against him or his spouse, child or other loved one.¹⁸⁵ And in most jurisdictions even accidental homicide constitutes some degree of murder if it occurs in the course of the commission of a felony.¹⁸⁶ There seems to be *something* about a "felony," doesn't there?

Probably more important, for our purposes, is the "aftermath" of the felony conviction, "including the bitter incidentals that flow from it," for this "far exceeds" the prison sentence per se "as a measurement of society's determination to chastise and humiliate":¹⁸⁷

"The convicted felon who has been sentenced to a term in prison may find himself deprived of one or more of the following civil rights, depending on his residence: (1) the right to vote in all states, except seven; (2) the right to hold

(1961), Mr. Justice Douglas lists thirty-five states which "provide for appointment of counsel as of course on behalf of an indigent in any felony case." *Id.* at 119. Since this appendix was compiled, Colorado has made appointment of counsel mandatory in all felony cases, COLO. R. CRIM. P. 44, effective Nov. 1, 1961. Furthermore, in excluding Michigan from this group Mr. Justice Douglas overlooked (as did the SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, *supra*) MICH. Cr. R. 35A, adopted June 4, 1947, effective Sept. 1, 1947, which provides that "if the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled . . . to have counsel, and that in case he is financially unable . . . the court will, if accused so requests, appoint counsel for him." This rule is set forth in 318 Mich. xxxix (1947), and is quoted in full in *People v. Bumpus*, 355 Mich. 374, 376-77, 94 N.W.2d 854, 855 (1959). Rule 785.3 of the new Michigan General Court Rules, effective January 1, 1963, contains an identical provision.

I am indebted to Samuel J. Torina, Solicitor General of Michigan when *McNeal v. Culver* was handed down, now Chief Appellate Lawyer, Office of the Prosecuting Attorney, Wayne County, and instructor in criminal law at the University of Detroit, for bringing Rule 35A to my attention. I am also indebted to Edward J. McCormack, Jr., and Gerald A. Berlin, Attorney General and Assistant Attorney General of Massachusetts, respectively, attorneys for amicus curiae in *Gideon v. Cochran* [*cert. granted*, 370 U.S. 908 (1962)], for informing me that Michigan is in a sense "setting the record straight" by joining twenty-one other states in urging the overruling of *Betts v. Brady*.

¹⁸⁴ MODEL PENAL CODE § 3.07, comment at 56 (Tent. Draft No. 8, 1958).

¹⁸⁵ For a summary of statutory provisions, see *id.* at app. A, 82-84.

¹⁸⁶ For a summary of the prevailing law of felony-murder, both statutory and decisional, see MODEL PENAL CODE § 201.2, comment at 33-37 (Tent. Draft No. 9, 1959).

¹⁸⁷ Teeters, *The Loss of Civil Rights of the Convicted Felon and Their Reinstatement*, 25 PRISON J. 77 (1945).

office, in most states; (3) the right to make a contract; (4) the right to testify as a witness or at least to have testimony expunged; (5) to serve on a jury."¹⁸⁸

"In thirty-six states, conviction of a felony, coupled with imprisonment, is a ground for divorce, and if a divorce is granted pardon does not restore conjugal rights. In some jurisdictions, the felon's children can be given to adoption without his consent. . . .

"State statutes commonly list some of the following who may be deprived of their occupations as a result of their conviction of an infamous crime: accountants, barbers, civil engineers, detectives, automobile operators, embalmers, hairdressers, junk dealers, real estate brokers, liquor store owners, pawnbrokers, pharmacists, midwives, naturopaths, nurses, veterinarians, chiropodists, chiropractors, dentists, physicians, surgeons, and lawyers."¹⁸⁹

"Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This . . . rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place"¹⁹⁰ The fact-pattern, I assert, is the felony case; the *wrong* law, I submit, is *Betts v. Brady*. The "problem-situation extends as far as you are *perfectly* clear, in your own mind, that you have grasped the picture fully and completely *in life-essence* and *in its detailed variants*, and therefore *know* it to present a *significantly single whole, and one over which your knowledge and judgment have command*."¹⁹¹ I am uncertain whether the problem-situation is wider in scope, *i.e.*, whether it embraces misdemeanants as well, but I am perfectly clear that it is *no narrower* than the felony situation. This much I do know: No man should be branded a "felon" or "ex-felon"—no man should be so reduced to being a "handicapped 'twilight' citizen"¹⁹²—without the assistance of counsel for his defense.

Q. Surely, you must realize that "felony" is even less of a unitary concept than "capital offense." "The fact that many things

¹⁸⁸ *Id.* at 80. See also BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 544-46 (3d ed. 1959).

¹⁸⁹ Tappan, *The Legal Rights of Prisoners*, *Annals*, May 1954, pp. 99, 101-02.

¹⁹⁰ Levin Goldschmidt, quoted in LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 122 (1960).

¹⁹¹ LLEWELLYN, *op. cit. supra* note 190, at 427.

¹⁹² Teeters, *supra* note 187, at 86.

which are classed as felonies in one state are classed as misdemeanors in nearby states shows how difficult it is to make a real distinction between them. Even within a single state the distinction often is vague."¹⁹³ The irrelevant factors which influence the felony-misdemeanor distinction are well illustrated by Massachusetts' experience:

"Since 1852, when a felony was first defined in Massachusetts as a crime punishable by confinement in the state prison, at least four changes have been made in the laws of that state, determining the conditions under which a sentence is served in state prison rather than in a jail or house of correction. These changes, which also changed crimes from felonies to misdemeanors or the reverse, were not made because of alterations in views regarding the atrocity of crimes but for purely administrative reasons, generally to relieve the congestion of the state prison."¹⁹⁴

Is the constitutional right to assigned counsel to turn on such considerations?

You pointed out that justifiable homicide in effecting an arrest generally turns on the felony-misdemeanor distinction. But you neglected to add that the reporters for the *Model Penal Code* found this distinction "manifestly inadequate for modern law."¹⁹⁵ One good reason: "[U]nder modern legislation, many statutory misdemeanors involve conduct more dangerous to life and limb than some felonies. Compare, for example, such felonies as the distillation of alcohol in violation of the revenue laws, on the one hand, and such misdemeanors as reckless and drunken driving, on the other."¹⁹⁶

I need not stop at reckless *driving*. I can do much better than that. I can talk about "reckless" or "negligent" *homicide*. Criminal homicide by automobile technically comes within the definition of involuntary manslaughter, but because juries hesitate to convict of manslaughter under these circumstances, many states have enacted special provisions concerning this type of homicide, prescribing a misdemeanor penalty of up to six months or one year imprisonment.¹⁹⁷ Some have gone farther. They have simply called

¹⁹³ SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 16 (6th ed. 1960).

¹⁹⁴ *Id.* at 17.

¹⁹⁵ MODEL PENAL CODE § 3.07, comment at 56 (Tent. Draft No. 8, 1958).

¹⁹⁶ *Id.* at 56-57.

¹⁹⁷ See generally MORELAND, *THE LAW OF HOMICIDE* 246-52 (1952); Riesenfeld, *Negligent Homicide—A Study in Statutory Interpretation*, 25 CALIF. L. REV. 1 (1936); Robinson, *Manslaughter by Motorists*, 22 MINN. L. REV. 755 (1938).

the offense a "misdemeanor," while retaining a felony penalty. In 1947, for example, Michigan designated "negligent homicide," until then a felony, a "misdemeanor," and although the maximum penalty of five years and/or 1,000 dollar fine was lowered, it remains a hefty two years and/or 2,000 dollar fine.¹⁹⁸

Correct me if I'm wrong, but as I see it, a legislature can wipe out the gains your proposal entails simply by changing the classification of an offense from "felony" to "misdemeanor," the substance and reality remaining the same.¹⁹⁹

A. No, of course not. I agree that the felony-misdemeanor distinction, as it now exists among the states, does not furnish a perfect peg on which to hang the limitations of a constitutional right, but it does provide a rough, and ready, peg. Utilizing the basic dichotomy does not preclude critical attention to certain misclassifications.

The state's characterization of its criminal offenses for varied, unrelated state purposes does not bind the Supreme Court when the content of a federal right is at issue. The scope of such a right

¹⁹⁸ MICH. COMP. LAWS § 750.324 (1948).

New Jersey designates most crimes as "misdemeanors" or "high misdemeanors." For example, kidnapping, punishable by life imprisonment, N.J. REV. STAT. § 2:143-1 (1937); forcible rape, punishable by 30 years' imprisonment, N.J. REV. STAT. § 2:163-1 (1937); and robbery, punishable by 15 years' imprisonment, N.J. REV. STAT. § 2:166-1 (1937); are all classified as "high misdemeanors." Fortunately, N.J. RULES 1:12-9 provides counsel as of right to all indigents "charged with a crime." Although other jurisdictions do not depart as widely from the typical grading of offenses as does New Jersey, probably most depart in *some* respects. Thus, in June of this year, Delaware Deputy Attorney General E. Norman Veasey, a member of a recently appointed Committee of the Superior Court of Delaware presently studying existing and proposed rules for appointment of counsel, reported to the Committee that "my examination of the Delaware Code . . . indicates that there will be in excess of thirty-five statutory misdemeanors" punishable by more than one year's imprisonment. Report 4, on file in the University of Minnesota Law Library. He cited narcotic violations, classified as "misdemeanors," but punishable by ten years' imprisonment, as "the most striking example." *Ibid.* This has led Mr. Veasey to recommend that "counsel should be required to be appointed by the Court in all felonies and in serious misdemeanors," *i.e.*, "in all cases where the offense is punishable by more than one year imprisonment." *Ibid.* "The Committee has not yet completed its project and this report represents only my thoughts as an individual." Letter from Mr. Veasey to Yale Kamisar, Aug. 20, 1962, on file in the University of Minnesota Law Library.

¹⁹⁹ Cf. Crane, J., dissenting in *People v. Lewis*, 260 N.Y. 171, 179-80, 183 N.E. 353, 356, 260 N.Y. Supp. app. 353, 356 (1932): "[D]o these protections and safeguards, found necessary against arbitrary and abusive power, apply only to grown-ups, or do our children share the protection? . . . Can a child be deprived of his liberty, taken from his home and incarcerated in an institution for a term of years, by changing the name of the offense from 'burglary' or 'larceny' to 'juvenile delinquency'? . . . May the Legislature call forgery, larceny, burglary, assault, 'moral delinquency,' and send a person twenty years of age to . . . some . . . correctional institution, on his own confession, wrung from him by an inquisitorial process in court, compelling him to be a witness against himself?"

is, of course, a federal question to be determined finally by the federal courts. When I urge that the right to assigned counsel be extended to all "felony" prosecutions I assume, of course, that "federal characterization" will tidy up the category and prevent the anomalous results you suggest.²⁰⁰

What I had in mind was something along these lines: The right to assigned counsel should extend to all indigents charged with (1) any offense designated a "felony" by the particular state (because of the opprobrium which attaches to and the "bitter incidentals" which flow from this categorization), *and—regardless of state characterization—* (2) any other offense punishable by imprisonment for a term exceeding one year (the definition of felony now generally employed in most jurisdictions)²⁰¹ or, if I can push my luck, for a term exceeding six months (the federal misdemeanor-petty offense distinction);²⁰² or [substitute (2)] any "infamous crime";²⁰³ or [alternative substitute (2)] any offense involving "moral turpitude."²⁰⁴

²⁰⁰ Cf. *Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953), *aff'd*, 347 U.S. 637 (1954): "[Petitioner] argues that the crime is not, per se, one which involves moral turpitude. A California case is cited However, there the California court was concerned with whether the crime involved such moral turpitude as to reflect upon the attorney's moral fitness to practice law, a state question. Here we are faced with the federal question of whether the crime involves such moral turpitude as to show that the alien has a criminal heart and a criminal tendency In the federal law, assault with a deadly weapon is such a crime."

See also *United States v. Acri*, 348 U.S. 211, 213 (1955) (state's characterization of its lien not controlling on question of relative priority of United States' lien); *Dyke v. Dyke*, 227 F.2d 461 (6th Cir. 1955), *cert. denied*, 352 U.S. 850 (1956) (state law on mental capacity disregarded in an action to determine rights to proceeds of national service life insurance policy); Fulda & Klemme, *The Statute of Limitations in Antitrust Litigation*, 16 OHIO ST. L.J. 233, 241-44 (1955) ("federal characterization" of state statutes of limitations when no federal statute of limitations was applicable to treble damage suits under the federal antitrust laws). See generally Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

²⁰¹ See MODEL PENAL CODE § 1.05, comment at 7 (Tent. Draft No. 2, 1954).

²⁰² 18 U.S.C. § 1 (1958).

²⁰³ An "infamous crime," within the meaning of the fifth amendment, providing that "no person shall be held to answer for a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury," includes any offense (except criminal contempt), whether designated a "felony" or "misdemeanor," punishable by imprisonment for over a year or at hard labor for any term, irrespective of whether the place of confinement be a prison or a workhouse. See, e.g., *United States v. Moreland*, 258 U.S. 433, 437 (1922); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896); *Ex parte Wilson*, 114 U.S. 417, 426-29 (1885). The misdemeanor of willfully neglecting to support one's minor children, subject to a punishment of twelve months hard labor in the workhouse and/or a \$500 fine has been held to be an "infamous crime." *United States v. Moreland*, *supra*. On the other hand, the Court has ruled that the misdemeanor of attempting to influence a juror by a written communication, punishable by imprisonment for not more than six months and/or a maximum fine of \$1,000 could be tried without an indictment. *Duke v. United States*, 301 U.S. 492 (1937). Criminal contempts "possess

Q. Quite a mouthful.

A. Yes it is. For the reason that I am not at all sure that a straight penalty cut-off point will necessarily do the trick. Sure, this is an important safeguard against "felonies" in "misdemeanor" clothing, but the moral quality of the offense, regardless of the penalty it carries, is also a significant factor. For example, considering the depravity of the offense, there is much to be said for furnishing counsel to an indigent charged with "reckless" homicide, even though it is *neither* designated a felony *nor* punishable by a sentence in excess of one year or, for that matter, six months.²⁰⁵

Now that I think about it, perhaps it would be easier to approach the problem from another direction. It may be more helpful to ask: what offenders need *not* be afforded counsel and our policy still endure it?²⁰⁶ One answer is those prosecuted for misdemeanors, but a better one may well be those charged with "petty offenses" or "summary offenses," *i.e.*, those numerous, relatively trivial offenses tried summarily without a jury and punished by commitment to jail or a workhouse.²⁰⁷ A flat maxi-

a unique character under the Constitution"; though subject to sentences of imprisonment exceeding one year, they are not "infamous crimes" within the meaning of the fifth amendment. See *Green v. United States*, 356 U.S. 165, 187 (1958).

²⁰⁴ The immigration and nationality laws exclude from admission into the United States "aliens who have been convicted of a crime involving moral turpitude . . . or . . . who admit having committed such a crime" [8 U.S.C. § 1182(9) (Supp. III, 1962)], and render deportable any alien "convicted of a crime involving moral turpitude committed within five years after entry" and sentenced for a year or more, or any alien "who at any time after entry is convicted of two crimes involving moral turpitude . . . regardless of whether confined therefor." 8 U.S.C. § 1251(a)(4) (1958).

"The term 'moral turpitude' has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorney and the revocation of medical licenses [and] . . . as a criterion in disqualifying and impeaching witnesses." *Jordan v. De George*, 341 U.S. 223, 227 (1951). "[I]t is not decisive that the crime is described as a felony, since moral turpitude does not inhere in all felonies. Conversely, some misdemeanors may be held to involve moral turpitude." GORDON & ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* 468 (1959). For a comprehensive classification of specific crimes, see *id.* at 472-81.

²⁰⁵ Cf. *District of Columbia v. Colts*, 282 U.S. 63 (1930), where the Court held that the offense of "reckless driving," although subject only to a maximum punishment of 30 days' imprisonment or \$100 fine, could not be categorized a "petty offense," in respect of which Congress may dispense with a jury trial. "The offense here charged is not merely *malum prohibitum*, but in its very nature is *malum in se* . . . [It] is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense. If the act . . . had culminated in the death of a human being, respondent would have been subject to indictment for some degree of felonious homicide." *Id.* at 73.

²⁰⁶ Cf. *Cardozo, J., in Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

²⁰⁷ See generally *HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE*

mum punishment approach, whatever the cut-off point, does not furnish sufficient flexibility to accommodate prevailing notions about the moral quality of an offense (to say nothing of changing norms). The "petty offense" concept does.²⁰⁸

Q. Only a moment ago we were debating whether an indigent prosecuted for reckless *homicide* should be afforded counsel. Now you are urging that even one charged with reckless *driving* should be, as a matter of absolute right. For somebody who just scolded me for making the "wedge" *objection* you are certainly putting the "wedge" *principle* to good use. I take it you are now suggesting that the unqualified right to assigned counsel, as a matter of due process, be equated with the sixth amendment right to trial by jury, *i.e.*, only the minor misdemeanors, the "petty offenses," should be excluded from coverage.

A. I prefer to say that I am equating the right to assigned counsel under the fourteenth amendment with the *same right* under the sixth.

Q. I beg your pardon.

A. The sixth amendment begins: "In all criminal prosecutions the accused shall enjoy . . ." The Court has had occasion to interpret the phrase "criminal prosecutions" in trial by jury cases,²⁰⁹ but the "criminal prosecutions" category qualifies *all* the rights enumerated in the sixth amendment—one of which happens to be "the assistance of counsel."²¹⁰

UNITED STATES 57-59 (1951); Doub & Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. PA. L. REV. 443 (1959); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

²⁰⁸ "We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. . . . [W]e may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted. . . . Doubts must be resolved . . . by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." Stone, J., in *District of Columbia v. Clawans*, 300 U.S. 617, 627-28 (1937). See also *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930), discussed in note 205 *supra*.

²⁰⁹ *E.g.*, *District of Columbia v. Clawans*, *supra* note 208 (dealing in secondhand goods without a license, punishable by a maximum sentence of 90 days or \$300 fine only a "petty offense"); *Schick v. United States*, 195 U.S. 65 (1904) (violation of Oleomargarine Act, punishable by a maximum fine of \$50, only a "petty offense"); *Callan v. Wilson*, 127 U.S. 540 (1888) ("conspiracy" a "criminal prosecution").

²¹⁰ *Cf. Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892): "It is argued . . . that

If the right to *assigned* counsel in all federal prosecutions except those for petty offenses "rests on a pervasive sense of justice,"²¹¹ why shouldn't the same approach carry over to state prosecutions for the same reasons?

Q. Pretty neat.

A. Not that neat. The "petty offense" concept does not func-

the investigation before the grand jury was not a criminal case [for purposes of the privilege against self-incrimination] In support of this view reference is made to article 6 of the amendments But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5. . . ."

It has been asserted that "the language of the sixth amendment seems clear" in guaranteeing the right of a federal petty offender to be represented by counsel *retained* by him. Note, 48 CALIF. L. REV. 501, 505 (1960). It is clear that a federal petty offender has such a right—so does the federal *civil* litigant—but fifth amendment due process—not the sixth amendment right to counsel—seems to confer it. Cf. *Levine v. United States*, 362 U.S. 610, 616 (1960): "Procedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies But while the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion . . . that 'justice must satisfy the appearance of justice.' . . . Accordingly, due process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt."

The aforementioned Note does recognize that an absolute right to assigned counsel in cases of petty federal offenses "could create substantial practical problems," e.g., "the burden placed on members of the bar, who are not paid for their services," and "additional time spent in jail by defendants awaiting trial." *Id.* at 506. But it concludes, *id.* at 506-07: "Should the rationale underlying the broad language in *Evans v. Rives* [126 F.2d 633 (D.C. Cir. 1942)] be accepted by the Supreme Court, however, the appointment of counsel even in these minor cases would seem to be required."

The aforementioned *Evans* case is apparently the only federal case to consider the problem. In the course of holding that petitioner, charged with the misdemeanor of failing to support a minor child, was entitled to appointed counsel if he could not retain his own, the court commented, *id.* at 638: "It is further suggested . . . that the constitutional guaranty of the right to the assistance of counsel in a criminal case [actually, this is *not* the wording in the sixth amendment, but the broader language of the fifth amendment protection against self-incrimination, *Counselman v. Hitchcock*, *supra*] does not apply except in the event of 'serious offenses.' No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction [S]o far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

It is patent that the *Evans* court did not consider, nor did the District call to its attention, the sixth amendment trial by jury misdemeanor-petty offense distinction. Of course there was no point in the District's doing so. The non-support charge, albeit a misdemeanor, carried a maximum punishment of one year in the workhouse—petitioner's actual sentence. Clearly, this made it more than a "petty offense"; indeed twenty years earlier the Supreme Court had classified *this very offense* an "infamous crime." *United States v. Moreland*, 258 U.S. 433 (1922). Thus, all the District could do was contend that the sixth amendment right to counsel did not apply to *any* misdemeanor prosecution. The court ruled to the contrary, but it did not hold—since this was *not* a "petty offense" case it could not hold—that the sixth amendment right to assigned counsel extended to petty offenders as well.

²¹¹ See note 14 *supra*.

tion automatically. If this is its weakness, it is also its strength. Sure, there may be a *presumption* that a maximum punishment of ninety days or even six months imprisonment connotes a "petty" or "summary" character,²¹² but in the last analysis—

"This qualified requirement . . . invokes judgment and not mechanical tests in the use of common-law history in the life of the law today. We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not The history of the common law does not solve the problem of judgment which it raises in demonstrating that the guaranty . . . did not cover offenses which, because of their quality and their consequences, had a relatively minor place in the register of misconduct."²¹³

Q. Even if all you seek is accomplished, the indigent petty offender will still be discriminated against on account of his poverty. Unlike his more fortunate brethren he must still "go it alone."

A. First you protest that to extend the absolute right to assigned counsel beyond capital offenses is to go too far; now you complain that to stop short of petty offenses is not to go far enough. Pardon me, but I am not impressed by your sudden solicitude for the indigent. What do you expect me to do? Deprive those who

²¹² Cf. *District of Columbia v. Clawans*, 300 U.S. 617, 627-29 (1937): "[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much The record of statute and judicial decision is persuasive that there has been no such change in the generally accepted standards of punishment as would overcome the presumption that a summary punishment of ninety days' imprisonment, permissible when the Constitution was adopted, is permissible now."

An early draft of the MODEL PENAL CODE, § 1.05(4), at 6 (Tent. Draft No. 2, 1954), defined a "petty misdemeanor" as an offense not punishable by more than three months' imprisonment. The revised definition designates an offense a "petty misdemeanor" if the maximum sentence does not exceed thirty days. MODEL PENAL CODE § 1.04(4), at 6 (Proposed Official Draft, 1962). The Federal Criminal Code characterizes as "petty" those offenses punishable by no more than six months' imprisonment, \$500, or both. 18 U.S.C. § 1 (1958). That the *sole criterion* is the severity of potential punishment is conceptually unsound. The *Clawans* opinion *first* notes that "apart from the prescribed penalty, the offense of which petitioner was convicted is, by its nature, of this ['petty'] class" [300 U.S. at 625]; *then* considers the significance of the maximum penalty. Moreover, the Court has ruled that reckless driving cannot be classified as a "petty offense," notwithstanding a maximum penalty of thirty days or \$100. See note 205 *supra*. However, two commentators have concluded that factors other than the severity of potential punishment "have only academic relevance here, for all offenses now in the United States Code which fall within the petty offense definition appear clearly not to involve any 'obvious depravity' and hence may constitutionally be classed as petty offenses." Doub & Kestenbaum, *supra* note 207, at 469.

²¹³ Frankfurter & Corcoran, *supra* note 207, at 981.

can afford to hire a lawyer of their right to do so in order to place all petty offenders, rich and poor, at an "equal" disadvantage²¹⁴

Q. I thought you were a man of principle. I expected you to take the position that imprisonment—for however short a spell—ought never to be available as a punitive sanction unless the defendant has the guiding hand of counsel.

A. Some day, maybe. "'Due process' is perhaps, the least frozen concept of our law . . . the most absorptive of powerful standards of a progressive society."²¹⁵ Some day, but not now. "[A]t any given time," due process "includes those procedures that are fair and *feasible* in the light of then existing values and *capabilities*."²¹⁶ I do adhere to principle—this one. Thus, we would do well to take into account the "feeling for judicial economy and dignity, realization of the disproportionate burden upon courts, jurors and defendants of handling all crimes upon the same procedural basis, and . . . moral judgment"²¹⁷ reflected in the historic classification of petty offenses.

Q. You draw a somewhat ragged line.

A. "There are objections to every line which can be drawn, and some line must be drawn."²¹⁸ I don't deny that there may be some objections to putting the line where I do, but, as I tried to

²¹⁴ Cf. Kadish, *The Advocate and the Expert: Counsel in the Penitentiary Process*, 45 MINN. L. REV. 803, 839 (1961): "Of course, there is inevitably a strong moral and practical pressure, once the right to counsel is recognized, to extend the benefit of that right to all who claim it, whether or not they can afford it, through provisions for the appointment of counsel. And given the multitude of parole and revocation proceedings it may prove inordinately expensive and otherwise impractical for the state to provide counsel. . . . It is hardly a proper solution to the institutional inadequacies which create the problem to deprive those who can obtain counsel of their right to do so. Financial inability to hire counsel when the need is legally recognized may well create a sense of unfairness and perhaps a degree of hopelessness in inmates and parolees and this may operate adversely to the rehabilitative end. But it is a matter of balancing gains and losses and one may reasonably find a greater injustice and obstacle to reform in the blanket refusal to permit representation by counsel, especially in view of the contributions to the integrity of the parole process itself which the presence of retained counsel tends to make."

²¹⁵ Frankfurter, J., concurring in *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956).

²¹⁶ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956). (Emphasis added.)

²¹⁷ Doub & Kestenbaum, *supra* note 207, at 447. "[I]nquiries by the Administrative Office disclosed that the [United States] commissioners in Upper Marlboro and Bethesda, Maryland, and in Alexandria, Virginia, disposed of 3,981, 2,789 and 11,762 petty offenses [chiefly traffic offenses and parking violations] respectively during the past fiscal year." *Id.* at 447 n.24.

²¹⁸ Lord Macaulay, *Note M*, at 56, in INDIAN LAW COMMISSIONERS PENAL CODE (1837).

demonstrate earlier, there are many more objections to leaving the line where it now is—at capital offenses.

Q. What of the petty offender of low intelligence and less education? What if “for want of benefit of counsel an ingredient of unfairness actively operated”²¹⁹ in the proceeding that resulted in a ninety-day confinement?

A. All I have said so far is that the conviction of an uncounselled indigent for a “petty offense” need not be overturned *without a specific showing of prejudice*.

Q. So, we come back to the *Betts* rule after all.

A. Yes, when the charge is “dumping ashes in the harbor of New York,”²²⁰ not robbery or burglary.

Q. Nor reckless driving or petty theft. One test for petty misdemeanants; another test for other misdemeanants. The constitutional right to counsel will still depend on differences of degree.

A. Is that bad? “The whole law does so as soon as it is civilized.”²²¹

V. RETROACTIVE OR PROSPECTIVE APPLICATION?

Q. There is yet another dimension to the problem of “drawing the line”: the retroactive operation of a decision overruling *Betts*. “[S]uch an abrupt innovation . . . would furnish opportunities hitherto un contemplated for opening wide the prison doors of the land.”²²²

A. *Fiat justitia ruat coelum*.

Q. Incredible! A moment ago you recognized that, abstract justice to the contrary notwithstanding, existing capabilities preclude a “flat requirement” of counsel for petty offenders. Now you are telling me that justice is absolute and eternal. You were right the first time.

I realize you regard “private law” as something a student has

²¹⁹ *Foster v. Illinois*, 332 U.S. 134, 137 (1947).

²²⁰ The poignant illustration of a petty offense used in *Frankfurter & Corcoran*, *supra* note 207, at 981.

²²¹ *Holmes, J.*, concurring in *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry.*, 232 U.S. 340, 354 (1914).

²²² *Foster v. Illinois*, 332 U.S. 134, 139 (1947).

to endure in order to learn all about criminal law and procedure, and constitutional law. But I had hoped that you would have at least read up to page three of Corbin's great treatise:²²³ "*Fiat justitia ruat coelum* is a phrase impressive mainly because of its being in Latin and not understandable. When the skies begin to fall, Justice removes the blindfold from her eyes and tilts the scale." True, justice must reign "but not a justice of fallacious absolutes in a realistic world of relativity."²²⁴

A. I didn't notice the heavens falling when *Griffin* was applied retroactively.²²⁵

Q. That's different. The constitutional objection to denying an indigent the right to appellate review does not affect the judgment of conviction.²²⁶

A. All right, I can make my point without even venturing outside the right to counsel field. In *Palmer v. Ashe*,²²⁷ the Court held that the habeas corpus petition of a non-capital defendant entitled him to a judicial hearing because the allegations satisfied the "special circumstances" test of *Betts* and subsequent cases. But petitioner had been sentenced (on a guilty plea) *eleven years* before *Betts* was handed down, and even *a year before* the *Powell* case.²²⁸ Nobody suggested that *Powell* and *Betts* should not be applied retroactively. Not one of the four Justices who dissented on other grounds. Nor even the State of Pennsylvania—Palmer's locale.

Q. This, too, is different. A "flat requirement" of assigned counsel in all capital cases and a "special circumstances" test in non-capital cases open the prison doors but a few inches. Weren't you the fellow who told me that the whole law depends on differences of degree as soon as it is civilized?

A. How do you get around *Walker v. Johnston*?²²⁹ Following

²²³ 1 CORBIN, CONTRACTS § 1 (1950).

²²⁴ 6A CORBIN, CONTRACTS § 1375, at 14 (1962).

²²⁵ *Eskridge v. Washington State Board*, 357 U.S. 214 (1958).

²²⁶ At least this is so where a transcript of the proceedings is available. See *Norvell v. Illinois*, 25 Ill. 2d 169, 182 N.E.2d 719, *cert. granted*, 371 U.S. 860 (1962). The state court held that defendant was not entitled to a new trial when he could not secure a transcript because of the death of the court reporter whose notes could not be transcribed. To the same effect, see *People v. Berman*, 19 Ill. 2d 579, 169 N.E.2d 108 (1960), where no stenographic notes of the trial had ever been made.

²²⁷ 342 U.S. 134 (1951). See also *Uveges v. Pennsylvania*, 335 U.S. 437 (1948), holding that petitioner, sentenced four years before *Betts* was handed down, met the "special circumstances" test.

²²⁸ 342 U.S. at 138 (dissenting opinion).

²²⁹ 312 U.S. 275 (1941).

his plea of guilty to a non-capital federal offense, petitioner was sentenced to a long term—two years before *Johnson v. Zerbst*.²³⁰ Pointing out that in 1938 and 1939, for example, “more than 70,000 pleas of guilty were filed in federal courts,”²³¹ and that “in March 1937 the Attorney General urged that counsel be appointed in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense (Circular No. 2946),”²³² the Government implored: “Such reforms can be achieved legislatively without the retroactivity of constitutional adjudication.”²³³

A unanimous Court was singularly unimpressed. The point was not deemed worthy of discussion. “If he did not voluntarily waive his right to counsel [citing *Johnson v. Zerbst*], . . . he was deprived of a constitutional right. . . . On this record it is his right to be heard.”²³⁴ And that was that. Did the skies fall?²³⁵

Q. You are forgetting all about the pre-1938 *federal practice*. “The Court chose to adopt a more enlightened procedure” in *Johnson* “because modern conditions and attitudes seemed to make such action desirable. . . . The judges and lawyers in the majority of federal districts would not oppose it, because their practice and custom had placed them in most instances under such a rule.”²³⁶

A. And you are completely overlooking the post-*Betts* state practice.²³⁷ Of the thirteen jurisdictions whose laws or rules still

²³⁰ 304 U.S. 458 (1938).

²³¹ Brief for United States, p. 48, *Walker v. Johnston*, 312 U.S. 275 (1941).

²³² *Id.* at 48-49.

²³³ *Id.* at 49.

²³⁴ 312 U.S. at 286-87.

²³⁵ Writing in 1953 (according to the preface), Professor Beane reported: “While only twelve cases involving the Sixth Amendment counsel provision had reached circuit courts up to 1939, ninety cases have gone up since 1939.” BEANEY 45 n.81.

²³⁶ *Id.* at 44. However, Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L.Q. REV. 1, 8 (1944), indicates that the pre-*Johnson* federal practice left much to be desired: “[S]ome district courts did not appoint counsel for a defendant who appeared without an attorney, unless the defendant affirmatively and expressly requested that a lawyer be designated to represent him. It was common practice not to assign counsel for a defendant desiring to plead guilty.”

²³⁷ The information hereinafter discussed in the text is based on recent correspondence with prosecuting attorneys and/or the attorney general's office in jurisdictions whose statutes or rules do not provide for assigned counsel as of right in all felony cases. Extensive extracts are collected in app. I to Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Pervasive Right” of an Accused*, 30 U. CHI. L. REV. 1 (1962).

do not require the appointment of counsel in all felony cases without regard to "special circumstances," the *practice* appears to be to furnish counsel almost invariably to all indigent felony defendants, at least when they so request, in five (Delaware, Maine, New Hampshire, Rhode Island and Vermont) and the usual practice is to do so in three others (Maryland, Hawaii and Pennsylvania). This leaves only the five southern states of Alabama, Florida, Mississippi, North and South Carolina. In at least three of the largest counties of Florida, the public defender or a court-appointed lawyer represents all indigent defendants unable to make bond.

Q. What about the uncounselled accused who did *not* request a lawyer? A number of the "liberal practice" states, indeed a good number of the states whose laws or rules extend the "flat requirement" of assigned counsel to non-capital cases, in effect condition the right on the accused's request for such appointment.²³⁸ "But it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"²³⁹ and "presuming waiver from a silent record is impermissible. 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."²⁴⁰

Moreover, however "liberal" the state *practice* has become in recent years, what was it *ten* or *fifteen* years ago? The uncounselled defendants convicted *then* who still linger in prison pose the real problem. The State may not be able to re prosecute them successfully. Witnesses die; evidence disappears.

A. To respond to your second point first, again we simply don't know how many prisoners fall into this category. For one thing, there is reason to think that, in those jurisdictions whose laws or rules do not go beyond the minimum requirements of *Betts*, the longer the maximum sentence the more likely a "flat requirement" approach is taken as a matter of practice. For example, in South Carolina, one of the very few states in the nation where the *Betts* rule holds sway, relatively unmitigated by local rules or liberal practice, a veteran county attorney has observed: "I have never in twenty-five years of practice seen anyone tried

²³⁸ See Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281, 303-05.

²³⁹ *Carnley v. Cochran*, 369 U.S. 506, 513 (1962).

²⁴⁰ *Id.* at 516.

for a crime carrying a penalty greater than five years without the Judge appointing counsel."²⁴¹

Q. It's not so much that you don't *know* as it is that you don't *care*. No matter how catastrophic it may be, you are bent on applying a decision overruling *Betts* to all cases, past and present. Once it is overruled, *Betts* will *never* have existed, regardless of what lawyers and litigants have thought and done to the contrary. If there is a better example of "mechanical" jurisprudence, I don't know what it is.²⁴²

A. I do. "Freezing the law into a changeless code" simply because people have relied on it.²⁴³

Now that I think about it, I may have been a bit hasty. If the practical consequences of a retroactive overruling will be as dire as you claim (although I still doubt it), then something less than across-the-board retroactive application may be warranted.²⁴⁴ For example, the problems raised by the failure of the accused to request counsel might be met by some type of "selective retroactive application": those petitioners who neither requested counsel nor evidenced any financial inability to procure one must still satisfy a "special circumstances" test.²⁴⁵

I must say that I am not enamored of such an approach, for a procedural due process right which goes to the heart of the guilt-determining process—as does the assistance of counsel²⁴⁶—is

²⁴¹ Letter from H. Wayne Unger, Colleton County Attorney, to Yale Kamisar, June 14, 1962, on file in the University of Minnesota Law Library.

²⁴² See WASSERSTROM, *THE JUDICIAL DECISION* 187 n.9 (1961).

²⁴³ See 6A MOORE, *FEDERAL PRACTICE* 4079 (2d ed. 1961). See also WASSERSTROM, *op. cit. supra* note 242, at 151.

²⁴⁴ The retrospective-prospective application problem has evoked a vast amount of literature. In addition to the authorities cited elsewhere in this section, see, e.g., Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190, 203 (1946); Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971 (1935); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEXAS L. REV. 514 (1943); Note, 60 HARV. L. REV. 437 (1947).

²⁴⁵ Cf. Note, 71 YALE L.J. 907, 943 (1962) (suggesting selective retroactive application in coerced confession area).

²⁴⁶ On the other hand, the exclusionary rule in search and seizure cases is not directed at preserving the integrity of the guilt-determining process, but designed to discourage future police misconduct. This has led many commentators to suggest that *Mapp v. Ohio*, 367 U.S. 643 (1961), be given prospective effect only. See Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 236 n.105 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 338-42; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practice*, 34 ROCKY MT. L. REV. 150, 172 (1962); Note, 16 RUTGERS L. REV. 587, 591-94 (1962); Note, 71 YALE L.J. 907, 942-43 (1962). But see Torcia & King, *The Mirage of*

hardly the best place to resist general retroactive application of an overruling decision. But I am willing to recognize the possibility that such resistance could successfully be waged even here, so that I may ask: just what are we fighting about? Whether or not *Betts* should be overruled *retroactively*, can't we agree that at least it should be overruled *prospectively*?

Q. I'm afraid not. The Supreme Court has never given an overruling constitutional decision prospective application only,²⁴⁷ and there is some doubt that it *can* so limit the effect of a decision.

A. Really? Doesn't the famous *Durham* case²⁴⁸ well illustrate that federal courts, as well as state courts, "have inherent power to limit decisions to prospective operation"?²⁴⁹

Q. Justice Black recently pointed out: "This Court and in fact all departments of the Government have always heretofore realized that prospective law making is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system."²⁵⁰

A. I would be considerably more impressed with Justice Black's position if, when he took it, he had not been *protesting* the result in *James v. United States*,²⁵¹ to wit, so far as prosecutions

Retroactivity and Changing Constitutional Concepts, 66 DICK. L. REV. 269 (1962), especially at 298, 288 n.90, 284 n.73.

²⁴⁷ But cf. *Brown v. Board of Education*, 349 U.S. 294 (1955). Does not the "with all deliberate speed" order imply that the segregation cases need not be given full retroactive effect, i.e., it permits Negro students to continue to be denied the equal protection of the laws? Would not the sustaining of a grade-by-grade integration plan, affecting only incoming students, be an instance of pure prospective overruling?

²⁴⁸ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). "[I]n adopting a new test [of criminal responsibility], we invoke our inherent power to make the change prospectively. The rule we now hold must be applied on the retrial of this case and in future cases." *Id.* at 874. See also *Warring v. Colpoys*, 122 F.2d 642 (D.C. Cir.) (Vinson, J.), *cert. denied*, 314 U.S. 678 (1941) (overruling decision narrowing scope of statutory summary contempt, not given retroactive effect).

²⁴⁹ DAVIS, ADMINISTRATIVE LAW § 5.09, at 352 (1958). Professor Davis treats the problem more extensively at 2 *id.* § 17.07.

The phrase "prospective operation" has a variety of meanings. See 6A MOORE, *op. cit.* *supra* note 243, at 4081-82. It is here used to mean application of the newly-announced rule to conduct occurring subsequent to the announcement *and* also to the present litigants. Whether a federal court could fashion a new rule and apply it *only* to conduct occurring subsequently raises significant article III problems. See Note, 71 YALE L.J. 907, 930-33 (1962).

²⁵⁰ *James v. United States*, 366 U.S. 213, 225 (1961) (concurring in part, dissenting in part).

²⁵¹ 366 U.S. 213 (1961).

for evasion are concerned, the decision overruling a prior holding that embezzlements are not income is prospective only.²⁵² I would be more impressed, too, if elsewhere, in a case articulating a new rule of trustee liability, Black himself had not plumped for "prospective application only."²⁵³

It is difficult to see how it can be said that the Constitution precludes the prospective-effect approach: "The overruling decision is rendered in an actual controversy between adverse parties. The fact that a former decision is overruled, but without retroactive effect, indicates a careful and thoughtful evaluation of the correct legal doctrines involved. The prospective application of the overruling decision is merely a product of the case or controversy presented."²⁵⁴

Q. Well, at least we're making some headway.

A. Much less than you think. *Whether or not* we give retroactive effect to the decision overruling *Betts*, most of the uncounselled defendants who went to prison ten or fifteen years ago and and who are still there will merit a new trial anyway.

Q. I beg your pardon.

A. Haven't you noticed? The *Betts* rule, like many other things, "ain't what it used to be." *Betts* required that "want of counsel in a particular case . . . result in a conviction lacking . . . fundamental fairness."²⁵⁵ *Uveges v. Pennsylvania*²⁵⁶ demanded that the particular facts, such as the gravity and the complexity of the offense, and the age and education of the defendant, "render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair."²⁵⁷ But in the recent case of *Hudson v. North Carolina*,²⁵⁸ where counsel for a co-defendant, in the

²⁵² For a careful discussion of this case, see Note, 71 YALE L.J. 907, 923-27 (1962).

²⁵³ "Despite its novelty, there is much to be said in favor of such a rule for cases arising in the future. It seems to me, however, that there is no reason why the rule should be retroactively applied to this respondent when to do so is grossly unfair. . . . [I]f the new rule is to be announced by the Court, I think it should be given prospective application only." Black, J., dissenting in *Mosser v. Darrow*, 341 U.S. 267, 276 (1951).

²⁵⁴ 6A MOORE, *op. cit. supra* note 243, at 4083-84. See also Note, 16 RUTGERS L. REV. 587, 588-91 (1962). Again, by "prospective effect" is meant that the new rule would apply to the present litigants, *i.e.*, the new rule would be decisive of the instant case and controversy. See the discussion in note 249 *supra*.

²⁵⁵ 316 U.S. at 473.

²⁵⁶ 335 U.S. 437 (1948).

²⁵⁷ *Id.* at 441.

²⁵⁸ 363 U.S. 697 (1960).

presence of the jury, had tendered a plea of guilty to a misdemeanor on behalf of his client, the Court dwelt on "the *potential* prejudice of such an occurrence"²⁵⁹ to other co-defendants, on the fact that the co-defendant's plea "raised problems requiring professional knowledge and experience beyond a layman's ken"²⁶⁰—what trial occurrences do not?

"[T]he Court did not consider the gravity of the error either from the standpoint of 'fundamental fairness' or from the standpoint of North Carolina law."²⁶¹ Now that *Hudson* is on the books, it seems that "whenever error occurs which is reversible under state law the denial of counsel results by that very fact in 'fundamental unfairness.'"²⁶²

Fifteen years ago, the Court could say: "[I]n every case in which . . . due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove . . . that for want of benefit of counsel *an ingredient of unfairness actively operated* in the process that resulted in his confinement."²⁶³ And fourteen years ago, it could say: "[T]he disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner *actually being taken advantage of, or prejudiced*, does make out a case of violation of due process."²⁶⁴ But compare the very recent case of *Chewning v. Cunningham*,²⁶⁵ where the Court struck down a ten-year sentence under Virginia's recidivist statute:

"Counsel . . . has shown the wide variety of problems that may be tendered. In Virginia, a trial under this statute may present questions such as whether the courts rendering the prior judgments had jurisdiction over the offenses and over the defendant and whether these offenses were punishable by a penitentiary sentence. . . . Double jeopardy and *ex post facto* application of a law are also questions which . . . may well be considered by an *imaginative lawyer*, who looks critically at the layer of prior convictions on which the recidivist charge rests. *We intimate no opinion on whether any of the problems mentioned would arise on petitioner's trial nor,*

²⁵⁹ *Id.* at 702. (Emphasis added.)

²⁶⁰ *Id.* at 704.

²⁶¹ *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 136 (1960).

²⁶² *Id.* at 137.

²⁶³ *Foster v. Illinois*, 332 U.S. 134, 137 (1947). (Emphasis added.)

²⁶⁴ *Townsend v. Burke*, 334 U.S. 736, 739 (1948). (Emphasis added.)

²⁶⁵ 368 U.S. 443 (1962).

if so, whether any would have merit. We only conclude that a trial on a charge of being a habitual criminal is such a serious one . . . [and] the issues presented under Virginia's statute so complex, and *the potential prejudice* resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials is equally applicable here."²⁶⁶

One can like the result in *Hudson* and still admit that, as the dissenters put it, the majority's view that the co-defendant's plea placed defendant in a prejudiced position "is purely speculative."²⁶⁷ One can welcome the approach taken in *Chewning*, and still concur that "the bare possibility that any of these improbable claims could have been asserted does not amount to the 'exceptional circumstances' which, under . . . *Betts v. Brady* . . . must be present before the Fourteenth Amendment imposes on the State a duty to provide counsel."²⁶⁸ Can't an "imaginative lawyer" *always* think up defenses not considered by an unrepresented defendant? Isn't the "*potential prejudice*" resulting from the absence of counsel *always* great? After *Hudson* and *Chewning*, what is left of *Betts v. Brady* to overrule?

The *Betts* rule, as it has evolved up to the year 1962, will be applied *retroactively*, even if the decision formally overruling *Betts* will not. The recent decisions minimizing the showing of "prejudice" required by *Betts* are being given retroactive effect right now.²⁶⁹ Yet these decisions have diminished the requisite showing of prejudice to the vanishing point.

²⁶⁶ *Id.* at 446-47. (Emphasis added.)

²⁶⁷ 363 U.S. at 705. "[T]he jury—despite language in the court's charge which indicated the presence of 'violence, intimidation and putting [the victim] in fear'—refused to find petitioner guilty of . . . robbery, but only . . . the lesser offense, larceny from the person. The record here would clearly support a verdict of guilty on the robbery charge. . . . [I]t would be much more realistic to say that [the co-defendant's] plea of guilty influenced the jury not to find petitioner guilty of the greater offense." *Ibid.*

²⁶⁸ 368 U.S. at 459 (Harlan, J., concurring).

²⁶⁹ That significant modifications of a rule (as well as its dramatic overruling) are applied retroactively is well illustrated by *Reck v. Pate*, 367 U.S. 433 (1961), ordering petitioner's release twenty-five years after he was sentenced to 199 years for murder. In denying habeas corpus relief, the district court observed that "Reck was convicted . . . in 1936 [the year the *first* due process confession case was handed down by the Supreme Court] and at *that* time the Due Process clause was not violated by the circumstances surrounding the making of his confession." 172 F. Supp. 734, 745 (N.D. Ill. 1959). The early due process confession cases rested on "*coercion proved in fact.*" *Id.* at 743. Fourteenth amendment violations were not based on whether conditions "surrounding the making of the confession were 'inherently coercive'"—petitioner's situation—until years later. *Id.* at 740. In reversing, the Supreme Court did not discuss the "retroactivity" point. Agreeing that "this case lacks the physical brutality present in *Brown v. Mississippi* [297 U.S. 278 (1936)]," 367 U.S. at 442, the Court went on to find, *id.* at 443, that "the

Don't you see—your anxiety over “changing the law” is misplaced. Today, it would be much more of an “abrupt innovation”²⁷⁰ to reinstate the *Betts* rule with all its original rigor than simply to finish it off!

No doubt the reluctance to overrule *Betts* retroactively has contributed significantly to its survival—but only to a nominal one. Here, as elsewhere—

“The alternative is to live uneasily with an unfortunate precedent by wearing it thin with distinctions that at last compel a cavalier pronouncement, heedless of the court's failure to make a frank overruling, that it must be deemed to have revealed itself as overruled by its manifest erosion. It must be cold comfort to bewildered counsel to ruminate that the precedent on which he relied was never expressly overruled because it so patently needed to be.”²⁷¹

Q. Your argument proves too much. Why urge that *Betts* be overruled if it has *already* happened?

A. Because too many troops haven't gotten the word²⁷²—and never will. Hence the need for a plain, clean overruling. “When the relevant rules are shoddy or clumsy it takes a master craftsman to bring out a fine and satisfying product, but if the rules are good enough they make it hard for even the dull or duffer to go too far wrong.”²⁷³

A Final Reflection

Q. And the further we extend the “flat requirement” of counsel, the better the rule.

A. Up to a point, at least past “felonies.” But we've been through all that.

Q. That you suggest a stopping point is of some comfort, but you are still asking for a great deal.

record here . . . presents a totality of coercive circumstances far more aggravated than those which dictated our decision in *Turner* [*Turner v. Pennsylvania*, 338 U.S. 62 (1948)].”

²⁷⁰ Cf. text at note 222 *supra*.

²⁷¹ Traynor, *Comment on Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 48, 54 (Paulsen ed. 1959).

²⁷² A number of state courts are still applying the *Betts* rule with all its old rigor. See, e.g., *Artrip v. State*, So. 2d 574 (Ala. Ct. App. 1962); *Pogolich v. State*, 141 So. 2d 206 (Ala. Ct. App. 1962); *Jones v. Cochran*, 125 So. 2d 99 (Fla. 1960); *Commonwealth ex rel. Simon v. Maroney*, 405 Pa. 562, 176 A.2d 94 (1961) (collateral attack of 1942 conviction).

²⁷³ LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 291 (1960).

A. I think not. "There comes a point," Justice Frankfurter once observed in a famous confession case, "where this Court should not be ignorant as judges of what we know as men."²⁷⁴ I ask even less. I ask only that the Court not be ignorant as judges of what they know as lawyers.

²⁷⁴ *Watts v. Indiana*, 338 U.S. 49, 52 (1949).