

Spring 1971

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Recommended Citation

Gary S. Dyer, *Gideon v. Wainwright: Echoes of the Trumpet*, 36 MO. L. REV. (1971)

Available at: <https://scholarship.law.missouri.edu/mlr/vol36/iss2/5>

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Comment

GIDEON V. WAINWRIGHT: ECHOES OF THE TRUMPET

Legal services, particularly defense in criminal cases, are not like houses or automobiles where those with more money can buy better products without affecting the basic functioning of society. When one defendant cannot afford a complete defense justice is rationed.

. . . There is no question that a man prepared to spend \$500,000 is far more likely to retain his freedom than a man who can afford only a few thousand dollars.

The amount of money which can be expended on defense should not affect the outcome of the trial. If justice is priced in the market place, individual liberty will be curtailed and respect for law diminished.¹

The concern Attorney General Kennedy expressed in this statement has been shared for years by many members of the bar and laymen alike. Regardless of one's feelings about the desirability of the states providing counsel for a criminally accused indigent, there is no doubt that, at least in federal cases, the sixth amendment requires that, "in all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defense."² Some persons have felt that many of the questions surrounding the provision of legal assistance to the indigent accused were answered by the United States Supreme Court in the landmark case of *Gideon v. Wainwright*,³ but subsequent developments in both federal and state cases indicate that *Gideon* raised more problems than it solved.

The questions raised concern the applicability of the sixth amendment guarantee, *i.e.*, is it limited to federal prosecutions, to what offenses does it apply, and at what stages of a criminal prosecution is counsel required. These are questions which, historically, did not particularly concern the courts of this country, and only recently have the bench and bar become cognizant of such issues. However, in 1963, in *Gideon*, the United States Supreme Court made it clear that "[a]ny person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth."⁴

This comment, in exploring the indigent's right to appointed counsel, will examine briefly the background of *Gideon* and the case itself, followed by a survey of subsequent developments and attempt to delineate those areas in which the law is clear as well as point out the troublesome areas still awaiting judicial articulation.

1. R. F. Kennedy, JUDICIAL ADMINISTRATION, FAIR AND EQUAL TREATMENT TO ALL BEFORE THE LAW, 28 VITAL SPEECHES #23 at 706, 708 (1962).

2. U.S. CONST. amend. VI.

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

4. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (emphasis added).

I. THE LAW PRIOR TO GIDEON

As one writer has noted, "until the 'Scotsboro' case in 1932, the Supreme Court had not been concerned with the problem of counsel for indigent defendants in criminal cases."⁵ In that case, *Powell v. Alabama*,⁶ the Supreme Court held that, in a capital case, failure to appoint counsel for an indigent state defendant was a violation of fourteenth amendment due process.⁷ *Johnson v. Zerbst*,⁸ a 1938 federal case, held that:

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.⁹

Thus, in federal felony cases, capital or not, a defendant has since 1938 been entitled to representation by counsel, and the court need not look past a mere lack of representation to find a due process denial; sixth amendment applicability to federal courts made judgments against unrepresented defendants void.

This rule was held not to apply to state court prosecutions in *Betts v. Brady*,¹⁰ decided in 1942. The Court held that the sixth amendment was made applicable to the states by the fourteenth amendment, and that only when "special circumstances," *i.e.*, a capital offense, were present, were state courts bound to provide counsel for an indigent.¹¹ Justice Black, joined by Justices Douglas and Murphy, dissented, but *Betts* became the law and stood, subject to gradual erosion,¹² until 1963.

II. GIDEON V. WAINWRIGHT¹³

Clarence Gideon's prosecution by the state of Florida for burglary, beginning with the trial court's refusal to appoint counsel to represent him,

5. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1151 (1963).

6. 287 U.S. 45 (1932).

7. [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. *Id.* at 71 (1932).

In discussing *Powell*, Beaney states that the case,

[I]f read in its narrowest sense, holds that in a capital case where defendants are young, illiterate, inexperienced, and subject to intense local hostility, failure to make an effective (rather than formal) appointment of counsel is a denial of due process. The overtones of the *Powell* opinion, however, suggest a more general rule, particularly in Mr. Justice Sutherland's broad and sympathetic treatment of the plight of uncounseled criminal defendants.

Beaney, *supra* note 5, at 1153.

8. 304 U.S. 458 (1938).

9. *Id.* at 467.

10. 316 U.S. 455 (1942).

11. *Id.*

12. From the mid-1950's on, it became more and more edivent that in the process of finding exceptions to the *Betts* non-appointment rule the court was destroying the rule itself . . . By 1963 the pretense of 'the Rule of *Betts v. Brady*' had become too thin to be maintained.

Beaney, *supra* note 5, at 1153.

13. 372 U.S. 335 (1963).

led to one of the most significant constitutional decisions by the United States Supreme Court in recent years.¹⁴ *Gideon* laid the groundwork for the expansion of the indigent's right to representation by counsel in criminal prosecutions at any "critical stage."¹⁵ The overruling of *Betts* removed any doubt that the sixth amendment right to counsel is applicable to the states through the due process clause of the fourteenth amendment. While that proposition may seem simple enough, the development of the law since *Gideon* makes it obvious that the Court's meaning was not completely clear.

III. RIGHT TO COUNSEL: FOR WHAT?

One question not answered by *Gideon* is whether persons charged with lesser offenses have a right to counsel concomitant with that of accused felons. In certain state courts, misdemeanors have been held to be within the purview of the sixth amendment, but several approaches have been taken and no definitive limits have been drawn.¹⁶

14. For an in depth view of the *Gideon* case, including the trial and the outstanding work of Abe Fortas as counsel on appeal, see A. Lewis, *Gideon's Trumpet* (1964).

15. See Section III *infra*.

16. Some states have spelled out the right to counsel in offenses classified as less than felonies. *California*, *In re Lopez*, 2 Cal.3d 141, 465 P.2d 257, 84 Cal. Rptr. 361 (1970); *In re Smiley*, 66 Cal.2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967); *Oregon*, *Application of Stevenson*, 458 P.2d 414 (Ore. 1969); *Minnesota*, (This state applies the right to counsel to all criminal cases where any jail term is possible). *State v. Borst*, 154 N.W.2d 888 (Minn. 1967); *State v. Collins*, 154 N.W.2d 688 (Minn. 1967); *State v. Illingsworth*, 154 N.W.2d 687 (Minn. 1967).

Other state courts have adopted the federal standard for determining when appointment of counsel is necessary. This is the "petty" versus "serious" offense rule of 18 U.S.C. § 1.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense. 18 U.S.C. § 1 (1964).

18 U.S.C. § 300 6A requires that counsel be made available to indigent criminal defendants charged in federal courts with anything but a "petty" offense: *Arizona*, *Burrage v. Superior Court*, 1905 Ariz. 53, 459 P.2d 313 (1969). The court adopted the federal rule and even allowed discretion by the trial court to provide counsel in some less severe cases; *Florida*, *State v. Hamlin*, 236 So.2d 442 (Fla. 1970), where the court would require appointment of counsel if the offense is punishable by more than six months in jail. *Massachusetts*, *MacDonnell v. Commonwealth*, 230 N.E.2d 821 (Mass. 1967) (requirement implied); *North Carolina*, 8 N.C. App. 234, 174 S.E.2d 8 (1969); *State v. Batiste*, 5 N.C. App. 511, 168 S.E.2d 510 (1969); *State v. Sims*, 5 N.C. App. 288, 168 S.E.2d 239 (1969); *State v. Norris*, 275 N.C. 50, 165 S.E.2d 245 (1969); *Wisconsin*, *State v. Department of Health and Social Services*, 37 Wis. 713, 155 N.W.2d 549 (1968). The court adopted at least the six month portion of the federal rule and seemingly extended it to give more flexibility to allow appointment:

[I]n such other cases in which the trial court, in the exercise of its sound discretion, deems it necessary and desirable in order to attain the best interests of justice. *Id.* at 725, 155 N.W.2d at 555 (1968).

Some states, however, take the position that there simply is no right to counsel on a misdemeanor charge: *Illinois*, *People v. Dupree*, 240 N.E.2d 414 (Ill. 1968), where the court said that there is no right to counsel unless a possibility of a jail sentence exists. *Louisiana*, *State v. Rochemore*, 253 La. 101, 216 So.2d 829 (1968);

The United States Supreme Court declined to settle the question when, just a little more than a month after *Gideon*, it decided *Patterson v. Warden*.¹⁷ The defendant was charged in a Maryland court with violation of a state statute¹⁸ prohibiting the carrying of a concealed weapon and with violating a Baltimore city ordinance.¹⁹ The Maryland Code clearly denominated the statutory violation a misdemeanor,²⁰ and, of course, the municipal violation was not a felony. The Maryland Court of Appeals affirmed Patterson's conviction at a trial without counsel.²¹ On certiorari, the Supreme Court of the United States merely vacated the judgment and remanded the case, without opinion, "for further consideration in light of *Gideon v. Wainwright*."²² On rehearing, the Maryland Court of Appeals decided that, in light of *Gideon*, Patterson was denied his sixth amendment right to counsel, reversed his conviction, granted him a new trial, "and ordered further proceedings in conformity with the opinion of the United States Supreme Court in *Gideon v. Wainwright*."²³

Conceivably the Maryland court, after further consideration, could have found that even "in the light of *Gideon*" defendant was not entitled to representation by counsel. The wording of the Supreme Court opinion certainly did not require a decision favorable to Patterson. Of course, such a decision might well have been reversed again by the Supreme Court as it was on Patterson's prior trip there,²⁴ but other cases do not necessarily support that conclusion.

In several state court cases decided after *Patterson* in which the issue of right to counsel on charges less than felonies was raised the Court denied certiorari, thus leaving the state court's refusal to grant counsel standing.²⁵ The Supreme Court was apparently not saying, however, that there was no right to counsel on lesser charges, at least in all cases, as is evidenced by the progress of one of the cases, *Beck v. Winters*.²⁶ In this case the Arkansas conviction of a black man for "immorality" under a Little Rock city ordinance was affirmed by the Supreme Court of Arkansas.²⁷ The United States

State v. Angelo, 251 La. 250, 203 So.2d 710 (1967); City of New Orleans v. Cook, 249 La. 820, 191 So.2d 634 (1966).

Other states seem to use the *Betts* "special circumstances" test. *Arizona*, In Burage v. Superior Court, 105 Ariz. 53, 459 P.2d 313 (1969); Arizona adopted the federal standard but allowed discretion on the part of the trial court to appoint counsel in less than "serious" misdemeanors if the judge feels justice warrants it. *New Mexico*, State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

17. 372 U.S. 776 (1963).

18. Art. 27, CODE OF MD. § 36 (1957).

19. Art. 24, CODE OF CITY OF BALT. § 48 (1950).

20. Art. 27, CODE OF MD. § 36 (1957).

21. 227 Md. 194, 175 A.2d 746 (1961). The court held that the charges were not "serious" despite the fact that the statutory violation carried a possible sentence of two years imprisonment.

22. 372 U.S. 776 (1963).

23. *Patterson v. Warden*, 231 Md. 509, 191 A.2d 237 (1963).

24. *Patterson v. Warden*, 372 U.S. 776 (1963).

25. DeJoseph v. Connecticut, 385 U.S. 982 (1966); *Winters v. Beck*, 385 U.S. 907 (1966); *Cortinez v. Flourney*, 385 U.S. 925 (1966).

26. 395 U.S. 63 (1969).

27. *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364 (1965).

Supreme Court denied certiorari²⁸ over a vigorous dissent by Justice Stewart. Winters subsequently received relief through a habeas corpus proceeding in federal district court. His case was remanded to the City of Little Rock for a new trial after the federal court held that, in light of *Gideon*, Winters' right to counsel had been violated.²⁹ The state appealed to the Eighth Circuit Court of Appeals which affirmed the grant of the writ.³⁰ On appeal by the state, the United States Supreme Court again denied certiorari.³¹ This time the opposite result was reached.

No reason for the different approaches taken by the state and federal courts in *Winters* was articulated. It seems to be merely a more liberal attitude by federal judges. It remains unexplained why the Supreme Court, without hearing, denied certiorari in two inconsistent rulings.

While the Court has not yet chosen to spell out what degree of offense brings into play the language of the sixth amendment requiring counsel for "all criminal prosecutions," there may be an indication of the attitude of the Court in *Baldwin v. New York*.³² Though the constitutional issue in that case was not the right to counsel, it did involve an interpretation of another part of the sixth amendment, *i.e.*, the right to jury trial.³³

Baldwin was charged with "jostling,"³⁴ a Class A misdemeanor in New York, punishable by a maximum imprisonment of one year.³⁵ He was convicted, sentenced to one year in prison, and his conviction was affirmed by the New York Court of Appeals.³⁶ The United States Supreme Court, by a three man majority opinion,³⁷ with two justices concurring³⁸ and three dissenting,³⁹ reversed his conviction and held that any crime which carries a possible maximum penalty of six months imprisonment is a "serious" as opposed to "petty" offense, and the right to jury trial attaches.⁴⁰ Thus, the Court applied the federal standard of "serious" versus "petty" offenses⁴¹ in determining whether there is a right to be tried by a

28. *Winters v. Beck*, 385 U.S. 907 (1966).

29. *Winters v. Beck*, 281 F. Supp. 793 (E.D. Ark. 1968).

30. *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969).

31. *Beck v. Winters*, 395 U.S. 963 (1969).

32. 399 U.S. 66 (1970).

33. *Id.*

34. Mr. Justice White, author of the majority opinion, stated in a footnote:

1. "Jostling is one of the ways in which legislatures have attempted to deal with pickpocketing. See Denzer & McQuillan, Practice Commentary N. Y. Penal Law § 165.25 (McKinney 1967); Pickpocketing: A Survey of the Crime and its Control, 104 U. Pa. L. Rev. 408, 419 (1955). The New York law provides:

"A person is guilty of jostling when, in a public place, he intentionally and unnecessarily:

1. Places his hand in the proximity of a person's pocket or handbag; or
2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag." N. Y. Penal Law § 165.25 (McKinney 1967). *Id.* at 67.

35. *Id.* at 67.

36. *Baldwin v. N.Y.*, 299 N.Y.S.2d 424, 24 N.Y.2d 207, 247 N.E.2d 260 (1969).

37. Justices White, Brennan, and Marshall.

38. Justices Black and Douglas.

39. Chief Justice Burger and Justices Harlan and Stewart.

40. *Baldwin v. N.Y.*, 399 U.S. 66 (1970).

41. 18 U.S.C. § 1 (1964).

jury. Logic would seem to dictate that an analogy can be drawn between the *Baldwin* holding and the right to counsel. The two rights arise out of the same amendment, and some states have already used the federal formula for determining to what offenses the right to counsel attaches.⁴² However, there is reason to doubt the validity of such an analogy. In the first place, at the time of the *Baldwin* decision, New York City was the only place in the United States where a defendant would not have been entitled to a jury trial for the offense with which he was charged.⁴³ Thus, the case did not involve a far reaching change but merely brought one city in line with the rest of the nation.⁴⁴ The effect of extending this holding by analogy to the right to counsel would be much more sweeping. Also, in the past, the Court has shown an unwillingness to find conclusively what offenses are within the purview of the right to counsel provision,⁴⁵ and it is questionable whether the court will deal broadly with the issue or continue to examine the facts of particular cases. Arguably, however, *Baldwin* expresses a willingness to give finality to the question in one area, thus making it more likely the court will, given the opportunity, deal with it in another. A closely related practical problem is that the previous unwillingness of the Court to attack the issue might make prospective appellants hesitant to expend the necessary time and money to perfect an appeal to the Supreme Court to seek reversal of minor sentences.

Finally, it should be noted that Justices Black and Douglas would give a strict and literal reading to the United States Constitution, *i.e.*, "criminal prosecutions" means *all* criminal prosecutions, and the right to be tried by a jury exists under any criminal charge.⁴⁶ If this approach were to be

42. See *supra*, note 16 and text.

43. The Court discusses the fact that when *Duncan v. Louisiana*, 391 U.S. 145 (1968) was decided, only three jurisdictions did not provide jury trial when the penalty exceeded six months. The three included: Louisiana, whose procedure was struck down in *Duncan*; one particular statutory violation in New Jersey (disorderly conduct) which was changed so that the penalty was scaled down to six months and \$500; and New York City. Justice White stated:

In the entire Nation, New York City alone denies an accused the right to interpose between himself and a possible prison term of over six months, the common sense judgment of a jury of his peers. *Baldwin v. New York*, 399 U.S. 66, 71-72, (1970).

Justice Harlan, however, in an appendix to his dissent in *Williams v. Florida*, 399 U.S. at 141-43 (1970), lists 6 states in which a misdemeanor was not entitled to a jury at his initial trial.

44. *Baldwin v. New York*, 399 U.S. 66 (1970).

45. See notes 28-36 *supra*, and text.

46. "[T]he Constitution itself guarantees a jury trial 'in all criminal prosecutions' and 'in all crimes.'" Mr. Justice Black goes on to discuss past judicial decisions which limit the right to a jury trial to "serious" offenses and then concludes:

Such constitutional adjudication, whether framed in terms of 'fundamental fairness,' 'balancing,' or 'shocking and conscience,' amounts in every case to little more than judicial mutilation of our written Constitution. Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs 'in all crimes' and '[i]n all criminal prosecutions.' Until that language is changed by the constitutionally prescribed method of amendment, I cannot agree that this Court can re-

adopted by a majority of the court, it would obviate the need for the petty-serious distinction and *Baldwin's* six month demarcation.

At present, there is no definitive answer as to when the defendant in a state court is entitled to have appointed counsel prepare his case. One can only speculate that *Baldwin* does give some indication of the feeling and reasoning of the United States Supreme Court on sixth amendment questions.

IV. RIGHT TO COUNSEL: WHEN?

A. *The United States Supreme Court and Right to Counsel*

1. The Critical Stage

The confusion centering around the gravity of the offense necessary for the right to counsel to exist is equaled by that concerning the determination of the point in the criminal process at which the right to counsel attaches and when an accused must be informed of his right. The Supreme Court has said that "[t]he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defense'."⁴⁷ In delineating when counsel is "necessary," and required, the court has said at the "critical stage."⁴⁸ Further, the Court has set itself the duty of determining on review whether denial of counsel came at a critical stage:

In some, the principal of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.⁴⁹

While it may seem that the Court has laid down a definitive test—one which prosecutors, trial courts, and state appellate courts could interpret in light of a given situation and use effectively to predict what would happen

assess the balance and substitute its own judgment for that embodied in the Constitution. *Baldwin v. New York*, 399 U.S. 66, 75 (1970), (concurring opinion).

The argument advanced by Mr. Justice Black concerning balancing the costs is given support in a footnote to the majority opinion wherein Mr. Justice White states:

Experience in other States, notably California where jury trials are available for all criminal offenses including traffic violations, Cal. Pen Code § 689 (1956), suggests that the administrative burden is likely to be slight, with a very high waiver rate of jury trials. *Id.* at 74, n.22.

Of course, it may be questionable whether as many persons would waive the right to counsel as would the right to a trial by jury. If so, Mr. Justice Black's argument is left to stand on its own constitutional merits without the benefit of empirical data concerning results in practice.

47. *U.S. v. Wade*, 388 U.S. 218, 225 (1967).

48. *Powell v. Alabama*, 287 U.S. 45 (1932).

49. *U.S. v. Wade*, 388 U.S. 218, 227 (1967).

should a case reach the United States Supreme Court—the line of cases in which the Court has applied the “critical stage” test and the confusion among state cases make it evident that such is not the case.

2. Arraignment As a Critical Stage

As early as 1932, the critical nature of “the time of . . . arraignment until the beginning of . . . trial,”⁵⁰ was recognized in *Powell v. Alabama*.⁵¹ Two years prior to *Gideon*, in 1961, the Court set the period back one step. In that case, *Hamilton v. Alabama*,⁵² a black man was sentenced to death for two counts of burglary.⁵³ The Supreme Court, with Mr. Justice Douglas writing for the majority, held that “[a]rraignment under Alabama law is a critical stage in a criminal proceeding.”⁵⁴ Douglas went on, seemingly, to amplify the “critical stage” test:

What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.⁵⁵

The particular language in which the Court chose to couch its ruling can leave the impression that it was saying that there could be instances where an arraignment was not a critical stage of the prosecution. This indication comes from the use of the words “under Alabama law.”⁵⁶ In other words, if it were not possible to “irretrievably” lose “defenses,” and rights would not be prejudiced or waived, then this stage might not be critical in other states. Some courts apparently received that impression and held that the arraignment was not a “critical stage.”⁵⁷ Other state courts, however, have taken the opposite approach and held this stage critical.⁵⁸

50. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

51. 287 U.S. 45 (1932). The Court stated:

[D]uring perhaps the most critical period of the proceedings . . . arraignment until . . . trial . . . they were entitled to such [counsel] during that period as at the trial itself. *Id.* at 57.

52. 368 U.S. 52 (1961).

53. *Id.* Defendant was charged on two counts, breaking and entering with intent to steal, and breaking and entering a dwelling at night with intent to ravish.

54. *Id.* at 53.

55. *Id.* at 54.

56. *Id.* at 53.

57. *Kentucky*, *Collins v. Commonwealth*, 433 S.W.2d 663 (Ky. 1968). The court distinguished *Hamilton*, indicating that the arraignment was not a critical stage because the trial court has discretion to allow withdrawal of any waivers made at the arraignment. *Maryland*, *Ewing v. Warden*, 4 Md. App. 716, 244 A.2d 902 (1968). This case was seemingly qualified by the proviso that the arraignment is not “critical” if no guilty plea is made. *Michigan*, *People v. Sharp*, 9 Mich. App. 34, 155 N.W.2d 719 (1967). Here the court indicated that counsel was not necessary at arraignment unless the defendant expressed a desire to plead guilty. *New Jersey*, *State v. Smith*, 109 N.J. Super. 9, 262 A.2d 45 (1970). Here again the court seemed to feel the “critical” nature issue turns on what defendant *does*, not what he *could* do. In other words, if he pleads not guilty, then the arraignment is not a critical stage.

58. *Alabama*, *Strickland v. State*, 189 So.2d 771 (Ala. 1965). Of course, this recognition makes little difference following the holding of the U.S. Supreme Court in *Hamilton*. *Florida*, *Machwart v. State*, 222 So.2d 38 (Fla. App. 1969);

3. Preliminary Hearing As a Critical Stage

Depending on the particular procedure used by a state in its criminal process, it may or may not appoint counsel for an indigent defendant at the preliminary hearing.⁵⁹ The Supreme Court's holding in *White v. Maryland*,⁶⁰ in 1963, moved the "critical stage" test back one step to encompass that hearing.⁶¹

White was charged with murder and at a preliminary hearing where he was not represented by counsel, he pleaded guilty. His plea was later changed to "not guilty" and "not guilty by reason of insanity" at his arraignment, where he was represented by counsel. At trial, the plea of guilty made at the preliminary hearing was entered into evidence against defendant, and he was convicted by a jury of the murder charges.⁶² The Court of Appeals of Maryland affirmed his conviction, contending that *Hamilton v. Alabama*⁶³ did not apply, and that the lower court was not required to appoint counsel for defendant at the hearing as it was not necessary for him to enter any plea at that time.⁶⁴

The United States Supreme Court saw the matter in an entirely different light, holding "that *Hamilton v. Alabama* governs and . . . the judgment . . . is reversed."⁶⁵ Further, the Court in its *per curiam* opinion made it clear that:

Whatever may be the normal function of the 'preliminary hearing' under Maryland Law, it was in this case as 'critical' a stage as ar-

Sardina v. State, 168 So.2d 674 (Fla. 1964); *Evans v. State*, 163 So.2d 520 (Fla. App. 1964); *King v. State*, 157 So.2d 440 (Fla. App. 1963). *New York*, *People v. Shelly*, 28 App. Div.2d 728, 281 N.Y.S.2d 633 (1967); *People v. Turchiarelli*, 26 App. Div.2d 898, 274 N.Y.S.2d 613 (1966). The court, in one case, seemed to indicate that counsel must be provided even prior to arraignment where it is delayed to give the police time to get a statement from the defendant. *People v. Meyer*, 11 N.Y.2d 162, 227 N.Y.S.2d 427, 182 N.E.2d 103 (1962).

59. See G. Anderson, *The Preliminary Hearing—Better Alternatives Or More of the Same*, 35 Mo. L. Rev. 281, 285-86 (1970). In the footnotes to his article Professor Anderson thoroughly discusses the procedural approaches used by various states and the rights given the accused:

18. By 1930, at least 32 states permitted the accused to have assistance of counsel at the hearing. ALI CODE OF CRIMINAL PROCEDURE, 279-80 (1930) (statutes only). By 1969, all states except Maryland, Mississippi, and Rhode Island specifically permitted the accused to have counsel at the hearing, by statute, court rule, or case law. Maryland, Mississippi, and Rhode Island require prosecution by indictment in felony cases.

19. In 1930, apparently no state required appointment of counsel to assist an indigent accused at the hearing. *Id.* By 1969, at least 14 states required such appointment unless the hearing or the right to counsel is waived: California, Delaware, Idaho, Iowa, Kentucky, Michigan, New Jersey, Nevada, New York, New Mexico, Oregon, South Dakota, Vermont, and Wyoming. . . . *Id.* at 285, nn. 18-19.

60. 373 U.S. 59 (1963).

61. *Hamilton v. Alabama*, 368 U.S. 52 (1961), had applied the "critical stage" test to the arraignment. See notes 50-58 *supra* and text. In *White v. Maryland*, 373 U.S. 59 (1963) counsel was provided for defendant at arraignment, but not at the preliminary hearing held a month earlier.

62. *White v. Maryland*, 373 U.S. 59, 60 (1963).

63. 368 U.S. 52 (1961).

64. *White v. State*, 227 Md. 615, 177 A.2d 877 (1962).

65. *White v. Maryland*, 373 U.S. 59, 60 (1963).

raignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.⁶⁶

Thus, under Maryland procedure, the accused was afforded the right to counsel at his preliminary hearing if he entered a plea at that time; but since the Court seemed to limit its holding to the state in question and its procedure, further application of the *White* doctrine was questionable until the Court more fully amplified its position in 1970 in *Coleman v. Alabama*.⁶⁷ Defendants were convicted in an Alabama court of assault with intent to murder. On appeal to the United States Supreme Court two issues were raised, the second of which was whether the "preliminary hearing," at which the state failed to provide the defendants with counsel, was a "critical stage" of the prosecution at which the defendants were entitled to counsel.⁶⁸ The court answered the question affirmatively, but remanded the case to let the state court determine whether the denial of counsel was harmless error.⁶⁹

The period following *White v. Maryland* showed that the Court's opinion was subject to narrow construction, as some states apparently felt the case did not apply to them⁷⁰ while others did supply counsel at the preliminary hearing.⁷¹ *Coleman* should end any confusion on this point.

66. *Id.* at 60 (emphasis added).

67. 399 U.S. 1 (1970).

68. *Id.* The defendants also contended that the line-up in which they were placed was conducted "[I]n circumstances so unduly prejudicial and conducive to irreparable misidentification as to fatally taint [the witness's] in court identifications. . . ." *Id.* at 4.

69. That inquiry in the first instance should more properly be made by the Alabama courts. The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California*, 386 U.S. 18, 87 (1967). *Id.* at 11.

70. *Arizona*, *State v. Chambers*, 100 Ariz. 368, 414 P.2d 742 (1966), at least not critical if defendants rights are not prejudiced in the particular hearing; *State v. Smith*, 99 Ariz. 106, 407 P.2d 74 (1965). *Kansas*, *Craig v. State*, 198 Kan. 39, 422 P.2d 955 (1967); *Smith v. State*, 196 Kan. 438, 411 P.2d 663 (1966). *Kentucky*, *Turner v. Commonwealth*, 404 S.W.2d 13 (Ky. 1966); *Commonwealth v. Watkins*, 398 S.W.2d 698 (Ky. 1966); *Yates v. Commonwealth*, 386 S.W.2d 450 (Ky. 1965); *Carson v. Commonwealth*, 382 S.W.2d 85 (Ky. 1964). It should be noted that, by 1969, Kentucky did require the appointment of counsel at a preliminary hearing. See G. Anderson, *supra* note 59 at 285 n. 19; *Maryland*, *Hartley v. State*, 4 Md. App. 450, 243 A.2d 665 (1968); *Arrington v. Warden of Maryland Penitentiary*, 232 Md. 672, 195 A.2d 38 (1963). Apparently the Maryland courts gave *White v. Maryland*, 373 U.S. 59 (1963), the narrow reading suggested as a possibility in text *supra*, at note 64. *Missouri*, *State v. McClain*, 404 S.W.2d 186 (Mo. 1966); *State v. Engberg*, 391 S.W.2d 868 (Mo. 1965); *State v. Small*, 386 S.W.2d 379 (Mo. 1965); *State v. Phelps*, 384 S.W.2d 616 (Mo. 1964); *State v. McMillan*, 383 S.W.2d 721 (Mo. 1964); *State v. Worley*, 383 S.W.2d 529 (Mo. 1964); *State v. Gagullarritti*, 377 S.W.2d 298 (Mo. 1964); *State v. Turner*, 353 S.W.2d 602 (Mo. 1962). *Pennsylvania*, *Commonwealth v. Moroney*, 420 Pa. 486, 218 A.2d 230 (1966); at least it is not a "critical stage" absent a showing of unusual circumstances. *Hobbs v. Russell*, 420 Pa. 1, 215 A.2d 858 (1966). *Tennessee*, *State v. Heer*, 218 Tenn. 338, 403 S.W.2d 310 (1966), particularly since defendant pleaded not guilty; *Virginia*, *Via v. Peyton*, 208 Va. 387, 158 S.E.2d 127 (1967).

71. For those states that required the appointment of counsel for a preliminary hearing in 1969, see G. Anderson *supra*, note 59, at 285, n. 19. Professor Anderson

Given the terms of Justice Brennan's opinion for the court,⁷² it is clear that a preliminary hearing, wherever it is held, is a "critical stage" of the prosecutorial process and requires the appointment of counsel.⁷³

4. Right to Counsel and Self-Incrimination

There is a close link between the sixth amendment's guarantee of right to counsel and the fifth amendment's protection against self-incrimination; this is evident in the decisions of the United States Supreme Court in *Escobedo v. Illinois*⁷⁴ and *Miranda v. Arizona*.⁷⁵

Danny Escobedo was arrested for murder and later released. He was rearrested, and, after repeated denials of his requests to see his attorney, he made a confession which was later introduced against him at his trial.⁷⁶ After a reversal of Escobedo's conviction and a subsequent rehearing on request of the state, the Supreme Court of Illinois affirmed his conviction.⁷⁷ After examining the facts of the case, the United States Supreme Court, speaking through Mr. Justice Goldberg, held:

[t]hat when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.⁷⁸

Thus, when an accused is to be interrogated by the police, and wishes to have his counsel present, his request cannot be denied because custodial interrogation is a critical stage of the criminal process. But more importantly, does the state have an affirmative duty to make counsel available? The Supreme Court, in *Miranda v. Arizona*,⁷⁹ provided the answer. The Court, in finding a denial of constitutional protections under the sixth and fourteenth amendments, issued the following mandate:

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . this warning is an absolute prerequisite to interrogation.⁸⁰

points out that the following states had the requirement: California, Delaware, Idaho, Iowa, Kentucky, Michigan, New Jersey, Nevada, New York, New Mexico, Oregon, South Dakota, Vermont, and Wyoming

72. "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). Justice Brennan went on to list the functions of defense counsel at a preliminary hearing and the importance of his presence in the preparation of a defense.

73. *Id.* See also G. Anderson, note 59 *supra* at 285 n. 19, where the author concludes that "*Coleman v. Alabama* . . . clearly requires appointment of counsel for the hearing."

74. 378 U.S. 478 (1964).

75. 384 U.S. 436 (1966).

76. *Escobedo v. Illinois*, 378 U.S. 478, 479-83 (1964).

77. *People v. Escobedo*, 28 Ill.2d 41, 190 N.E.2d 825 (1963).

78. *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

79. 384 U.S. 436 (1966).

80. *Id.* at 471. The Court reversed not only *Miranda*, but the companion cases, *Vignera v. New York*, 384 U.S. 436, 494 (1966); and *Westover v. U.S.*, 384 U.S.

After *Escobedo* and *Miranda* it is evident that when an accused is in custody, and the police interrogate him, this is a "critical stage" in the criminal prosecution.⁸¹

5. The Line-Up As a Critical Stage

In *United States v. Wade*⁸² the Supreme Court focused its attention on the "line-up" stage, where an accused is subjected to identification procedures. The specific problem in *Wade* was not that defendant was not appointed counsel, but that a line-up was held without notification of his attorney. At his trial Wade was identified by two witnesses who, on cross-examination, told of a prior identification at a line-up.⁸³ Wade's conviction on the charge of bank robbery was reversed by the Court of Appeals of the Fifth Circuit.⁸⁴ The Supreme Court, reversed, indicating that the wrong test had been utilized in determining the propriety of admitting the identifications,⁸⁵ and remanded the case to the district court for a determination of whether Wade's constitutional rights had been prejudiced.⁸⁶ The Court held that the line-up itself did not violate the fifth amendment

436, 495 (1966). The Court affirmed the Supreme Court of California's reversal of a conviction in *California v. Stewart*, 384 U.S. 436, 498 (1966). In examining *Vignera*, the Court found no evidence that any warning of the right to remain silent was given to the defendant, and in fact, when the question was asked on cross-examination of the police detective who had testified as to Vignera's confession, an objection was sustained. 384 U.S. 436, 493-94 (1966); The defendant in *Westover* was interrogated first by the Kansas City police and then the F.B.I. The total in custody time prior to the confession was fourteen hours and Westover was, "[i]nterrogated at length during that period." Even though, "the F.B.I. agents gave warnings at the outset of their interview," 384 U.S. 436, 496 (1966); the Kansas City police apparently gave more, and the Court pointed out:

There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. *Id.*

The Court looked to the benefit accruing to the F.B.I. from the "[p]ressure applied by the local in-custody interrogation," in deciding that under "[t]hese circumstances the giving of warnings alone was not sufficient to protect the privilege." *Id.* at 497. In *Stewart* the Court affirmed a prior reversal of the conviction of the defendant. The U.S. Supreme Court agreed with the California Court that *Escobedo* was applicable and that that court's determination was correct. *Id.* at 498.

81. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

82. 388 U.S. 218 (1967).

83. *Id.* at 220.

84. *U.S. v. Wade*, 358 F.2d 557 (5th Cir. 1966).

85. The Court felt that, while the denial of counsel at the line-up was unconstitutional, if the in-court identification by the witness was sufficiently based on factors other than the witness's seeing defendant at the line-up, *i.e.*, an independent identification, the evidence was admissible notwithstanding the denial of the sixth amendment right to counsel. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Also, the Court added that the harmless error issue should be considered:

[T]he appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman v. State of California*, 386 U.S. 18. . . . 388 U.S. 218, 242 (1967).

86. *U.S. v. Wade*, 388 U.S. 218, 243 (1967).

privilege against self-incrimination,⁸⁷ but, nevertheless, the pretrial line-up for identification purposes was a "critical stage" of the criminal prosecution and the sixth amendment right to counsel attached.⁸⁸

The same day as *Wade*, the United States Supreme Court also decided *Gilbert v. State of California*,⁸⁹ applying the *Wade* test to reverse a conviction where in-court identifications may have been based on an unconstitutional pretrial line-up. Also, the same day the court, in *Stovall v. Denno*,⁹⁰ refused to apply *Wade* and *Gilbert* retroactively.

6. Stages After Trial

The United States Supreme Court has repeatedly held that an accused is entitled to the aid of counsel not only at trial, but at all pretrial "critical stages." The remaining question is whether, once the jury verdict is in or a guilty plea made, is there a continuing right to counsel?

The sentencing of a defendant who has entered a guilty plea was considered in *Mempa v. Rhay*⁹¹ in 1967, where a state prisoner's habeas corpus petition claimed he was wrongfully imprisoned following revocation of his probation. He had been placed on probation following a guilty plea to a "joyriding" charge.⁹² Mr. Justice Marshall, writing for the Court, stated the issue as a "question of the extent of the right to counsel at the time of sentencing where the sentencing has been deferred subject to probation."⁹³ The Court looked to cases prior to *Gideon*,⁹⁴ and then stated that when those cases are re-examined in the light of *Gideon*:

[They] clearly stand for the proposition that appointment of counsel for an indigent is required at *every stage* of a criminal proceeding where substantial rights of a criminal accused may be affected.⁹⁵

Mr. Justice Marshall applied this rule and pointed out that, "certain legal rights may be lost if not exercised at this stage,"⁹⁶ and finally held "[a] lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing."⁹⁷ Thus, the right to counsel extends past the actual trial stage at least until the accused is sentenced.⁹⁸ Although there are no Supreme Court cases declaring the appli-

87. *Id.* at 221.

88. *Id.* at 236-37.

89. 388 U.S. 263 (1967).

90. 388 U.S. 293, 296 (1967). The Court stated "that on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment." Thus Theodore Stovall's death sentence was affirmed applying the test of *Powell v. Alabama*. See note 7 *supra*.

91. 389 U.S. 128 (1967).

92. *Id.* at 130.

93. *Id.*

94. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Moore v. Michigan*, 355 U.S. 155 (1957); *Reece v. Georgia*, 350 U.S. 85 (1955); *Townsend v. Burke*, 334 U.S. 736 (1948).

95. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (emphasis added).

96. *Id.* at 135.

97. *Id.* at 137.

98. *But see McClain v. State*, 448 S.W.2d 599, 603 (Mo. 1970), where the Missouri Supreme Court indicated that defendant was not prejudiced by the fact that counsel was not present at sentencing and could not offer for him mitigating factors as to punishment because defendant had received the minimum sentence.

cability of this rule to the former situation, *i.e.*, a not guilty plea and trial, there seems to be no basis for distinguishing them under the sixth amendment.

Moving the inquiry further, what of a convicted indigent defendant's right to counsel when he appeals his conviction? In dealing with this question, the Court shifted its primary emphasis from the due process philosophy of *Gideon v. Wainwright* to focus on the equal protection clause of the fourteenth amendment.⁹⁹ Nine years prior to *Gideon* the Court had held in *Griffin v. Illinois*¹⁰⁰ that, while an appeal was not a matter of right, once a state granted an appeal it must be granted equally to rich and poor alike; therefore, in order to effectively prepare an appeal, petitioner must be furnished a transcript of the trial at state expense.¹⁰¹ Although the Court mentioned due process, the primary thrust of the opinion, and its firmest basis, was the equal protection clause of the fourteenth amendment.

The actual question of the right to counsel on appeal was the subject of *Douglas v. California*.¹⁰² The Court, through Mr. Justice Douglas, made it clear that the decision was concerned only "with the *first appeal*, granted as a matter of right to rich and poor alike"¹⁰³ under California law. The Court spoke in terms of equal protection rather than due process in holding that counsel must be provided for the indigent appellant. Nowhere in the majority opinion was there mention of *Gideon*. Justices Harlan and Stewart took issue with the equal protection approach, pointing out that if the Court's analysis were applied to right to counsel at trial, the method of reasoning in *Gideon* was wholly unnecessary, and it could have easily been decided on equal protection terms.¹⁰⁴ Whether one agrees or disagrees with the *Douglas* holding, clearly extending the right to counsel to the appellate stage, or even with the application of the equal protection approach, it does seem paradoxical to require a seemingly higher standard for showing a right to counsel at trial and the earlier critical stages, than after conviction when appeal is taken.¹⁰⁵ This is meant in no way to

99. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

100. 351 U.S. 12 (1961).

101. *Id.* at 18. Mr. Justice Black's opinion makes it evident why the fact that there is no absolute right to appellate review is a moot point today when he states, "All of the states now provide some method of appeal from criminal convictions . . ." *Id.* at 18.

102. 372 U.S. 353 (1963).

103. *Id.* at 356.

104. *Id.* at 363.

105. The higher standard stems from use of the "due process" approach requiring the defendant to show that the denial of counsel will result in his rights being prejudiced and thus that his denial came at a "critical stage." On the other hand, to merely hold that, at a particular stage, if a person who can afford an attorney's presence will be allowed to have him there then equal protection requires the state to furnish counsel for an indigent, is a seemingly less strict standard. This would appear to be the result of *Douglas*, whereas the cases concerning pretrial "critical stages" use the "due process" approach. See footnotes 47-90 *supra*. One other factor to be noted is that *Douglas* was decided in 1963, the same day as *Gideon*, and not only did the majority opinion in *Douglas* not mention *Gideon*, but the later cases dealing with pretrial "critical stages" take the "due process" approach of *Gideon*, rather than the "equal protection" approach.

criticize the result or opinion in *Douglas*, but perhaps it would be desirable to re-examine *Gideon*, if the situation arises, and place the right to counsel at trial and earlier critical stages on the basis of equal protection, thus putting all defendants on an equal basis.

B. State Courts and the Right to Counsel

As previously noted, the courts of the various states tend to disagree as to the gravity of the offense necessary to require appointment of counsel.¹⁰⁶ As to what is a critical stage, there is also a lack of conformity and agreement.¹⁰⁷ While many states have expressly acknowledged the binding effect of *Gideon* on their criminal procedures,¹⁰⁸ the application in given cases may vary. However, at least in certain areas, the mandate from the United States Supreme Court should make it clear that, in fact, certain stages of the criminal process are "critical," and the right to counsel exists. The effect of Supreme Court rulings on interrogation at an accusatory stage,¹⁰⁹ arraignment,¹¹⁰ preliminary hearings,¹¹¹ trial,¹¹² sentencing,¹¹³ and the appellate stage¹¹⁴ has been discussed, and the rulings that these are critical stages should be clear. While the effect on state held line-ups and identification procedures may not be quite so clearly outlined,¹¹⁵ here too, if a defendant is likely to lose or irretrievably waive rights critical to his effective defense at trial, the right to counsel attaches. Thus, courts desiring effectively to protect the right of indigent criminal defendants to be represented by counsel at every "critical stage" of the prosecution should be able to reach that result.

V. CONCLUSION

Nearly a decade has elapsed since the United States Supreme Court announced its decision in *Gideon v. Wainwright*. The questions of what is an offense to which *Gideon* applies and what is a "critical stage" have been

106. See note 16 *supra*.

107. See note 70 *supra*.

108. *E.g., California*, *People v. Bourland*, 247 Cal. App.2d 76, 55 Cal. Rptr. 357 (1966), *cert. denied*, 388 U.S. 920 (1967); *Idaho*, *Bement v. State*, 422 P.2d 55 (Idaho 1966); *Kansas*, *Johnson v. Stucker*, 203 Kan. 253, 453 P.2d 35 (1969); *Maryland*, *Moore v. State*, 7 Md.App. 330, 254 A.2d 717 (1969); *Michigan*, *People v. Stearns*, 380 Mich. 704, 158 N.W.2d 409 (1968); *Missouri*, *State v. Martin*, 411 S.W.2d 215 (Mo. 1967); *Montana*, *State v. Lucero*, 151 Mont. 531, 445 P.2d 731 (1968); *North Dakota*, *Smith v. Woodley*, 164 N.W.2d 594 (N.D. 1969); *New Mexico*, *State v. Carrothers*, 79 N.M. 347, 443 P.2d 517 (1968); *Pennsylvania*, *Commonwealth v. Ritchey*, 431 Pa. 269, 245 A.2d 446 (1968); *South Carolina*, *State v. Cowart*, 251 S.C. 360, 162 S.E.2d 535 (1968); *Texas*, *Steel v. State*, 453 S.W.2d 486 (Tex.Cr.App. 1970).

109. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

110. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

111. *Coleman v. Alabama*, 399 U.S. 1 (1970); *White v. Maryland*, 373 U.S. 59 (1963).

112. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

113. *Mempa v. Rhay*, 389 U.S. 128 (1967).

114. *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

115. See notes 82-90 *supra*, and text.

argued before the United States Supreme Court, state and federal appellate courts, and the trial courts of both.

The foregoing discussion makes it evident that neither of these questions has been conclusively answered in the years since *Gideon*. However, the Supreme Court has provided guidelines in some areas which will make the job of lower courts, prosecuting and defense attorneys, and police easier.

If there is one development that could become significant in the future, it is the shift away from due process and toward equal protection suggested by *Griffin v. Illinois*¹¹⁶ and *Douglas v. California*.¹¹⁷ If equal protection were substituted as the ground requiring representation by counsel for indigent defendants, it would eliminate the basis for the "petty-serious" distinction, and eliminate any need to determine what is a "critical stage" of the prosecution. The only question then would be whether a lack of representation for indigent defendants desiring counsel is a denial of equal protection of the law. Stated another way, if the affluent defendant can be represented by counsel, then the state must provide counsel for the indigent defendant.

Although this is the approach that seems to this writer to be most fair and just, as well as providing a simple answer to the questions raised by *Gideon*, there is no present indication that the Supreme Court will adopt it.

There are, no doubt, those who will say to do so would place a heavy financial burden on the governments, state and federal, although there is evidence that it would not;¹¹⁸ but even so, it seems hard to justify the placing of a price on constitutional rights.¹¹⁹

The full application of the equal protection approach has been discussed already in the dissent of Mr. Justice Harlan in *Douglas v. California*:

The short way to dispose of *Gideon v. Wainwright* . . . would be simply to say that the State deprives the indigent of equal protec-

116. 351 U.S. 12 (1956).

117. 372 U.S. 353 (1963).

118. It is apparent that the cost of a large-scale extension of the indigent's right to counsel, while costly both in terms of men and money, may not be as prohibitive, as some may have assumed. There are seemingly the resources available for counsel to be extended . . . to all . . . indigent felony defendants.

55 IOWA L. REV. 1249, 1267 (1970). However, as to the exact amount necessary to provide all criminally charged indigents with counsel the author goes on to point out, "[U]ntil a greater extension of counsel is attempted by the courts and legislatures, it will be impossible to determine what the actual effect of such an extension of the right to counsel will be." *Id. Cf. contra*, *State v. McCormick*, 426 S.W.2d 62 (Mo. 1968), *cert. denied*, 394 U.S. 930 (1969).

119. A literal application of this approach would require an extremely large financial burden on society. Practically speaking, rich defendants will be more likely to retain their freedom because society will probably be reluctant to expend the amount of money that would be required to make legal services for indigents "equivalent," e.g., investigative staff, etc.

tion whenever it fails to furnish him with legal services . . . equivalent to those that the affluent defendant can obtain.¹²⁰

Whether this approach will ever be adopted is at best open to speculation. However, if it were, it might provide a surer means to the worthwhile end suggested at the outset by Attorney General Kennedy.

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120. *Douglas v. California*, 372 U.S. 353, 363 (1963).