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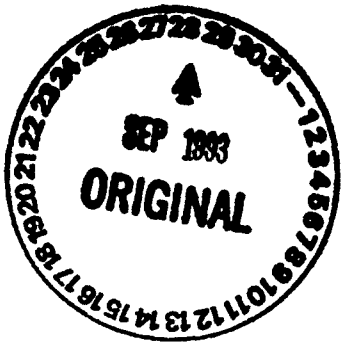

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#70

TABLE OF CONTENTS

INTRODUCTION

The right of a criminal defendant to be represented by counsel is a fundamental protection for individual liberty in our system of criminal justice. While it is clear that a defendant who is able to retain a lawyer is entitled to the effective assistance of counsel at all stages of the process,[1] the vital issue at the present time is the extent to which and in what manner society should provide counsel for defendants who are financially unable to obtain adequate representation.

Recent court decisions have moved significantly toward requiring fulfillment of our ideal of equal justice for all criminal defendants. These decisions have inspired more effective and widespread efforts by legislatures, courts, and private individuals and organizations to provide counsel for the accused. However, it is also true that large elements within these same assemblages oppose such action. The questions now facing all jurisdictions are the following: In what proceedings shall counsel be provided; what methods shall be used to provide counsel; and what criteria of eligibility for free services shall be applied? There are two basic reasons representation by counsel is essential in our system of criminal justice. An individual forced to answer a criminal charge needs the assistance of a

lawyer to protect his legal rights and to help him understand the nature and consequences of the proceedings against him. The vital importance of counsel is obscured by asking simply whether a lawyer is needed to handle the trial of a criminal charged, for representation at trial is only a part of the defense counsel's role. More often than not, the defendant is lacking in education, intelligence and capacity for insight. Without the support and perspective of counsel the defendant may have little understanding of what is happening to him or why. The process leading toward the goal of full representation has already begun, although priorities may have to be established to ensure that limited resources are first applied to the most essential needs. It would appear to be realistic initial goal for all jurisdictions to require the appointment of counsel in every case in which a defendant who cannot afford adequate representation may suffer a substantial loss of liberty.[2] As the capacity of the bar to provide representation is increased, the requirement of counsel should be expanded to encompass all cases from interrogation to sentencing procedures, in which the defendant faces a substantial penalty and proceeding after conviction. Therefore, in an attempt to better understand what the courts are requiring when dealing with the accused to date, this paper is designed to sketch the major cases--to probe the nature of the issue that confronted the court, to discern the

precedents that were broken, to examine the legal theories that emerged in the opinions and to delineate the judicial and political dilemmas that persist. The rights of the accused are too precious to err.

These rights of the accused are only some of the numerous responsibilities of the chief law enforcement officer of a county. The importance of this individual to have a complete knowledge of all aspects of the law is imperative. However, of utmost importance to this administrator is to ensure that no case is dismissed due to technicalities, that no lawsuit is generated due to lack of knowledge by any of his deputies and most importantly, that the rights of the accused are not violated.

RIGHT TO COUNSEL AT TRIALS

For a legal system, which prides itself on such noble traditions as presuming an accused innocent unless proven guilty, to permit a defendant to be formally tried, in a court without the benefit of counsel must seem strange to any fair-minded person. And yet for centuries the common law courts of Britain did not allow a prisoner to be heard by counsel upon the general issue of guilt or innocence either in felony cases or on charges of treason. Although, ironic as it may seem, a person accused of a misdemeanor constituted less of a threat to the crown and realm and did not offend the system.[3]

Nearly a half a century before England changed these general rules,[4] the Sixth Amendment to the United States Constitution already proclaimed that "[i]n all criminal prosecutions, the accused shall. . .have the assistance of counsel for his defense."[5] Until relatively recently, this amendment was interpreted as restricting the federal government only; however, it is interesting to note that by 1789 only six of the original states judged it sufficiently important to incorporate such similar protection into their own constitutions. However, at the state level, moves towards copying or implementing the Sixth Amendment rights of counsel proceed at a slow and uneven rate through constitutional changes, statutory enactment, or judicial

interpretation.[6] More importantly neither the state nor the federal government extended the procedural right readily to the indigent defendant. In federal jurisdictions, the right to counsel for defendants who were poor, and who did not "completently and intelligently" waive right to counsel, did not become mandatory until 1938 (Johnson v. Zerbst).[7]

Four years later, when the Supreme Court was asked to extend this principal to defendants in state courts, Justice Owen J. Roberts, writing for the majority, in Betts v. Brady refused.[8] At that time, the laws of as many as eleven states failed to provide counsel for indigent defendants in either capital or non-capital cases. In other states, constitutional and statutory provisions to the contrary; had been either ignored, limited to certain types of offenses or left to judicial discretion. Having surveyed all the relevant practices, Justice Roberts concluded: "[I]n the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[9] Under these conditions "we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the state. . .to furnish counsel in every such case."[10] The court said a lawyer was constitutionally required only if to be tried without one amounted to "a denial of fundamental fairness." The crucial passage in the opinion read:

> Asserted denial [of due process of law] is to be tested by an appraisal of the totality of facts in a given case. That which may in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice may in other circumstances, and in the light of other considerations, fall short of such denial.[11]

In short, counsel need not be appointed unless there are "special circumstances" showing that without a lawyer a defendant cannot have an adequate and fair trial.

Justice Hugo Black, speaking for Justices William O. Douglas and Frank Murphy, dissented. While not willing to go so far as requiring counsel for indigents in all cases and under all circumstances, he did contend that the defendant in this case--an uneducated and unemployed farm hand sentenced to an eight-year prison term for robbery--could not have obtained a fair trial without such aid. Subjecting a man "to increased dangers of conviction merely because of their proverty" seemed to Justice Black difficult to reconcile with "common and fundamental ideas of fairness and right." He also asserted that the Fourteenth Amendment made the Sixth applicable to the states.[12]

It took yet another twenty years before a handwritten, badly misspelled petition from an inmate of Florida state prison to the United States Supreme Court (proceeding in forma pauperis) led to the revolution in state criminal procedures that finally gave the indigent the right to counsel.

In Gideon v. Wainwright, Clarence Earl Gideon, a fifty-

one-year-old white man, had been charged and sentenced to a five-year term for having broken into the Bay Harbor Pool Room with the intent to commit a misdemeanor; under Florida law this constituted a felonious offense. His request for counsel had been turned down by the trial court which informed him that according to the law of the state, counsel for indigent defendants could only be furnished in capital cases.[13]

Also rejected was a habeas corpus petition to the Florida Supreme court in which Gideon attacked his conviction on the grounds "that the trial court's refusal to appoint counsel for him denied him rights 'guaranteed by the Constitution and the Bill of Rights. . .'"[14] It was at this point that Gideon wrote a pencilled request for review of his case by the United States Supreme Court. By granting certiorari, the Court indicated its willingness to face squarely the issue of whether or not Betts should be considered controlling and whether the failure to provide counsel was "offensive to the common and fundamental ideas of fairness."[15]

Justice Black and an unanimous court decided that it was, and that Betts should be overruled. While it was true, he argued, that Betts considered the Sixth Amendment counsel guarantee not to be a fundamental right incorporated into the Fourteenth Amendment as, for example, such rights as freedom of speech, press, religion, assembly and petition,

there were cases such as Powell v. Alabama (1932) that could have been followed in which the Supreme Court did hold the aid of counsel to be indeed of such a fundamental nature as to be binding on the states.[16] To Justice Black therefore, Betts made an abrupt break with its own well-considered precedents. "But more than that, in our adversary system of criminal justice," he added, "any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[17]

Actually Justice Black overstated his case somewhat, as Justice John Marshall Harlen quite correctly pointed out in his concurrence. Powell v. Alabama had involved a capital offense which was obviously not true of either Betts or Gideon. In non-capital cases, on the other hand, the court had employed the so-called "special circumstance" rule which had justified the appointment of counsel. Since Betts there had been a number of decisions which held that "the mere existence of a serious criminal charge constituted in itself special circumstances."[18] This meant to Justice Harlen that it would be sounder for the overall administration of justice if the "special circumstance" rule should now be formally abandoned "at least as to offense which. . .carry the possibility of substantial prison sentence."[19] While agreeing, therefore, that Betts should be overruled (although he thought it "was entitled to a more respectable

burial"),[20] Justice Harlen also disassociated himself rather pointedly from the theory advanced by Justice Douglas in his concurrent opinion in which he stated that the Sixth Amendment along with the rest of the Bill of Rights was made directly applicable to the states through absorption into the Fourteenth Amendment. This was going too far for Justice Harlen's view of federalism. "Any such concept would disregard the frequently wide disparity between the legitimate interests of the state and of the Federal Government. . ."[21]

In Gideon, the court explicity rejected the Betts rule of "special circumstances" and held that the Sixth Amendment's guarantee of counsel for all indigent defendants is a fundamental right made obligatory upon the state by the Fourteenth Amendment.

Gideon thus joined the ranks of a rather select group of cases. For, despite its widespread reputation as a court most ready to disregard precedent and overrule its own earlier decision, the Supreme Court in fact had directly overruled prior decision on no more than a hundred occasions in over a century and a half of judicial review. And only about half of these instances involves cases, like Gideon, in which the court was dealing with a constitutional question.[22]

With the aid of his court-selected counsel--the distinquished trial lawyer and future Supreme Court Justice

Abe Fortas--Gideon thus had won a reversal and with it the right to a new trial. This time a carefully conducted defense by a highly skilled attorney proved successful, and when the jury, after deliberating sixty-five minutes, returned with a verdict of "not guilty," Gideon having spent about two years in prison, walked out, once again a free man.

The consequences of Gideon were immediate and enormous. Within thirteen months of that decision, the court employing the new standard reversed and remanded for trial appeals involving approximately twelve states with some forty-six cases, twenty-seven were from Florida.[23]

Reports from Florida's director of prisons, indicated that within a few months of Gideon, about one thousand prisoners were released from the state penitentiary because prosecutors could or would not retry them under the new procedural standard. Of another group of over three hundred prisoners who did not receive a new trial, most had their sentences reduced, twelve received longer sentences and seventy-five inmates found that their terms were reaffirmed.[24] To facilitate compliance with Gideon, legislatures and courts in twenty-three states took specific action within twenty-four months to expand or improve their assigned counsel or public defender systems in varying degrees.[25]

COUNSEL FOR INTERROGATIONS AND CONFESSIONS

Approximately forty years ago, a nation that had always prided itself in affording "due process of law" to all its citizens was stunned to learn how interrogations and confessions were being conducted. Some of the more critical students of American criminal procedure had long suggested that police treatment given defendants in major crimes deeply offended community standards and were occasionally harsh, cruel and even arbitrary--especially if the defendants belong to unpopular minorities. The public revelation of such acts, in the last four decades, added special impact and drama to the situation.

The first such case which brought these injustices to the surface was the Brown v. Mississippi case in 1936. This case involved three black men who were convicted for murder solely upon the basis of a confession obtained by brutality and physical torture. This cruelty consisted of hanging them twice and letting them down only to be tied to a tree and whipped, but they still protested their innocence and were finally released. A day or two thereafter deputies arrested them and on their way to jail, they were severely whipped again until they confessed. The court explained that merely "because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal." The rack and torture chamber may not be substituted for the witness stand...It would be difficult to conceive of methods

more revolting than. . .the use of confessions thus obtained as the basis for conviction and sentence and [in this case it is] clear denial of due process.[26] This was the first Fourteenth Amendment due process confession case heard by the United States Supreme Court.[27]

Although the court had been willing to take a strong position, with respect to evidence obtained by coercion, it found problems with what constituted coercion. While physical violence clearly amounts to coercion, as in the Brown case, it is apparent that certain types of psychological pressures may do so also. In Chambers v. Florida (1940), the court held a denial of due process in the "sunrise confessions" of four blacks which followed five days and nights of interrogation in the absence of friends, advisors or counsel and under "circumstances calculated to break the strongest nerves and stoutest resistance."--On occasioned outburst by Justice Black which rose above the terse language of the law to reach heights of classic universality.[28]

In the course of adhering to this approach as in Brown and Chambers, the court agreed to hear more than thirty "confession" cases and reversed the state court ruling in most of them. The progression in the many cases that reached the court for decision showed the folloiwng characteristics: the form of coercion became increasingly more subtle by the police officer. The court became more

willing to find the necessary due process violation in its reviews of the "totality of the circumstances" of the confession objected to. A few of the "totality of circumstances" the court was finding important during its thirty year sojourn through the wilderness of police practices included: length of time of questioning, denial of opportunity to call or speak to family, education of the suspect, type or nature of coercion employed. These were the main tactics used by law enforcement officers who were honestly convinced of the suspect's guilt and eager to rid society of one of its enemies.[29]

Until 1943, the court had not given a "clear cut" decision on interrogations and confessions to federal jurisdictions. In McNabb v. United States (1943), two men suspected of shooting a revenue officer were taken into custody by federal officials and questioned over a period of two days, without presence of friends or counsel, until a confession was secured. The Supreme Court voided the conviction, not on the grounds that the confession was coerced, but because of violation of the "without unnecessary delay" provision.[30] Federal statutes require suspects upon apprehension to be taken before the nearest judicial officer "without unnecessary delay" for hearing, commitment or release on bail. When suspects are taken before a committing magistrate, the law officer must show probable cause for the arrest, and the suspects must be

informed of their right to remain silent and to have counsel. The motive in McNabb was undoubtedly a delaying tactic by federal agents, in an attempt to secure a confession before the suspect knew his rights. True, the Fifth Amendment forbids the use in federal courts of confessions secured under conditions of physical or mental coercion, for in such cases the defendant would obviously have been under compulsion to testify against himself. Nevertheless, the court did not choose to use the Fifth Amendment in their reasoning.[31]

The apparent reluctance of the court to expand the due process clause of the Fifth Amendment in the area of federal criminal procedure can be explained in part by its reluctance to impose specific procedures upon the states. There is an obvious tendency for any procedure required by the due process clause of the Fifth Amendment to become part of the fourteenth Amendment due process also, and the court has basically preferred to leave the states free to experiment and devise in the realm of criminal procedure provided they meet a minimum standard of fairness. So when the court has wished to enforce against the federal government standards of fairness more exacting than those spelled out in the Bill of Rights, it relies on what may be called "quasi due process" based on its general supervisory power over the administration of justice in the United States courts.[32]

The McNabb case was reaffirmed by the court in 1957 by its opinion in Mallory v. United States. The court stated that "[i]t is not the function of the police to arrest, as it were, at large and to use an interrogation process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'"[33]

As a result of these two cases, the so-called McNabb-Mallory rule was established. Basically the rule states that a person accused of a federal violation must be charged before a committing magistrate, given the right to counsel, the right against self-incrimination and protection against arbitrary arrest. Although the McNabb-Mallory rule was not binding on state courts, the states, of course, were free to adopt the rule on their own. On the eve of Escobedo v. Illinois, however, no state had done so. Michigan seemed to adopt it in People v. Hamilton (1960), but the holding was subsequently severly limited.[34]

Many hoped, and many others feared, that someday the Supreme Court would apply the McNabb-Mallory rule to the states as a matter of the Fourteenth Amendment due process. A small spark to this came through in Spano v. New York (1959). A majority of the court had reached the conclusion that once an accused has been formally charged by an indictment or information, his constitutional right to counsel had begun.[35]

The real break-through came in 1964 with the Supreme Court's ruling in Escobedo v. Illinois. When Danny Escobedo was first arrested in connection with the murder of his brother-in-law, his retained lawyer, Warren Wolfson, secured his release on a writ of habeas corpus. His lawyer advised him to make no statement to the police. Escobedo was again arrested, and he told the police that he wished to consult his attorney. In the meantime Escobedo's attorney had been contacted and had arrived at the station asking to see his client. The request was refused, even though the defendant was at the same time asking the officers to permit him to consult with his lawyer. The only communication between the two men came when the lawyer saw Escobedo and made a gesture which the suspect understood as an instruction to remain silent.[36]

During the interrogation, the police informed Escobedo that another suspect, Benedict DeGerlando, had admitted his own participation in the crime, and had accused Escobedo of the actual killing. Escobedo was taken before his accuser; he declared that the accuser had fired the fatal shots. Escobedo soon admitted his own complicity in the murder, which under Illinois law made him equally as guilty as if he had fired the bullet himself.[37]

Defense motions to strike this damaging admission, during the trial at which Escobedo was convicted of murder, was denied. After the Illinois Supreme Court affirmed the

conviction, the United States Supreme Court granted certiorari to consider whether the petitioner's statement was constitutionally admissible at his trial. It was found by Justice Goldberg not to be so. He saw the interrogation, although preceding the indictment, as an important and often decisive link to the subsequent trial.[38] The Supreme Court held that the right to an attorney becomes effective as soon as the investigating "has begun to focus on a particular suspect."[39] Under Escobedo, the Supreme Court recognized two constitutional violations:

1. . . .the police had not effectively warned him of his absolute constitutional right to remain silent. . .

2. . . .the accused has been denied the assistance of counsel in violation of the Sixth Amendment to the constitution as made obligatory upon the states by the Fourteenth Amendment. . .[40]

There were three separate opinions for the four dissenters. Justice Harlen thought the rule of Escobedo "ill-conceived" and as likely to obstruct "seriously and unjustifiably. . .perfectly legitimate methods of criminal law enforcement."[41] As Justice Stewart construed applicable legal precedents, the adversary proceedings which required assistance of counsel did not begin until the accused was arraigned, indicted or presented with a formal charge. Justice White was equally emphatic. Like his "colleagues-in-dissent," he challenged the new rule as an unwarranted and unworkable burden on criminal law enforcement. Police

cars would have to be "equipped with public defenders and undercover agents and police informants [would need a]. . .defense counsel at their side."[42] Although the Escobedo decision will not destroy the criminal law enforcement machinery, concluded Justice White, it will be crippled and the task made a great deal more difficult.[43]

The American public had seen only a beginning with Escobedo. The all-time high in Supreme Court decisions occurred on June 13, 1966, in the case of Miranda v. Arizona. Perhaps no other single Supreme Court decision affecting the administration of criminal law has had a more far-reaching impact or been more controversial than Miranda.

The case centered around the petitioner, Ernesto Miranda, a twenty-year old male with an eighth grade education and a mental age of twelve. Miranda had been arrested by the Phoenix police and charged with kidnapping and rape. The police took him to the station where he was questioned by two officers. Miranda had not been advised that he had a right to counsel. Two hours later officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was typed a paragraph stating that "this confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.'"[44]

Miranda's conviction by the Supreme Court of Arizona

was brought up for review on a writ of certiorari and a 5-to-4 majority of the United States Supreme Court voted to reverse the judgment. Chief Justice Earl Warren delivered the opinion of the court. Chief Justice Warren left no doubt that a majority of the court was now ready and eager to amplify what was begun in Escobedo and to promulgate in light of that decision a farily distinct and comprehensive standard for constitutionally permissible forms of police questioning. Thus, before a statement by a defendant in police custody,[45] "deprived of his freedom of action" and "cut off from the outside world," can be admitted into evidence,[46] the following procedural conditions had to be met:

1. The defendant must have been warned 'at the onset of the interrogation process' that he had a right to consult an attorney.

2. If indigent, the defendant must be assured that the public will provide him with counsel.

3. The defendent must be appraised of his rights to remain silent and if he indicated in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

4. If defendant does give a statement he must be warned that anything he says 'can and will be used' against him in court.

5. Before a waiver of a defendant's right will be held valid in an interrogation conducted in the absence of an attorney, 'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege againt self-incrimination and his right to retained or appointed counsel.'[47]

Such then were the essential and necessary protection that chief Justice Warren saw bestowed by the constitution through the Fifth and Sixth Amendments on defendants in American police custody.

These were necessary protections, Justice White argued, first because traditions insist that no person in a criminal case shall "be a witness against himself"; second, because the use of physical brutality, psychological pressures and other refined forms of the third degree employed by overly zealous law officers are still practiced; third, because inquisitorial tricks and tactics can easily "subjugate the individual to the will of his examiner"; and fourth, becuase individual "dignity" and "integrity" command respect from our government, both state and federal.[48]

The procedures and warnings which Chief Justice Warren proposed were to be guidelines only. They were not designed to do away with all confessions nor with general on-the-scene questioning as to facts surrounding the crime. Chief Justice Warren felt that these standards were sufficiently safe and practical not to consititute an undue interference with a proper system of law enforcement.[49] Whether it will be the court's interrogation model the Congress or state legislatures might wish to adopt, its operation must effectively meet the constitutional requirement of "informing accused persons of their right to silence

and. . . [of] affording a continuous opportunity to exercise it."[50]

The dissenting opinions where sharply worded and indicative of the deep division of the court regarding the questions of limits imposed by the constitution on custodial interrogation. Common to the three separate dissents was a solemn rejection of the 'new' code which was characterized in varying degrees of intensity as an unsound judicial experience, as ignoring the legitimate consideration of public safety, as unnecessarily critical of the police and as dangerous compounding their already sufficiently difficult problems.[51]

These cases, especially Escobedo and Miranda, have taken the "right to counsel" a long way down the road of justice. But there are still other areas yet to be considered by the court. It has taken time for the American public to adjust to these new rules governing the rights of the accused, but since this adjustment has been made it truly proves that all Americans are entitled to their fundamental rights of individual freedoms.

REACTIONS AND IMPACT TO COURTS POSITION ON RIGHT TO COUNSEL

The reaction to the decisions rendered by the United States Supreme Court in the area of "right to counsel" came primarily from the courts' opinions concerning

interrogations and confessions rather than from the area of right to counsel at trials. Strong and not unexpected support for custodial interrogation and confessions had come from police officials, public prosecutors, and state attorneys generals as well as from certain segments of the bench and bar.

There was ample testimony to that effect, for example, during the 1958 hearing of the House and Senate Judiciary Committees which at that time were considering legislative proposals to limit the applicability of McNabb and Mallory rules. These were the decisions in which the Supreme Court held that confessions were inadmissible in evidence if there was an "unnecessary delay" in the arraignment of the accused. Critics from various law enforcement agencies who testified before these committees termed the court's position an obstruction to the effective control and apprehension of criminals.[52]

Late in the summer of 1958, the 85th Congress almost enacted such a bill designed to limit the application of the Mallory rule. H. R. 11477 passed the House 294 to 79, and in a slightly different version, the Senate voted 65 to 12. Failure of the Senate to accept the Conference Committee's report, however, caused the bill to die.[53]

Congressional debate centered on the needs to balance the community's natural quest for security with a defendant's constitutional right to due process of law.

Pro-interrogation forces emphasized the usefulness of the custodial arraignment to both the accused and the law enforcement effort. A person wrongly suspected could clear his name quickly and thus avoid the embarrassment of a formal arraignment. As these efforts continued, the drive to remove the Mallory rule failed.[54]

The next eruption from Congress came as a result of the Miranda decision in 1966. Congressional reaction to Miranda with a few exceptions were predominantly hostile.

The court's decision "will make confessions a thing of the past" (Georgia Senator Herman Talmadge). What Miranda demonstrated was "the majority's eager, crusading spirit, tipping the balance of justice towards the criminal--without equal regard for those against whom the criminal has offended. . ." (Missouri Representative Durward Hale). "It seems to me. . .to be the height of folly to embark on fanciful new experiments limiting the power of the people when crime is annually increasing at a disastrous rate" (Mississippi Senator John C. Stennis). As a consequence of Miranda, ". . .multitudes of guilty suspects will escape convictions and punishment, and be turned loose upon society to repeat their crimes simply because many crimes cannot be solved without confessions" (North Carolina Senator Samuel Ervin). The Senator also introduced a constitutional amendment which would have made binding on all appellate courts (state and federal) the determination of a trial

judge as to whether a defendant's confession was voluntary or not.[55]

In 1965 and 1966, the Congress tried to limit the Mallory and Miranda rule by passing the District of Columbia "omnibus crime bill." One of its purposes was to revise portions of the District of Columbia's criminal code. One of the bill's sections provided that no "statements and confessions," otherwise admissible, shall be inadmissible solely because of delay in taking an arrested person before a commissioner. The act passed both houses of Congress by a large margin. The bill was vetoed by President Lyndon B. Johnson who stated that the bill went "far beyond the necessities of interrogation in practically all cases."[56]

When the 90th Congress convened in 1967, the legislature battle against Mallory and Miranda resumed again. Senator John McClellan, chairman of a special Senate Judiciary Subcommittee on Criminal Law and Procedures, promised energetic action in his opening statement on this subject to the Senate on January 25, 1967. Senator McClellan's determined efforts won him the passage of the omnibus,[57] Crime Control and Safe Street Act (H. R. 5037-PL 90-351).

In addition to authorization of funds to upgrade state and local police forces, the bill contained a section which weakened the Mallory and Miranda rule. The measure provided that a confession by a defendant was to be admissible in

evidence if it were "voluntary," even if the suspect had not been warned of his constitutional rights. It also permitted police to hold suspects in custody for up to six hours (or more in certain circumstances) before arraignment and still obtain an admissible confession.[58]

President Johnson signed the bill on June 19, 1967, the last day he could have vetoed it. President Johnson implored Congress to "repeal" various sections of the bill. Meanwhile, he said, federal officials would continue to observe the guidelines set down by the Mallory-Miranda rule despite the provisions of this law.[59] It will certainly be an interesting climax when the court reviews this law.

At the time of the Miranda decision, there were many claims that the ruling would greatly endanger the law enforcement's ability to acquire confessions. An example of this was Duane Nedrud, the Executive Director of the National District Attorneys Association Foundation, who predicted that "fewer crimes will be solved, even fewer crimes will be prosecuted." New York's Police Commissioner Howard Leary spoke of the ruling as "sophisticated law for an immature society."[60]

Six months after the decision, Justice Clark, one of the four dissenting justices in the case, said that the decision had not impeded law enforcement as he thought it might when he wrote his dissenting opinion. Justice Clark reported after talking with district attorneys and law

enforcement agencies in metropolitan areas across the nation, he found that confessions are being obtained at a higher rate than before the decision was handed down.[61]

A number of studies have been made to determine if, as a result of the Miranda rule, there has been a decline in the rate of confessions now obtained as compared to before the ruling. An in-depth study, conducted in New Haven, Connecticut, has shown that new Miranda rule had not caused a drop in confessions. Other studies such as those made by the American Bar Association, the American Law Institute and the President's Commission on Law Enforcement all indicate that there has been little or no change in the number of confessions received by the police. These reports did, however, suggest a compromise with the Mallory-Miranda rule. The compromise would allow one hour interrogation without counsel and before arraignment.[62]

One survey undertaken by Eville Yonger, District Attorney of Los Angeles County to measure the impact of some four thousand felony cases in a three-week period from late July to mid-July, confessions were essential to a successful prosecution in only a small percentage of criminal cases. Even more relevant was the conclusion that the percentage of cases in which confessions or admissions were made had not decreased because of the Miranda requirement.[63]

The implementing of the Miranda rule answered many legal questions, but in turn created many problems which

needed to be addressed by the law enforcement community. How was a suspect to be advised, when was he to be advised and who was to advise him were just a few of the questions that had to be answered. Police officers all across the nation had to be trained as to exactly what a suspect had to be told upon arrest and/or any subsequent questioning. A commentary by Fred E. Inbau illustrates how over-reaction to Miranda is sometimes used to keep from losing a high-profile case such as in the attempted assassination of President Ronald Reagan, John W. Hinckley, Jr. was read his Miranda rights four different times within about two and one-half hour period immediately after shooting President Reagan.[64]

The State of Texas has incorporated the Miranda rule into its Code of Criminal Procedure through legislation. This code speaks specifically of the Miranda rule in Article 1.05 which outlines all of the rights that are to be afforded to a person accused of committing a crime in Texas. It provides in part that; "he shall have the right of being heard by himself, or counsel, or both".

Article 1.051 takes that right several steps further. It provides that everyone is entitled to be represented by counsel in any adversarial judicial proceeding that may result in confinement, or in any other proceeding where "the interests of justice require". This right also includes the right to consult in private with counsel sufficiently in advance of the trial to allow the attorney to adequately

prepare. The Texas Commission on Law Enforcement Officers Standards and Education makes it mandatory that the Code of Criminal Procedure be taught in all accredited basic Law Enforcement Academies. Police officers are taught what they must advise suspects prior to questioning, when questioning must cease and other pertinent requirements of the Miranda rule as spelled out by Chief Justice Earl Warren in writing for the majority of the Supreme Court in Miranda v. Arizona.[65]

Local police agencies and sheriff's offices in Texas then in order to ensure compliance with the Miranda rule, had to provide training to all their licensed officers which included both those who had graduated from a police academy and those who had never been required to attend. Local county and district attorneys held training sessions so that officers would not violate the rights of a suspect, thus allowing a guilty person to remain unpunished for a crime committed. Even with all the laws by legislatures, decisions handed down by the Supreme Court and all the training sessions being held at all levels by law enforcement, confusion still exists and serious mistakes are still being made.

CONCLUSION

In view of the enormous complexity of crime and in view of fundamental difficulties that have already emerged in efforts to strike a widely accepted balance between

colliding claims of individuals with social order, this much appears certain; there are undeniable advantages inherent in the legislative process that could be brought to bear on a proximate solution to an insoluble problem. While courts must proceed on a case-by-case basis, legislatures can bring together the diverse facets of the law enforcement technology, they can accommodate sharply competing community interests and values and they do operate within a much larger context of social engineering. Still, it must be observed that legislatures were slow to apply the libertarian value of the Bill of Rights to criminal procedures in general and to the "gatehouse" of the process in particular. Perhaps Congress through empirical investigaiton can discern better means with which to advance the cause of justice than could the Supreme Court. But as with all recommendations to redefine or reinterpret highly treasured constitutional provisions, the burden of proof rests on the innovator. The advocated changes can be reconciled fairly with norms of individual liberty.

Many Americans would insist, it seems, that the understandable frustration and failures encountered in an attempted abatement of control of a contemporary social crisis should not be permitted to serve as apologia for unwarranted or arbitrary exercises of governmental authority.

APPENDIX

TABLE OF CASES

NOTES

NOTES

1. Jesse H. Chopper, Yale Kamisar and William B. Lockhart, The American Constitution: Cases and Materials, 2nd ed. (St. Paul: West Publishing Company, 1967), p. 429; See Ferguson v. Georgia, 365 U. S. 570 (1961), Chandler v. Fretag, 348 U. S. (1954).

2. Houston Chronicle, 13 June 1972, p. 4; this rule has been adopted in Harris County, Texas since 1963.

3. David Fellman, The Defendant's Rights Under English Law (Milwaukee: University of Wisconsin Press, 1966), pp. 80-81.

4. Ibid.; a statute was adopted in 1695 extending the rights of representation by counsel to persons accused of treason, and in 1836 the right was secured for all persons accused of a felony.

5. U. S. Constitution, Amendement 6.

6. C. Herman Pritchett, American Constitutional Issues (New York: McGraw-Hill Book Company, 1962), p. 404.

7. Robert E. Cushman and Robert F. Cushman, Cases in Constitutional Law (New York: Appleton-Century, Inc., 1958), p. 519.

8. Chopper, Kamisar and Lockhart, p. 426.

9. Ibid., p. 427.

10. Ibid.

11. Anthony Lewis, Gideon's Trumpet (New York: Random House, 1964), p. 8.

12. Chopper, Kamisar and Lockhart, p. 428.

13. Stephen D. Smoke, ed. "The Right to Legal Counsel," Judgment (Englewood Cliff, N. J.: National Counsel for the Social Studies, 1966), n.p.n.

14. Ibid.

15. Chopper, Kamisar and Lockhart, p. 428.

16. Philip B. Kurland, ed., The Supreme Court Review, by Jerold H. Israel (Chicago: University of Chicago Press, 1963), p. 232.

17. Chopper, Kamisar and Lockhart, p. 431.

18. Ibid., p. 433.

19. Smoke, n.p.n.

20. Ibid.

21. Ibid.

22. Kurland, pp. 213-214.

23. "Ex-Con Overturns the Law," Life, Vol. 56, June 12, 1964, p. 83.

24. Ibid., p. 84.

25. "Legislative Changes for the Accused," Time, Vol. 85, January 29, 1965, p. 40.

26. Robert E. Cushman and Robert F. Cushman, p. 623.

27. Chopper, Kamisar and Lockhart, p. 441.

28. Robert E. Cushman and Robert F. Cushman, p. 623.

29. Melvin M. Belli, The Law Revolution (Los Angeles: Sherbourne Press, 1968), p. 71.

30. Pritchett, p. 385.

31. Robert E. Cushman and Robert F. Cushman, p. 521.

32. Ibid.

33. Chopper, Kamisar and Lockhart, p. 447.

34. Ibid., p. 446.

35. Ibid.

36. Walter Vincent Schaefer, The Suspect and Society (Evanston, Illinois: Northwestern University Press, 1967), p. 19.

37. Richard J. Medalie, From Escobedo to Miranda: The Anatomy of a Supreme Court Decision (Washington, D. C.: Lerner Law Book Company, 1966), pp. 6-7.

38. Ibid., pp. 7-8.

39. V[ivian] A. Leonard, The Police The Judiciary and The Criminal (Springfield, Illinois: Charles C. Thomas, 1969), p. 128.

40. Marvin Katz and Arlene Spector, Police Guide to Search and Seizure Interrogation and Confessions (Philadelphia: Chilton Company, 1967), p. 7.

41. Medalie, p. 17.

42. Ibid., p. 24.

43. Ibid., p. 27.

44. Belli, p. 84; one of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

45. Custody was defined in the Orozco v. Texas (1969) as meaning at the time incriminating statements are made; Marvin E. Aspen and Fred E. Inbau, Criminal Law for the Police (Philadelphia: Chilton Book company, 1969), p. 110.

46. Chopper, Kamisar and Lockhart, p. 459.

47. "Current Documents: Miranda v. Arizona," Current History, Vol 52, No. 310, June, 1967, p. 362.

48. Medalie, pp. 194-202.

49. Ernest H. Schopler, "The Progeny of Miranda v. Arizona in the Supreme Court," United States Supreme Court Reports: Lawyers Edition. Vol. 46, 1977, p. 320.

50. Medalie, p. 242.

51. Chopper, Kamisar and Lockhart, pp. 469-478.

52. Schaefer, p. 49.

53. Congress and the Nation, Vol. 1, 1945-1964, (Washington, D. C.: Congressional Quarterly, Inc., 1964), p. 804.

54. "Mallory: Right to Arraignment," Time, Vol. 77, August 12, 1958, p. 32.

55. "Rewriting the Rules: Police Interrogation," Newsweek, Vol. 67, June 27, 1966, pp. 21-22.

56. Congress and the Nation, Vol. 2, 1965-68 (Washington, D. C.: Congressional Quarterly, Inc., 1969), p. 95a.

57. "Police, Judges Tell Congress: Criminals Get the Breaks," U. S. News and World Report, Vol. 62, March 27, 1967, p. 44.

58. Congress and the Nation, Vol. 2, p. 323.

59. Ibid.

60. Gary L. Chamberlain, "Crime, Confession and the Supreme Court," America, Vol. 117, No. 1, July 8, 1967, p. 33.

61. Ibid.

62. Theodore L. Becker, ed., The Impact of Supreme Court Decisions (New York: Oxford University Press, 1969), p. 163.

63. Ibid.

64. Fred E. Inbau, "Commentary: Over-Reaction--The Mischief of Miranda v. Arizona," Journal of Criminal Law and Criminology 73 (Summer 1992): 9.

65. Larry Gist, "Right to Counsel, The," Texas Trooper 3 (Summer 1992): 9.

BIBLIOGRAPHY

BIBLIOGRAPHY

Aspen, Marvin E. and Inbau, Fred E. Criminal Law for the Police. Philadelphia: Chilton Book Company, 1969.

Bartholomew, Paul C. Leading Cases on the Constitution. rev. ed. Paterson, New Jersey: Littlefield, Adams and Company, 1961.

Becker, Theodore L., ed., The Impact of Supreme Court Decisions by Richard J. Medalie, Leonard Zeitz and Paul Alexander. New York: Oxford University Press, 1969.

Belli, Melvin M. The Law Revolution. Los Angeles: Sherbourne Press, 1968.

Chamberlain, Gary L. "Crime, Confession and the Supreme Court". America. 117:32-34.

Chopper, Jessie H.; Kamisar, Yale; and Lockhart, William B. The American Constitution: Cases and Materials. 2nd ed. St. Paul: West Publishing Company, 1967.

Congress and the Nation. Vol. 1, 1945-1964. Washington, D. C.: Congressional Quarterly, Inc., 1969.

Congress and the Nation. Vol. 2, 1965-1968. Washington, D. C.: Congressional Quarterly, Inc., 1969.

"Current Documents: Miranda v. Arizona". Current History. 52:359-62, 368.

Cushman, Robert E. and Cushman, Robert F. Cases in Constitutional Law. New York: Appleton--Century, Inc., 1958.

Durham, John. "DA Says Lawyers are Provided in Jail-Term Cases". Houston Chronicle. 71:4.

"Ex-Con Overturns the Law". Life. 56:83-4. June 12, 1964.

Fellman, David. The Defendant's Rights Under English Law. Milwaukee: University of Wisconsin Press, 1966.

Gist, Larry. "Right to Counsel, The". Texas Trooper 3 (Summer 1992): 9-11.

Inbau, Fred E. "Commentary: Over-Reaction--The Mischief of Miranda v. Arizona". Journal of Criminal Law and Criminology 73 (Summer 1982): 797-810.

Katz, Marvin and Specter, Arlen. Police Guide to Search and Seizure Interrogation and Confession. Philadelphia: Chilton Company, 1967.

Knapp, Gary. "Supreme Court's View as to What Constitutes Valid Waiver of Accused's Federal Constitutional Right to Counsel". United States Supreme Courts Reports: Lawyers Edition. 101 (1990): 1017-43.

"Legislative Changes for the Accused". Time. 85:39-40. January 29, 1965.

Mallory: Right to Arraignment". Time. 77:32-33.

Kurland, Philip B., ed. The Supreme Court Review by Jerold H. Israel. Chicago: University of Chicago Press, 1963.

Leonard, Vivian A. The Police the Judiciary and the Criminal. Springfield, Illinois: Charles C. Thomas, 1969.

Lewis, Anthony. Gideon's Trumpet. New York: Random House, 1967.

Medalie, Richard J. From Escobedo to Miranda: The Anatomy of a Supreme Court Decision. Washington, D. C.: Lerner Law Book Company, 1966.

"Miranda v. Arizona Discussed". American City. 82:52.

Paulsen, Monrad G. Equal Justice for the Poor Man. 4th Edition. Public Affairs Pamphlet No. 367. New York: Public Affairs Committee, Inc., 1964.

"Police, Judges Tell Congress: Criminals Get the Breaks". U. S. News and World Report. 62:44-45.

President's Commission on Law Enforcement and Administration of Justice. Task Force Report: The Court. Washington, D. C.: U. S. Government Printing Office, 1967.

Pritchett, C. Herman. American Constitutional Issues. New York: McGraw-Hill Book Company, 1962.

"Rewriting the Rules: Police Interrogation". Newsweek. 67:21-2.

Schopler, Ernest H. "The Progeny of Miranda v. Arizona in the Supreme Court". United State Supreme Court Reports: Lawyers Edition, 46 (1977):903-26.

Schaefer, Walter Vincent. The Suspect and Society. Evanston, Illinois: Northwestern University Press, 1967.

Smoke, Stephen D. ed. "The Right to Legal Counsel". Judgment. Englewood Cliff, New Jersey: National Council for the Social Studies, 1966.