Evolving Due Process and the French Institutionalists: Reflections on the Right to Counsel and the Adamson Dissent

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Can there be objective constitutional analysis? Or does broad constitutional choice, as in due process cases, inevitably rest upon the subjective values of each judge? Vigorous controversy on this point has stirred the Supreme Court itself, as well as its commentators.

The Supreme Court may justify apparent constitutional "change" as correction of long standing error, as if the original intent of the constitutional draftsmen was only now correctly perceived. The historicity of the Court "better informed" has sometimes been viewed as dubious, to use a gentle word. Commentators may renounce the possibility of objective decision, and attribute constitutional change to the different subjective attitude of a newer judge, as in the apparent shift in the Court's position on the scope of legislative investigation after the appointment of Mr. Justice Goldberg.  

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2 See Justice Harlan's dissent in Wesberry, supra note 1. That such debate over ancient history may be irrelevant, or at least not of prime importance, is suggested by Judge Friendly, op. cit. supra note 1, at 70. "... The constitutional ground of Erie must be appraised in the light of the Constitution as it had come to be known by 1938." The notion of development in constitutional doctrine is at least as old as Hurtado v. California, 110 U.S. 516 (1884).

The “classic debate” on the court has abated, but the stillness may portend a drastic restrictive reformulation of due process. The sharp exchange in the literature on “neutral principles” has subsided, but no working consensus has emerged. If we seek a method of objective constitutional analysis, at once principled and purposeful, perhaps it is time to consider a legal way familiar neither to our judges nor to our craft literature: the dynamic institutional approach that Hauriou, Renard and Delos advanced in France.

We set this preliminary study of the judicial method of the French Institutionalists in the concrete context of the recent developments in the Court concerning the right to assistance of counsel in state criminal cases, and of general due process formulation as reflected in renewed interest in the dissent of Mr. Justice Black in Adamson v. California.

The Court’s decision in Gideon v. Wainwright closed the central dialogue on the right to counsel in state criminal cases by holding it absolute. But how the Court reached this result furnishes unusual pathology, and opens up further questions: Is the Court on the verge of repudiating other decisions on the content of due process? If so, how will it rationalize such changes? Will

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7 But see Hauriou, An Interpretation of the Principles of Public Law, 31 Harv. L. Rev. 815 (1918). A translation of selections of the writings of Hauriou, Renard and Delos, and some commentaries on their work, is in process of preparation for publication by the Harvard University Press in its Twentieth Century Legal Philosophy Series, under the auspices of the Association of American Law Schools. See Broderick, Sur une nouvelle edition des institutionalistes francais, 8 Archives de Philosophie Du Droit 277 (1963).

8 A Rockefeller Foundation grant, in legal and political philosophy made it possible for the author to study these jurists in France in 1962-1963.

9 382 U.S. 46 (1947). This dissent, in which Justices Douglas, Murphy and Rutledge (in part), concurred, urged that the effect of the 14th Amendment had been to incorporate in itself the first eight Amendments. See Justice Douglas’ concurring opinion in Gideon v. Wainwright, 372 U.S. 335, (1963), and the following colloquy in the Court on the argument of Malloy v. Hogan, No. 110, on March 5, 1964, reported in 32 U.S. L. Week 3310:

Mr. Justice Black: “You want us to hold that the Fourteenth Amendment does incorporate the first eight Amendments of the Bill of Rights.”

[Counsel for petitioner]: “Only to the extent necessary to decide this case. I am not willing to be a pioneer beyond reasonable distances.”


11 In the Malloy case, supra note 9, petitioner asks that the Court overrule Twining v. New Jersey, 211 U.S. 78 (1908), where the Court refused to find that the 5th Amendment privilege
it now adopt the much rejected suggestion in the Adamson dissent that the 14th Amendment "incorporated" the first eight amendments, making them applicable to state action? How would the Court deal with these questions if it used the French Institutional approach? First, the ingredients of this approach must be briefly set out.

I

The Institutional Approach: Theory

It is the distinctive dynamic\(^\text{12}\) approach of the French Institutionalist jurists, Hauriou,\(^\text{13}\) Renard\(^\text{14}\) and Delos,\(^\text{15}\) that we emphasize here.\(^\text{16}\) The leader of the French school, Maurice Hauriou, was Dean of the Faculté de Droit of Toulouse in the first quarter of the century,\(^\text{17}\) as well as the acknowledged dean of French jurists writing on droit administratif.\(^\text{18}\) Georges Renard during most of his career was professor of public law at Nancy,\(^\text{19}\) where François Geny\(^\text{20}\) against self-incrimination was made applicable to the states by the 14th. On the argument in Malloy Justice Brennan stated that at least four justices were prepared to reverse Twining on this ground. See 32 U.S. L. WEEK 3309. The case was sub judice when this article went to press. See Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L. J. 74 (1963).

\(^{12}\) The contrast is with the concept of institutions as a stationary, ponderous force in society, made popular by Veblen, The Theory of the Leisure Class, and Walton Hamilton, Institution, in the ENCYCLOPEDIA OF THE SOCIAL SCIENCES.

\(^{13}\) Hauriou's chief works are LA SCIENCE SOCIALE TRADITIONNELLE, 1896, twelve editions of LES PRINCIPIES DE DROIT ADMINISTRATIF, two editions of LES PRINCIPIES DE DROIT PUBLIC, and two editions of PRECIS DE DROIT CONSTITUTIONNEL, the second of which (in 1929) was his last work. In addition Hauriou published three volumes of his notes on decisions of the Conseil d'État from 1892 to 1929, and many monographs, the most celebrated of which was LA THEORIE DE L'INSTITUTION ET DE LA FONATION, A CAHIER DE LA NOUVELLE JOURNEE 10 (1925).

\(^{14}\) Renard's leading volume is LA THEORIE DE L'INSTITUTION, 1930. His many other works include LA PHILOSOPHIE DE L'INSTITUTION, 1939, a sequel to the other institutional volume, and his three volume series, INTRODUCTION PHILOSOPHIQUE A L'ETUDE DU DROIT (embracing LE DROIT, LA JUSTICE, ET LA VOLONTE, 1923-24; LE DROIT, LA LOGIQUE ET LE BON SENS, 1925-26; LE DROIT, L'ORDRE ET LA RAISON, 1925-27). These volumes are unavailable for purchase even in France. They have been translated into Spanish; their translation into English would greatly expand our contact with French legal philosophy.

\(^{15}\) Delos' chief works are LA SOCIETE INTERNATIONALE ET LES PRINCIPIES DU DROIT PUBLIC, (1929), with a second edition in 1950 (a volume also much in need of an English translation), and LA THEORIE DE L'INSTITUTION, L'ARCHIVES DE PHILOSOPHIE DU DROIT 97 (1931).

was dean. Joseph T. Delos, long professor of sociology and of law at Lille, and the only one of the three still alive, is now a professor at the Angelicum University in Rome.

Their thought is much too precise and complex, and too diverse at points, to attempt more here than a selection of a few leading themes that characterize their approach to public law. Their basic orientation is sociological, but their constant quest is for a balance between the extremes of Kelsen (formalism) and of Duguit (pure "materialism" or "sociologism"). They conceive justice as the concern of positive law, but urge that the practical concrete answers as to what is just are found in the "social facts"; and man himself, in his natural sociability, is the principal "social fact".

In their view, these social facts tend to structure themselves into institutions under the direction of "ideas of the group" that are continually developing and renewing themselves. For in the social facts the jurist must recognize the primacy of the rational element, the role played by the "idea," which moves the individuals in the way of the institution and which is the vital thing in organized groups. The role of authority is to organize, pursue and elaborate the "idea", but before acting in this way it must "observe", or extract from the social facts, the idea in its present stage of development; and this is the role of sociology. The social facts are not themselves normative, for this role belongs to the "idea", the rational element, and this in turn must be viewed in the light of a few basic critical principles furnished by moral and social philosophy. The excellence of a society will ultimately depend upon the quality of these principles. Hauriou believes that observation of the development of civilized society confirms that such principles include the values of social order, justice and liberty, and recognition of the need to balance power

Readers by Judge Cardozo's The Nature of the Judicial Process, 1921, in which Gény was cited more than any other single author. See Wortley, François Gény, in Modern Theories of Law, op. cit. supra note 19, at pp. 139-159.

Hauriou's comments on Kelsen may be found in the Preface to his Précis du droit constitutionnel, (2d ed., 1929), and on Duguit in his classic essay, La théorie de l'institution et de la fondation, op. cit. supra note 13, and in almost every one of his general textual works.

Hauriou pointed out that "institution" is taken in two different senses in the common use of the word. The first, in which he was almost exclusively interested, in the sense of organized groups; he called these "institution-persons" that enjoyed independent existence. The second was in the sense of an objective social factor of standing and acceptance that inhered in some person or group; these he called "institution-things", and he identified the most characteristic example of what he had in mind, the legal rule.

The definition that Hauriou gave to "institution" is widely cited:

... An institution is an idea of a work or enterprise that is realized and that endures juridically in a social milieu; for the realization of this idea a power is organized that equips it with organs; and among the members of the social group interested in the idea manifestations of communion occur that are directed by the organs of the power and regulated by procedures.

Hauriou, La théorie de l'institution et de la fondation, op. cit. supra note 13, at p. 10. Note that the "institution" is not a mystical personified entity, but the "idea" itself, in which the members share ("communion").
with power in view of the history of human weakness here, in Lord Acton's sense.  

Four basic elements may be singled out for the purpose of relating the thought of Hauriou, Renard and Delos to our constitutional law. (1) This institutional approach is purposeful, intent upon achieving human group aims; but these elaborated purposes, or "ideas", are not static, but rather in dynamic process of development. Any conscious redirection must commence from realistic evaluation of the contemporary situation: not only the practice in a society, but also its basic "ideas". For these "ideas" frequently are loftier than the practice. (2) The juridical rule is no mere formal deduction, nor a subjective end product of a judge; the rule and social reality are intimately interrelated; in fact, priority in time belongs to the social reality from which the rule proceeds. Delos makes this point clearly:

An important change has been introduced into the study of the juridical rule. It has ceased to be studied independent of its social matter, as if the juridical form was the whole of the rule of law, its very essence. . . . The rule of law has become again in the eyes of jurists what it is in fact: a social form . . . taking positive juridical form.

(3) Law is an art of achieving accepted social objectives. Yet it operates under certain scientific conditions. There is urgent need properly to understand the true objects and functions of law, politics, economics, sociology, psychology and the other social sciences. The practical influence of one upon the other is certain, but each has its distinct object and proper method. The jurist must be aware of these distinctions and make use of these other social sciences in his work. (4) At the peak of any social ordering are certain fundamental moral presuppositions that eventually leave their mark on the final product. Many of these, urge the Institutionalists, can be verified by close observation of the reality of man living in society. Delos extends this notion to a revival of objective natural law:

The return to reality extends to the study of natural law and justifies the revival of favor it now rightly enjoys, although it has not entirely recovered from the discredit into which it was plunged by an abstract and notional conception. Natural law rests upon a consideration of human nature, and we are finally convinced, it seems, that human nature is not first of all a notion or a concept but a reality.

24 "Power corrupts; absolute power corrupts absolutely."
25 In Renard's phrase, the institution, that is, "the idea is only a theme to be developed."
27 This basic notion that law is not primarily logical and deductive, but practical and purposeful Hauriou takes from the classical legal tradition going back to Aristotle and the Roman jurisconsults. Hauriou frequently cited Celsus who called law "Ars aequi et boni."
It resides in each individual; it is what is most real and most living in each one, the principle of all the instincts, vital forces, intellectual, moral or physical needs, that give birth to the life of society and provide it with its ends.29

Can this institutional approach help us to find a measure of objectivity in constitutional development? The first consideration is what the Court has been doing in due process interpretation; the second is whether the Institutional approach would be useful in formulating objective working rules. Concretely, this study begins by analyzing the development of the right to counsel in state criminal cases, down to its full-fledged recognition in Gideon v. Wainwright.30 This case prompts consideration of the various formulae used by the Court to ascertain the content of 14th Amendment due process: those of the past; the prevailing Palko31 formula; and alternatives presently under consideration, such as the “total incorporation” doctrine of the Adamson dissent,32 and the “Brennan doctrine”33 of “selective incorporation” of specific provisions of the Bill of Rights into the 14th Amendment due process clause. Finally, comes the question whether the Institutional approach itself engenders a purposeful and objective interpretation of due process.

II

THE RIGHT TO COUNSEL

Twenty years is not a long life for a constitutional rule, but that life span of Betts v. Brady34 was longer than many.35 The rule was conceived in violent controversy, lived in unceasing combat and died of sheer exhaustion. Its life history is worth poring over; but the autopsy of a constitutional rule is a painful process.

The 6th Amendment reads that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”36 Not until Powell v. Alabama37 did the Supreme Court agree that such a “right” was protected against state action by the 14th Amendment. The in-

29 Delos, La théorie de l'institution, op. cit., supra note 14, at p. 152.
30 372 U.S. 335 (1963). Many other areas might just as well have been selected; for instance “equal protection” and education, the relation of the 4th and 5th Amendments and the developing national right of privacy.
35 For instance, Wolf v. Colorado, 338 U.S. 25 (1949) left to the states whether or not to receive evidence that had been unconstitutionally seized, a rule that survived only 12 years—until Mapp v. Ohio, 367 U.S. 643 (1961). See also Ker v. California, 374 U.S. 23 (1963).
36 Cf. Freund, ON UNDERSTANDING THE SUPREME COURT, 35, 1949: “It seems more nearly true to regard that [6th] Amendment as having simply conferred the right of the accused to employ counsel—a right which of course was by no means assured prior to the adoption of the Constitution.”
37 287 U.S. 45 (1932).
dications prior to Powell had looked the other way. For Hurtado v. California,38 in other respects strong on affirmative indications as to the content of due process, had stated that rights specifically treated in other sections of the Bill of Rights were not to be considered duplicated in the due process clause of the 5th, or 14th. The Powell decision, (the Scottsboro case), disregarded this criterion of Hurtado. Six years later, in Johnson v. Zerbst,39 a non-capital counterfeiting case, the Court held, for the first time, that the guarantee of right to counsel in the federal courts applied to all cases, capital and non-capital, and to all defendants, wealthy or indigent, as a very basis of jurisdiction.

A. The Saga of Betts v. Brady

The question whether an absolute right to counsel, as construed in the Zerbst case, applied in a state non-capital case40 was asked in Betts v. Brady.41 The Court’s answer was “No.” It provoked a strong reaction.42 Betts was accused of robbery; he did not waive counsel, but pleaded not guilty and examined witnesses. Maryland practice did not require counsel in such cases and the Court, speaking through Mr. Justice Roberts, found this no basis for reversal:

Due process of law . . . formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial 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.43

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38 110 U.S. 516 (1884).
39 304 U.S. 458 (1938).
40 For Justice Sutherland’s reflections on the implications of his opinion in Powell v. Alabama, 287 U.S. 45 (1932), see Grosjean v. American Press Co., 297 U.S. 233, 243 (1936). He recalls that “we concluded” in Powell that there were certain rights which were safeguarded against the states by the due process clause” and “Among them the fundamental right of the accused to aid of counsel in a criminal prosecution.”
41 316 U.S. 455 (1942).
42 The following comment by Dean Griswold and Benjamin Cohen (letter to New York Times, August 2, 1942) was included with the Douglas dissent in Bute v. Illinois, 333 U.S. 640, 677 (1948):
“The majority of the majority of the Supreme Court which rendered the decision in Betts v. Brady would not wish their decision to be used to discredit the significance of that right and the importance of its observances. Yet at a critical period in world history, Betts v. Brady dangerously tilts the scales against the safeguarding of one of the most precious rights of man. . . . The right to counsel for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law.”
43 316 U.S. 455, 462 (1942).
If the case had come up from a federal court, under the 6th Amendment as interpreted by Zerbst, reversal would have been mandatory. But, the Court pointed out, "The Sixth Amendment of the national Constitution applies only to trials in the federal courts." Powell was distinguished as a capital case. The Court announced it would appraise case-by-case the consequences of denial of counsel in state non-capital cases. Only where unfairness at the trial was apparent would it grant constitutional relief. Justices Black, Douglas and Murphy dissented with the comment that even "under the prevailing view of due process" as stated in the opinion of the Court, the facts called for reversal.

In the course of the case-by-case process of inclusion and exclusion following Betts, the Court gradually underlined certain factors as significant in determining whether there was a constitutional right to counsel. In Uveges v. Pennsylvania a 17-year old defendant had pleaded guilty to burglary and been sentenced to twenty to forty years. In the face of uncontested evidence that threats by the district attorney had preceded the plea of guilty, the Court reversed. Due process had been violated by the unfairness resulting from absence of counsel, and the defendant's failure to ask for counsel was no bar to relief. The Court took the occasion to summarize criteria it had developed for reversal under the Betts rule:

Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offenses charged and the defense thereto render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . .

In three cases subsequent to Uveges constitutional violation was again found, but the Betts v. Brady policy of case-by-case review was unqualified by a straightforward general exception until Chandler v. Fretag, where a potential fourth offender (charged with a three dollar larceny), facing a mandatory life term as an habitual criminal, was denied opportunity to employ counsel.

Chandler produced a general rule that there was an inviolable constitution-
al right to retain a lawyer in any case, capital or not. When considered in connection with *Griffin v. Illinois,* this decision presented a challenge to the *Betts* doctrine that was apparently not fully appreciated at the time.

*Griffin* involved the question of appeal under Illinois statutes, which because of the requirement of a trial transcript was not realistically available to indigents. The Court recognized that due process did not guarantee a right of appeal, yet where a state permits appeal it must be fairly available to all—even though this may mean that the state must furnish the indigent appellant a free trial transcript. Mr. Justice Black, for four members of the five-man majority, based his conclusion on both due process and equal protection. Mr. Justice Frankfurter, furnishing the controlling vote, limited his assent to the equal protection ground. Was the issue under *Betts* now narrowed? In all cases, capital and non-capital, a defendant in the state courts who could pay was entitled to counsel (*Chandler*). An indigent was entitled to equal treatment on matters of appeal (*Griffin*). What satisfactory rational grounds now remained for denying a general right to counsel to an indigent at this trial?

The last favorable reference to *Betts v. Brady* in a prevailing opinion of the court was in *Cash v. Culver.* A twenty year old defendant had been represented by counsel at his first trial for robbery, which ended in disagreement. Unable to pay for counsel at a second trial called on one-day notice, he asked for court appointment of counsel. This was denied. After conviction, he sought reversal on due process grounds. The setting was available for the *coup de grace* of *Betts.* But the court was not ready. A unanimous court reversed on the *authority* of *Betts v. Brady.* In the opinion of Mr. Justice Stewart there is no inkling of impending developments.

In the 17 years that have passed since its decision in *Betts v. Brady* . . . this court by a traditional process of inclusion and exclusion has indicated the factors so apt to result in injustice as to violate the 14th Amendment.

He quoted the criteria of *Uveges* and stressed that the dominant one of them here in *Cash* was the complexity of the issues in the case.

The various shortcomings revealed in the state cases that reached the Court underlined the question originally asked by Mr. Justice Douglas in his *Bute v. Illinois* dissent:

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54 *On Griffin's implications see Annot., 55 A.L.R. 2d (1957) and 2 L. Ed. 2d 1644 (1958).*
55 *Griffin v. Illinois, 351 U.S. 12, 17 (1956).* "... our own constitutional guarantees of due process and equal protection both call for procedure in criminal trials which allow no invidious discrimination between persons and different groups of persons."
56 *Id. at 21.*
59 See text accompanying note 46, *supra.*
Of what value is the constitutional guaranty of fair trial if an accused does not have counsel to advise and defend him?61

The cumulative force of seven cases in the 1959 and 1960 terms intimated that the implications of Chandler and Griffin had ripened.

Kinsella v. United States62 was not a 14th Amendment case, but one concerning overseas court martials for civilians. Nevertheless, it was a straw in the wind. The government invited the Court to extend the Betts distinction between capital and non-capital cases to such cases.63 The Court declined, although Mr. Justice Frankfurter in his dissent pressed for the extension of the Betts "fair trial doctrine" to this new area.

In Hudson v. North Carolina,64 the Court, without mentioning Betts (although Mr. Justice Frankfurter was in the majority), found "circumstances . . . where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment", for when defendant's co-defendant pleaded guilty during the trial in the presence of the jury, problems were raised "requiring professional knowledge and experience beyond a layman's ken." Justices Clark and Whittaker exploded in dissent:

The opinion of the court bids fair to "furnish opportunities hitherto uncontroverted for opening wide the prison doors of the land."65

They saw grave implications in the decision: "Without so much as mentioning Betts v. Brady [which they viewed as controlling] . . . it cuts serious inroads into that holding."66

In McNeal v. Culver67 the following term, a unanimous Court set aside the conviction of an indigent defendant in a non-capital case. Mr. Justice Whittaker, writing for the Court, made no reference to Betts v. Brady, citing Cash v. Culver68 as controlling. Justices Douglas and Brennan, concurring, called for the reversal of Betts v. Brady. They attached to their opinion a supplement to the appendix Mr. Justice Black had filed with his dissenting opinion in Betts. This supplement showed that the right to counsel was now recognized in thirty three states in both capital and non-capital cases.

Reynolds v. Cochran69 was a unanimous decision reversing, for denial of
counsel, petitioner's conviction as a second offender in Florida, on the authority of Chandler (in turn cited by Mr. Justice Black, writing for the Court, as depending on Powell).

In Newsom v. Smyth the implications of Griffin were brought squarely before the Court. Petitioner had been represented by counsel at his trial, convicted and sentenced to life imprisonment. The Virginia court, specifically noting the question whether Griffin required counsel for an indigent defendant on appeal, had denied the petition for habeas corpus. The Supreme Court conceded that the case had been brought up precisely to consider the right to counsel on appeal question but, in a curious per curiam opinion, dismissed the appeal for failure to present a federal question. Justice Douglas, for himself, Chief Justice Warren and Justice Black, wrote in dissent that the counsel "Question . . . is present and ripe for decision."

Ferguson v. Georgia concerned a Georgia statute that made a defendant in a criminal case incompetent to testify under oath. It was a relic that existed in no other common law jurisdiction. A companion statute permitted him to make an unsworn statement, but without aid of counsel in its preparation. Defendant's counsel tried to question him at his murder trial despite the unsworn statement statute. The Georgia court, standing on the statute's restriction, refused. After conviction defendant sought reversal, arguing that the refusal of the Georgia court to permit his counsel to interrogate him constituted unconstitutional denial of right to counsel. The Court was in agreement that the conviction must be reversed. Justice Brennan for the majority based his opinion upon right to counsel; Justices Frankfurter and Clark preferred to ground reversal upon invalidation of the incompetency statute. Justice Brennan went out of his way to claim for the case a place in the retreat from Betts v. Brady:

Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a non-capital offense, or represented by appointed counsel. (Chandler v. Fretag).

Events now moved swiftly. In Carnley v. Cochran, a defendant convicted after a jury trial under the Florida child molesting statute claimed denial of right to counsel. All seven justices that participated voted for reversal. Four
were on record in favor of discarding the Betts v. Brady rule, but one of them, Justice Brennan (in the absence of Betts' chief supporter, Mr. Justice Frankfurter, because of illness) declined to join\(^7\) the Chief Justice and Mr. Justice Douglas in Mr. Justice Black's opinion that would overrule Betts v. Brady.

The interment was merely deferred. In the same term the Court handed down an order granting an in forma pauperis motion and petition for certiorari and requested briefing and oral argument on the specific question "Should this Court's holding in Betts v. Brady, 315 U.S. 455, be reconsidered?" Gideon v. Cochran.\(^8\) On March 18th, 1963, the Court answered "yes" and Betts v. Brady was overruled.\(^9\) Justices White and Goldberg were now on the court in place of Justices Whittaker and Frankfurter, two Betts supporters. But it was not a question of mathematics. There was no dissenting voice. The Court's opinion was written by Mr. Justice Black. Justices Clark and Harlan added concurring opinions of their own, but only Harlan seemed to half hold back a tear. Mr. Justice Douglas joined in the Court's opinion, but in a separate one indicated mild chagrin that the Court had not taken the occasion to adopt the blanket formula of the Black-Douglas dissent in Adamson v. California\(^1\) that would incorporate in the 14th Amendment the specific terms of the first eight Amendments.

B. Gideon v. Wainwright

The indigent defendant in Gideon had been denied counsel in his non-capital case as Florida law specified that he should be. Charged with entering a poolroom with intent to commit a misdemeanor, he had conducted his own trial. He was convicted and sentenced to serve five years. Justice Black found the facts and circumstances here so akin to Betts, so devoid of special circumstances, that "we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel."\(^2\) Accordingly, he added, "Upon full reconsideration we conclude that Betts v. Brady should be overruled."\(^3\)

a. The Black Opinion

Justice Black was boundless in his victory. The 6th Amendment spoke clearly enough. Federal courts had construed it in straightforward fashion to mean

\(^8\) 370 U.S. 908 (1962).
\(\text{Id.} 332 U.S. 46 (1947).\)
\(\text{Id. at 339:} \text{"Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman." Id. at 337.}\)
\(\text{Id., at 339.}\)
counsel must be furnished unless the right is intelligently waived. Betts, as a defendant, had argued that "this right is extended to indigent defendants in state courts by the Fourteenth Amendment." The Betts court, had based its holding that the 6th Amendment "laid down no rule of conduct of the state" upon "historical data" that there was no such practice prior to the adoption of the Bill of Rights, or, indeed, in "the judicial history of the states to the present date." The Betts court did not, then, view the appointment of counsel for an indigent defendant as "a fundamental right, essential to a fair trial." But there was ample precedent available to the Betts court, urges Justice Black, to the effect "that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process clause of the Fourteenth Amendment." Black cites here Powell v. Alabama (6th Amendment), the 1st Amendment free speech-press-assembly cases that followed in a steady stream after Gitlow v. New York, the long-standing 5th Amendment "in-corporation" by the 14th as to "just compensation" and the more recent "in-corporations" concerning the 4th and 8th Amendments. Betts was right, says Justice Black, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. Betts was "wrong", adds Black, in concluding that the 6th Amendment's guarantee of counsel is not one of these fundamental rights. Powell had, ten years before, "unequivocally declared that 'the right to the aid of counsel is of this fundamental character'". Black concedes that Powell (a capital case) had "limited its holding to the particular facts and circumstances of that case." But this is a frequent mannerism of this Court. Still, in Grosjean v. American Press Co. and in Johnson v. Zerbst, the Court stressed the fundamental nature of this constitutional right to counsel. The true posture of the situation, Black concludes, is that the Court in Betts had "made an abrupt break with its own well-considered precedents."

In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.

Justice Black next turns from "history" and the "ancient" Powell learning
of 1932 (Betts arrived in 1942), to "reason and reflection," and to the "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Justice Black points to the availability of counsel to governments prosecuting and to monied defendants defending. Whatever the rule elsewhere, a lawyer in our country is not a luxury but a necessity. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Mr. Justice Black then urges that from the beginning our polity has "laid great emphasis on procedural and substantive safeguards designed to assure fair trials . . . ." But "This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." The telling passage of Mr. Justice Sutherland on the feebleness of a defense without counsel is then invoked, and the Betts court is accused of departing from this "sound wisdom." Black concludes with a neat statistic. Only three states at the Court argument (as amici curiae) had asked that Betts be "kept intact." Twenty two argued that Betts was "an anachronism when handed down."

b. The Concurring Opinions

Justice Clark sees Gideon simply as erasing a distinction between capital and non-capital crimes "which has no basis in logic" and an increasingly eroded basis in authority. Justice Harlan insists that Betts merely urged that there might be "special circumstances" in non-capital cases where lack of counsel might prejudice a "fair trial". No case since 1950, notes Justice Harlan, failed to reveal such "special circumstances". Case after case found new sets of "special circumstances". "In truth," he concludes, "the Betts v. Brady rule is no longer a reality."

C. Reprise

The Gideon doctrine had emerged only gradually. The 6th Amendment itself originally envisaged merely the right to engage counsel. Not until Powell in 1932 had a constitutional right to appointed counsel been recognized in even a capital case. Johnson v. Zerbst, six years later, declared that this right in the

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95 Ibid.
96 Ibid.
97 See text accompanying note 139, infra.
federal courts extended to non-capital cases as well. But the reach of *Powell* in the state courts was limited by *Betts* to capital cases, although *Betts* would allow relief to defendants even in non-capital cases where “special circumstances” were shown. *Chandler* then made it clear that a defendant who could pay for counsel in a state court was entitled to have one, whether the case was capital or not. *Griffin* found a disparity in appellate opportunity keyed to affluence or indigence constitutionally odious. Meanwhile, through the years, the Court found category after category of “special circumstances” that made denial of counsel fatal. The states themselves turned against the *Betts* rule. Noble or ignoble, the experiment with *ad hoc* judicial supervision had failed. *Betts* was obviously non-viable. *Gideon* merely ratified its death.

D. Gideon’s Limits and Implications

Whether *Gideon* extends to all criminal trials, or to felonies alone or to any crime that carries “the possibility of a substantial prison sentence” is still open. The right to counsel does extend to the “first appeal” as a matter of “equal protection”. The exact point at which it comes into being is still being explored. Current case law suggests the line as being from arraignment in the event of a capital offense, and after indictment in a non-capital offense. But the working tool seems to be: “at any ‘critical’ stage of the proceeding”, whatever that may prove to be. Another problem to be worked out is the extent of retroactivity to be given to *Gideon*. Justice Clark, writing on this point, recalls that *Griffin* had been given retroactive effect by the Court. But the situations are not at all on all fours.

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104Douglas v. California, 372 U.S. 353 (1963), decided the same day as *Gideon*.
107Clark, *The Sixth Amendment and the Law of the Land*, 8 St. Louis U.L.J. 1, 9 (1963): “... It may be that the question would be governed by our opinions holding that the right of an indigent to a sufficiently full record of the proceedings is retrospective.” The leading case is *Eskridge v. Washington*, 357 U.S. 214 (1958).
108A reversal in the counsel situation would involve freeing the prisoner when the statute of limitations may have run; in the *Griffin* type situation he remains a prisoner, of course, during appeal. There was some relief open under *Betts*, i.e., if special circumstances existed, though this is now seen as inadequate. Two recent Court of Appeals cases have held that *Gideon* must be applied retroactively, *Durocher v. LaVallee*, —— F. 2d —— (2 Cir., March 26, 1964), 32 U.S. L. Week 2503, and *Craig v. Myers* —— F. 2d ——, (3 Cir. April 2, 1964), 32 U.S. L. Week 2519. The Second Circuit case, heard en banc, produced the dictum that the question of retroactive application of *Gideon* was no longer open after *Doughty v. Maxwell* —— U.S. ——, 84 S. Ct. 702 (1964). But *Doughty’s* two-sentence per curiam opinion cites first *Carnley v. Cochran*, 369 U.S. 506 (1962) (where Justice Black concurred that the appeal was sound “even under the constitutional doctrine announced in *Betts v. Brady*”); only in second place did the *Doughty* court cite *Gideon*. The *Gideon* retroactivity question remains open in the Supreme Court.

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Gideon v. Wainwright bears comparison with the landmark decision of two years before, Mapp v. Ohio.¹⁰⁹ In Mapp the Court held that all evidence obtained by illegal search and seizure in violation of the federal constitution is inadmissible in trials in state courts. In Wolf v. Colorado¹¹⁰, only twelve years earlier, the Court had held that the 4th Amendment prohibition of unreasonable searches and seizures was “implicit in the concept of ordered liberty and thus applicable against the states.” But it had declined to impose on the states the federal Weeks¹¹¹ rule against using at trials the fruits of an illegal search. As in Betts, the Court applied to state action something less than the full federal rule. Mapp changed Wolf in the same spirit that Gideon changed Betts. How do these two recent cases fit into a reconsideration of the general formulae used by the Court in due process interpretation? To this subject the inquiry now turns.

III

THE DUE PROCESS FORMULAE

From the Magna Carta at Runnymede in 1215 (“the law of the land”) to the Fifth Amendment in 1791 (the first use of the term due process of law in an American constitution) is a direct line. Until Barron v. Baltimore¹¹² more than a suspicion existed that due process was a limitation upon state action. That case settled it was not. Not until 22 years later did the Supreme Court furnish a formula to measure due process. The history of the Court’s efforts to identify the general content of due process may be told in terms of four landmark cases: Murray, Hurtado, Twining and Palko, and in that order.

Murray

In the first major pronouncement, Murray v. Hoboken Land and Improvement Company,¹¹³ two tests were adopted: (1) the terms of the constitution itself; (2) “old process”, “those settled usages and modes of proceeding existing in the common and statute law of England before the immigration of our ancestors,” provided not “unsuited” to our need.

Hurtado

The next formulation of criteria awaited the post-Civil War amendments that subjected state action to due process safeguards. Davidson v. New Orleans¹¹⁴

¹¹² 92 U.S. (7 Pet.) 245 (1883).
¹¹³ 59 U.S. (18 How.) 272 (1855).
¹¹⁴ 96 U.S. 97 (1877).
produced a phrase of humble sagacity that is still occasionally met in the search for "the intent and application" of due process: "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."\textsuperscript{115} But \textit{Hurtado v. California}\textsuperscript{116} is the second landmark in due process formulation. Mr. Justice Black cites \textit{Hurtado} in \textit{Gideon} only to note that one of its suggested formulations proved to be a "dud".\textsuperscript{117} But \textit{Hurtado}'s claim to attention lies elsewhere, and it is still considerable.

The defendant in \textit{Hurtado} had been convicted after indictment by information rather than by the grand jury process that had been \textit{de rigeur} in England at the time of our breakaway. Defendant contended that this process violated the 14th Amendment, since \textit{Murray} had said due process is "old process".

Mr. Justice Matthews for the Court rejected this restrictive view, insisting that the basic constitutional guarantees do not merely consecrate "particular forms of procedure", but constitute "the very substance of individual rights to life, liberty and property."\textsuperscript{118} These rights consist in "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."\textsuperscript{119} They are not rigidly frozen but "developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government."\textsuperscript{120} The judicial technique for noting this development is rich in its resources: history, comparative law, natural law (in the sense of "justice—\textit{suum cuique tribuere}"), and experience.\textsuperscript{121} The final objective is always "furtherance of the general public good."\textsuperscript{122}

Respect was owed to the process and laws of the states. Due process in the 14th Amendment "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State" operating...
within the bounds of the "fundamental principles of liberty and justice." The "greatest security" for these principles "resides in the right of the people to make their own laws, and alter them at their pleasure."\textsuperscript{123}

Justice Matthews went on to the counterbalance to state action in the constitutional scheme. "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint." Justice Matthews stressed the ultimate rational foundation of all law. "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power."\textsuperscript{124}

The chief early concern in due process litigation was with the adequacy of notice and hearing. The Supreme Court's hesitation to interfere with any state legislative action, as typified by the Slaughter-House Cases,\textsuperscript{125} Hurtado itself, and Munn v. Illinois\textsuperscript{126}, was replaced by a new judicial self-assertiveness. The vigorous Field dissents\textsuperscript{127} in the name of "natural justice" and "liberty of contract" became majority doctrine.\textsuperscript{128} A new chapter of due process was sketched out and written, substantive due process striking at state economic legislation. It was the era of judicial supremacy in the economic area. Parallel was a resolute judicial self-abnegation in the field of personal liberties.

**Twining**

The next landmark was *Twining v. New Jersey.*\textsuperscript{129} New Jersey practice permitted court comment on a defendant's failure to take the stand. Defendant attacked this provision as a violation of the privilege against self-incrimination, which he asserted to be guaranteed by the 14th Amendment. In uphold-
ing the New Jersey practice, Mr. Justice Moody outlined three complementary tests. Due process was: 1) Old process (*Murray*); but 2) it was not every old process (*Hurtado*); 3) old or new, the Court would sustain against state action only those processes which constituted "established principles of private rights and distributive justice," "immutable principles of justice which inhere in the very idea of free government," "fundamental rights."

Without rejecting anything that had been said in *Hurtado* (in fact, purporting to follow that case), *Twining* gave the doctrine a new emphasis. Not every commonly accepted process was contained within the protected sphere—only rights that were clearly "fundamental." Justice Moody's opinion laid its chief stress upon the expression of popular will through state action. The judicial veto, he inferred, would be sparingly employed—at least within the sphere of procedural due process.

The years following *Twining* found economic substantive due process still ascendant, reaching its high water mark in spirit in the 5th Amendment District of Columbia minimum wage case, *Adkins v. Children's Hospital*. A new and startling development in the 14th Amendment due process was the extension of that Amendment to include the substantive free speech and free press guarantees mentioned in the 1st Amendment.

**Powell Again**

In *Powell*, as we have seen, the issue was posed whether the "right to assistance of counsel," guaranteed in those words against the federal government by the 6th Amendment, was protected against state action under the 14th. The Court conceded that counsel was not guaranteed at common law at the time of the enactment of the Constitution. The *Murray* formula, although it had been used by the Court recently enough for Mr. Justice Stone to have been the successful counsel, did not present a formidable hurdle.

The 6th Amendment expressly mentioned "assistance of counsel"; it was obviously then not included within due process in the 5th Amendment. But this mechanical exclusion test of *Hurtado* was no bar. It had been found want-

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211 U.S. 78 (1908).
210 Id. at 101.
211 Id. at 102.
212 Ibid.
213 261 U.S. 525 (1923).
215 287 U.S. 45 (1932).
All nine justices (including Justice Butler, who dissented) agreed in Powell that effective "assistance of counsel" was required by 14th Amendment due process in that capital case.

In his opinion in Powell, holding in that capital case that there had been a denial of "Assistance of Counsel" which violated the due process protection of the 14th Amendment, Justice Sutherland had conceded that under the Murray formula an affirmance of the conviction would have been required, for there had been no right to counsel in felony cases in 18th century England. The mechanical rule aspect of Hurtado would also have gone against relief. But this was a "rule of construction," and not without exceptions, as the recent recognition of freedom of speech, press and assembly protection against state action by the 14th Amendment had made clear. Twining had recognized the evolving concept of "fundamental rights" that Hurtado had first embraced. It was in this spirit that Powell was decided.

Mr. Justice Sutherland's opinion in Powell strongly stressed the pressing relevance of assistance of counsel to a fair trial:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prove his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

But the Court expressly confined itself to the case at hand, "a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like." In such a case at least, due process is violated if a state court does not make effective, timely assignment of counsel.

**Palko**

The next major formulation of due process after Twining was Mr. Justice Cardozo's effort in Palko v. Connecticut. It has since 1937 been the prevailing standard in the Court, although its future standing is in doubt.

Palko was indicted for 1st degree murder. He received a 2nd degree con-
conviction and a life sentence. On appeal under a permissive statute, the state won reversal. The new trial brought a 1st degree conviction and death sentence. Palko appealed. In affirming, against a claim of alleged double jeopardy, Justice Cardozo found his way prepared by Hurtado, Twining, Powell, and the 1st Amendment cases. In the "1st Amendment cases" there had been no automatic absorption:

If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.

Was this such a fundamental right? There might be cases on both sides of the line. But there was also a unifying, rational principle that would place them here or there. Was this statute, this decision to be set aside? Before going on, the Court needed answers to preliminary questions. Did the statute or decision defile immunities which were "implicit in the concept of ordered liberty" ("of the very essence of a scheme of ordered liberty")? Did it subject defendant "in the particular situation" to "a hardship so acute and shocking that our polity will not endure it?" And (citing the Hebert dictum), "Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'?" Did the state's criminal appeal in Palko violate such a principle?

The answer surely must be "no". A reciprocal privilege, subject at all times to the discretion of the presiding judge . . . has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

The fixed historical measure of due process suggested by Murray had been concerned only with procedure. Hurtado opened the way to a flexible approach. At the time of Hurtado emphasis was still on procedural due process, predominantly the right to notice and a fair hearing. There followed the rumblings in the Field and Harlan dissents of the forthcoming judicial activism in the substantive economic field. Twining may have been designed as a brake on the Court in both fields. If so, it did not succeed. The high stand-

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141 Justice Cardozo's chief reliance was on Twining v. New Jersey, 211 U.S. 78 (1908). He found that the Twining opinion had recognized "that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action . . . not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law". Justice Cardozo cited this passage from Twining (211 U.S. 78, 99) in his note 4.


143 Hebert v. Louisiana, 272 U.S. 312 (1926) (McReynolds, J).

ard the Twining opinion had set—of “fundamental rights”—was held satisfied by guarantees of freedom of speech-press-assembly, which were protected as against federal action by the 1st Amendment. It seemed to some, from Powell and Palko, that the high standard had been met by “right to assistance of counsel.” But Betts, as has been seen, checked that impression so far as non-capital cases were concerned. And this check did much to provoke the Black dissent in Adamson, the opening gun in the “classic debate.”

IV

BEYOND PALKO: THE ADAMSON DISSERT AND THE “CLASSIC DEBATE.”

A. The Adamson Dissent

The basic division in the Court in the right to counsel cases had been between those Justices who insist upon a case-by-case appraisal to determine whether a “fair trial” had been vitiated by the absence of counsel, and those who saw an absolute, unqualified right to counsel in any serious case. This latter position was merely a particularized instance of a suggestion twice made by the first Justice Harlan that the 14th Amendment had incorporated the first eight Amendments of the Constitution, that it specifically secured against the states those rights which the federal Bill of Rights had secured against federal action, that is, that it had been designed to reverse Barron v. Baltimore.

This contention was revived again by Justice Black in his dissenting
opinion in *Adamson v. California* in which Justice Douglas concurred in its entirety, and Justices Murphy and Rutledge in substantial part. The *Adamson* dissent, though unsuccessful in persuading a Court majority, provoked what Justice Brennan has referred to as "the classic debate." It may prove to be more than a bit of recent history for it appears that at least four of the present justices have not rejected the Black position.

The cast of Justice Black's thinking is nowhere more sharply set than in his concurring opinion in *International Shoe Co. v. Washington*. In *International Shoe*, Chief Justice Stone for the Court wrote that the due process test of the jurisdiction of a state to tax foreign corporations was "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." The Court was unanimous in result, but Justice Black saw in the new formula an instance of judicial tentacles reaching out where they did not belong. Procedurally, he would dismiss the appeal as unsubstantial and "decline to formulate broad rules as to the meaning of due process" before constitutional necessity demanded. He had more to say:

I believe that the federal constitution leaves to each state, without any "ifs" or "buts", a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those states. . . . I think it a judicial deprivation to condition its exercise upon this court's notion of "fair play", however appealing that term may be.

The thrust here was clearly against a revival of substantive economic due process. The next passage makes this abundantly clear:

There is a strong emotional appeal in the words "fair play," "justice" and "reasonableness". But they were not chosen by those who wrote the original Consti-

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150 22a. In *Poe v. Ullman*, 367 U.S. 497, 509 (1961). Justice Douglas indicates a modification of his agreement with Justice Black in *Adamson* to the extent that he no longer thinks that the 14th Amendment is "restricted and confined to" the content of the first eight Amendments. He cites the recent recognition of a "right to travel" in *Kent v. Dulles*, 357 U.S. 116, 125-7 (1958). He adds that "Liberty is a conception that sometimes gains content from the emanations of other specific guarantees (NAACP v. Alabama, 357 U.S. 449, 460 (1958) or from experience with the requirements of a free society." *Id.* at 517.


152 326 U.S. 310, 322 (1945).

153 *Id.* at 324.
tution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected representatives."

Justice Black wished judicial withdrawal from the field of liberties to be all but complete, beyond a mere mechanical vindication of rights that had already been recognized. To allow a wider scope was to invite their curtailment.

Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion, and the right to counsel.

He conceded frankly that the 1st Amendment liberties had themselves been drawn into 14th Amendment protection:

... only because the Court, as then constituted, believe[d] them to be requirements of fundamental justice.

The threat remained of withdrawal of this protection of speech "under the same rule" by "another Court, with a different belief as to fundamental justice," which could:

... at least against state action, completely or partially withdraw Constitutional protection from these basic freedoms, just as though the First Amendment had never been written.

He was not, he was quick to point out, idly speculating. "This has already happened. Betts v. Brady, 316 U.S. 455."

How to protect the liberties so recently confirmed against state action from intrusion by a future Court, and yet forestall intrusion on the prerogatives of the states in the economic field? The Black answer would be to revive the contention of Justice Harlan in his Maxwell and Twining dissents that due process was a concept whose content was measured by, and limited to, the first eight amendments to the Constitution.

Adamson v. California gave Justice Black his opportunity to present this position. Under California law the failure of a defendant to explain or deny evidence against him could be commented upon by the court and by counsel, and considered by the jury. Adamson was convicted of murder in the first degree under this practice. He claimed that this constituted involuntary self-incrimination, which constituted violation both of a national "privilege" and of the guarantee against self-incrimination of the due process clause of the

156 Id. at 325.
157 Ibid.
158 Id., note 2.
159 Ibid.
14th Amendment. The majority disagreed with these contentions. Mr. Justice Reed, for four justices, was content to characterize the question as settled by Twining and Palko. Justice Frankfurter, concurring, stressed the peculiar claim to respect enjoyed by Palko and Twining ("one of the outstanding opinions in the history of the Court").\textsuperscript{161} Justice Black strongly attacked Twining. He demanded that it be overruled both on its precise holding (on self-incrimination), and on its general theory ("the natural law' theory of the Constitution upon which it relies").\textsuperscript{162} The debate was launched. Mr. Justice Douglas concurred in the Black opinion that the 14th Amendment due process clause embraced the first eight amendments and nothing more. Justices Rutledge and Murphy agreed with the Black dissent insofar as it proclaimed inclusion of the first eight amendments in the 14th. But they were not prepared to say that the 14th Amendment due process clause "is entirely and necessarily limited by the Bill of Rights."\textsuperscript{163}

The Black opinion reexamined the authorities relied on by Mr. Justice Moody in the prevailing opinion in Twining. In the elaborate historical appendix to Justice Black's opinion in Adamson there is no significant new material not already passed on by Moody.\textsuperscript{164} Black's point was simply that of Justice Harlan in his Twining dissent: that the design of the 14th Amendment due process clause had been to reverse the effect of Barron v. Baltimore,\textsuperscript{165} and thus make the first eight amendments applicable to the states. Justice Black "distinguished" Palko from Twining. Twining would apply none of the first eight amendments to the states. Palko involved a "selective process" that would apply "some of them."\textsuperscript{166} Of the two techniques he preferred the latter. But the correct historical view was to apply them all. He renewed his International Shoe condemnation of "natural law" formulas:

Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course.\textsuperscript{167}

Justice Black was sensitive to the sly suggestion that his position "would unwisely increase the sum total of the powers of this Court to invalidate state

\begin{itemize}
\item \textsuperscript{161} Adamson v. California, 332 U.S. 46, 59, (1947).
\item \textsuperscript{162} Id. at 70.
\item \textsuperscript{163} Id. at 124.
\item \textsuperscript{164} Justice Black apparently relied heavily upon Haines' writings and upon Flack, The Adoption of the Fourteenth Amendment, 1908. The Moody opinion also conceded that there was some support for the "incorporation" argument among those who were responsible for the framing and adoption of the 14th Amendment. Justice Black laid stress upon the development subsequent to Twining. But this bridge had been crossed in Palko.
\item \textsuperscript{165} 32 U.S. (7 Pet.) 243 (1833).
\item \textsuperscript{166} This distinction of the analysis in Twining from that in Palko was not warranted. See Palko v. Connecticut, 302 U.S. 319, 326 note 4 (1937).
\item \textsuperscript{167} Adamson v. California, 332 U.S. 46, 90 (1947).
\end{itemize}
He fastened upon the word "unwisely," asking if the Federal Government had been "harmfully burdened" by sustaining the demands of the Bill of Rights. The Black counter-suggestion was that only a one-sided form of judicial self-abnegation limited "substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights," and left it free:

... in considering regulatory legislation, to roam at large in the broad expanses of policy and morals, and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government.

The implication was clear. Only by accepting the "incorporation" formula could the two desired objectives be obtained—supervision of state laws and procedures in the field of civil liberties, and a hands-off policy in the area of economic legislation.

The issues reopened by the Adamson dissenters were promptly aired in the literature, as they would be in the court. All that could be said on the legislative origins of the Fourteenth Amendment had soon been said. If the Black historical contentions were not disproved, they remained clearly unproved.

B. The "Debate"

The debate in the Court turned again to "the gradual process of inclusion and exclusion" (Davidson), the content of "fundamental rights" (Palko).

To the Adamson dissenters, later often in company with Chief Justice Warren and Justice Brennan, the line in such situations could be drawn only subjectively, on the basis of individual preferences of judges. Mr. Justice Frankfurter and Justices Reed, Burton, Clark, and Harlan, following the Palko view, insisted upon the availability of objective criteria. Various guides to ob-

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169 Ibid.
170 Comment ranged from strong opposition to the Black contentions (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights—The Original Understanding? 2 STAN. L. REV. 5 (1949), and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights—The Judicial Interpretation? 2 STAN. L. REV. 140 (1949)), to strong support (see Crosskey, Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954)). For a median view see Kadish, Methodology and Criteria in Due Process Adjudication, 66 YALE L. J. 319 (1956).
171 Morrison's conclusion seems overdrawn: "The real significance of Adamson v. California is that four judges are willing to distort history as well as the language of the framers in order to read into the Constitution provisions which they think ought to be there." 2 STAN. L. REV. 140, 162 (1949). A more moderate comment is by Kadish, supra, n. 46: "... the evidence is neither so compelling nor ambiguous to have impelled" Justice Black's approach.
173 Palko v. Connecticut, 302 U.S. 319 (1937). The original introduction of the "fundamental rights" concept had been in Hurtado: the term was first used as such in Twining.
jectivity were offered by them: History,\textsuperscript{175} a community "sense of justice,"\textsuperscript{176} sociological statistics,\textsuperscript{177} "a disinterested inquiry pursued in the spirit of science."\textsuperscript{178} Emphasis was placed upon a community consensus, "the conscience of society."\textsuperscript{179} This was ascertainable ("as best as it may be") because of the very nature of the Court, "a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."\textsuperscript{180}

To Justices Black and Douglas this detachment was an illusion: "emotion rather than reason dictates the answers."\textsuperscript{181} "Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge."\textsuperscript{182} Due process had become "a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent or reasonable."\textsuperscript{183}

Justice Frankfurter continued, over violent opposition, to stress: the evolving aspect of due process ("due process does not preclude new ends of government or new means for achieving them");\textsuperscript{184} the "manifold variety and perplexity of the tasks" of the other branches of government and of the states, which forecloses "a doctrinaire conception" of due process;\textsuperscript{185} the need of the Court to strike "the balance of individual hurt and justifying public good,"\textsuperscript{186} and to recognize "that what is unfair in one situation may be fair in another . . ."\textsuperscript{187}

Dissenting in the same case in which Justice Frankfurter (concurring) had made the above observations, Justice Douglas restated his position and that of Mr. Justice Black: "I think due process is described in the Constitution and limited and circumscribed by it."\textsuperscript{188} The prevailing concept was a "chameleon-like," "free-wheeling concept of due process," which "turns on the personal predilections of the judge."\textsuperscript{189}


\textsuperscript{176} "Due process is not measured by the yardstick of personal reaction . . . but by that whole community sense of 'decency and fairness'" Clark J. in Breithaupt v. Abram, 352 U.S. 432, 436 (1957); ". . . methods that offend a sense of justice," Frankfurter J. in Rochin v. California, 342 U.S. 165, 173 (1952).


\textsuperscript{178} Rochin v. California, 342 U.S. 165, 172 (1952).


\textsuperscript{182} Id. at 505.

\textsuperscript{183} Ibid.


\textsuperscript{185} Id. at 487.

\textsuperscript{186} Ibid.

\textsuperscript{187} Ibid.

\textsuperscript{188} Id. at 507.

\textsuperscript{189} Id. at 506.
The "debate" ended, but its first fruit soon fell in the form of the Mapp and Gideon retreat from a double state-federal standard in due process. Was the traditional Hurtado-Twining-Palko due process approach to survive? The Court engaged in its own "agonizing reappraisal." And this meant giving serious reconsideration to the Adamson dissent, and to a more modest "selective incorporation."

V

**IMPORTANT NON-SENSE: Adamson Again, "Selective Incorporation"**

In a separate opinion in Gideon Mr. Justice Douglas hints broadly that he is hopeful of favorable reconsideration of the viewpoint of the Adamson dissent. Two years before, Mr. Justice Brennan took elaborate care to point out that he and Chief Justice Warren had neither endorsed nor rejected the Adamson dissent. Of the new members on the Court Mr. Justice White has given sufficient indication that he is not apt to join this alignment. But there is no clear word pro or con from Mr. Justice Goldberg. For the first time in the history of the Court the view of "total incorporation" of the first eight Amendments into the 14th vi et armis is a practical possibility.

From the time of his Adamson dissent, in which Mr. Justice Black made Twining his ostensible quarry, it was evident that his true target was Palko and its formula of "ordered liberty" that permitted judges to assess each new asserted right against the test of "fundamentality". We have seen why Black would jettison this formula: the possibility of retreat by a future Court from liberties now protected and from the policy of self-restraint in the economic field. His cause célèbre in opposition to the "ordered liberty" view was Betts v. Brady. It is natural to expect that he will now pursue further efforts to make his Adamson formula that of the Court. Does Gideon contain some hidden link to this end?

In asking what does Gideon mean we may first note two solid gains beyond its square holding reversing Betts: (1) Justice Black's emphasis that a "fundamental right" might be entitled to constitutional recognition though it was not shared widely beyond our nation's brushes close to the Institutionalists'.

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100 Gideon v. Wainwright, 372 U.S. 335, 345 (1963). But see Poe v. Ullman, 367 U.S. 497, 515 (1961), where Justice Douglas withdrew from the position that the 14th Amendment is "restricted and confined to" the content of the first eight Amendments. See supra note 150.
103 See text accompanying notes 152-157, supra.
104 See text accompanying notes 169-170, supra.
105 "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Black J. in Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
conception of the "idea" of the national group, and is a gain over the more global terminology of Hurtado and Palko. (2) It seems that Gideon accentuates a development, reflected in other recent cases, away from permitting a two-fold standard for assertion of a "fundamental right", one standard in the Bill of Rights against the federal government, and another in the 14th Amendment against the states. There was logical value in the contention, made chiefly by Justices Frankfurter and Harlan, that the factor of state-federal relationship makes it reasonable to require a greater infringement to constitute violation of a protected liberty by a state than would constitute an infringement by the federal government. But the logical strength of this point has been clearly outweighed by its sociological weakness. Our society is too integral to take kindly or practically to a double standard of liberty depending on whether the infringer is state or federal government. The recognition of this point in Gideon may give impetus to another form of "incorporation" doctrine, one not aimed at drawing the entire first eight Amendments into the 14th, but only a selected few. This has been recently referred to as "selective incorporation" and designated as the "Brennan view."  

The dissatisfaction with the double standard brings into target range three cases closely associated with the "ordered liberty", "fundamental rights" doctrine; Twining (which involved court comment on failure of defendant to take the stand, arguably a form of self-incrimination), Palko (which involved an arguable form of double jeopardy), and Adamson (a Twining type situation). Change in the rule in each case could be rationalized in any one of the four ways to which we have already called attention. Which way is preferable?

a) The Black Adamson dissent 

The 5th Amendment with its double jeopardy and self-incrimination provisions, as well as the others of the first eight Amendments, and nothing else, would be "incorporated" into the 14th.

b) The Rutledge-Murphy Adamson dissent 

Justices Rutledge and Murphy joined Black and Douglas in their "historical" incorporation argument, but they would not limit 14th Amendment due process to the "incorporated" Bill of Rights.

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192 See supra note 11.

193 Justice Douglas has moved to this camp. See supra note 150.
c) The so-called "Brennan view" of "selective incorporation"

The Court could select certain "specifics" of the first eight Amendments for "incorporation" into the 14th.

d) The Matthews-Cardozo view (in Hurtado and Palko)

According to the Matthews-Cardozo view the Court recognizes new "fundamental rights" as elements of "ordered liberty" from time to time as the community consciousness accepts their fundamentality.

Each of these alternatives has its shortcomings. The first three suffer from lack of accepted historical bases. Professor Henkin has recently made a devastating showing that there is no more logic than history in favor of turning to the first eight Amendments to seek the content of the 14th.²⁰⁰ It is the fundamental nature of a right that makes it subject to the 14th Amendment protection as against the states, and not the fact that it is contained in the first eight. It is undoubtedly an embarassment to Justice Black's theory that his omnibus incorporation would strictly entail saddling state practice with civil jury trials,²⁰¹ and also reverse Hurtado's allowance of indictment by information rather than by grand jury. A state's failure to have such grand and petit jury requirements hardly shocks today's consciences.

The designation "non-rational" applies to the "Brennan view" of "selective incorporation", which does not have the saving grace of Black's arguable historical contention that the authors of the 14th intended to make the Bill of Rights applicable against the states and reverse Barron v. Baltimore.²⁰² The argument against the Matthews-Cardozo view is that it leaves it within the discretion of the judges to recognize new "fundamental rights", or to refuse to recognize old ones.²⁰³ Black's objection to a subjective, free-wheeling "natural law" is shared by the Institutionalists. For they attend closely to the

²⁰⁰ Henkin, op. cit. supra note 197, at 79. Professor Henkin is certainly correct in saying that Justice Cardozo's emphasis in Palko was upon locating the right "in the concept of ordered liberty that is due process," and that any language of "incorporation" is secondary to this step. It follows, as Henkin indicates, that "A right of counsel, one might say, was incorporated in the fourteenth amendment, but not necessarily the same right of counsel given in the fifth [sic] amendment." Ibid. This has been the contention, logically correct, of Justices Frankfurter and Harlan. Professor Henkin is less sure-footed in implying that this logical position should prevail despite the sociological ineptness of a state-federal double standard, whether with respect to right to counsel (Gideon), or with respect to trial use of unconstitutionally seized evidence (Mapp), or as to "cruel and unusual punishment" (Robinson). Or perhaps in the future (see supra note 11), with respect to the precise boundaries of self-incrimination (Twining, Adamson), or of double jeopardy (Palko), or even as to interrogation of defendants (McNabb-Mallory).

²⁰¹ Cf. the 7th Amendment: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."


²⁰³ The answer to the "argument", according to the Institutionalists, is that the judges are not free in any reasonable, responsible sense of the word. They are bound, from this standpoint, to make their "choices" within the objectively ascertainable framework of the basic ideas of the society, as they have developed. The origin of these ideas in American society is
social facts, the very kind of objective factors that made it so evident that *Betts v. Brady* fell well behind the development of the "ideas" of liberty and equality in the American society of today. The Matthews-Cardozo doctrine is flexible as well as objective. In fact, upon a showing that present day standards have advanced beyond the procedures sanctioned in *Twining, Palko, and Adamson*, the precise holdings of these cases could be reversed and still leave intact the general constitutional formulation to which these cases have lent their names.

What "idea" shared by the national group endorses "incorporation", in whole or in part? There is the questionable gain of escaping from that minimum exercise of judicial judgment that recognizes as "fundamental" and as part of a "scheme of ordered liberty" rights viewed as such by the community generally. For this is but a sociological report identifying what the Institutionalists call the developing "ideas" of the group. On the other hand, "incorporation", even in its most moderate form, is non-rational, it puts the cart (containment in the first eight Amendments, or any of them) before the horse (the "fundamental right"). Once evident that the right newly recognized as "fundamental" under the 14th is also contained in the first eight, it may be treated by the same measure in the 14th as in, say, the 5th. And this not for logical necessity, but for sociological convenience. Since total "incorporation" itself is also without demonstrable historical foundation, its use as technique connotes a wilfulness and lack of frankness, that belies the professed canons of realistic jurists.

With so little to gain and so much judicial caste to be lost by a substitution of the *Adamson* dissent, or its little brother, "selective incorporation", the Institutional approach suggests that the assault on the *Palko* formula should fail. But creative work remains to be done. What guides are offered here?

VI

**THE INSTITUTIONAL APPROACH: APPLICATION**

A. *The Argument*

Is it the contention of this study that the Supreme Court is reaching the same results that would follow from the Institutional approach, and under in-

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the Preamble of the Constitution: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, to ordain and establish this Constitution for the United States of America." This is the starting point from which constitutional development proceeds, both the elaboration of Articles, and subsequent decisional constitutional law. The Preamble, as we can see, refers us instantly to the life of the society.

fluence of the same factors, but that the Court camouflages its process with deceptive "historical" and "analytical" trimmings? Or is it contended that, despite tipping its hat to formulae, the Court actually proceeds subjectively, ad hoc, whereas it should adopt an objective method, and most advantageously the Institutional approach.

Neither alternative gives full sweep to the argument here, which has four prongs:

1. Often decisions like those reached by the Court would be achieved by the Institutional approach, and more rationally explained by it.

   Thus the right to counsel—from its permissive state in the 6th Amendment for those who can afford counsel; to its recognition as a right of indigents to effective representation in capital cases even against state action, (Powell-1932); to its recognition against states in non-capital cases only where actual prejudice results from deprivation (Betts-1942); to its absolute recognition against states, discarding Betts' limitation (Gideon-1963) (to mention only the mileposts)—is best explained as development, in evolving stages, of constitutional law. And this is the Institutional approach.

2. If the Court were to soften its often too rigid emphasis upon the "fundamentality" of the rights to be recognized, and the recent "absorption" language, the Hurtado-Twining-Palko formulation would correspond to the objective Institutional approach to due process.

3. Under the guise of objectivity, the Court has, by use of a pseudo-historical method, and an absolutist reading of constitutional language,

   as well as in the proposed "incorporation" formulae), frequently disclosed an unavowed subjectivity as the real basis of constitutional decisions.

4. The Institutional approach, with its forthright acceptance of the legislative-political aspect of broad constitutional decision, merits consideration by the Court in its present reappraisal of due process formulation.

B. The Development

History is thoroughly inadequate to explain Gideon. Incontestably, the language of the 6th Amendment itself was not directed towards indigents, but to those who could pay their way: those who could afford counsel could not be denied counsel. The very shortage of lawyers in colonial days would have made compulsory counsel unfeasible. It was not the rule in England. The

Griswold, Absolute is in the Dark, supra note 6, recalls a recent word of Justice Black:

"I have an idea there are some absolutes. I do not think I am far in that respect from the Holy Scriptures." To this Griswold comments: "The Black approach might better be called the 'Fundamentalist theological' approach." Id. at 172.

Reflections on the Right to Counsel constitutional issue first descended upon the Supreme Court in *Powell*, a case coming out of the Scottsboro trials. The extension of *Powell* to all cases in the federal courts (in *Johnson*) was a severe strain upon the manpower of the federal bar. When the issue presented itself in *Betts* the “fair trial” answer given was hardly avant garde. But it was based upon an arguable position, that constitutional protection was only needed against de facto prejudice resulting from the failure to furnish counsel. In the years after *Betts* the factual data piled up, almost without exception reinforcing the thinkers who had protested *Betts* from the outset. The sheer social need of counsel was underscored by the sorry record of many states in dealing with indigents; this performance became obvious to the Court itself in processing its petitions and reading its records on appeal. Type situations piled up that required counsel. State statutes insuring effective right to assistance of counsel increased in number—but some laggards remained. Irrationalities accumulated: counsel assured in federal courts and not in state; in capital and not in non-capital cases; and, above all, to those able to pay in all cases, capital or not, but not to indigents except as to appeals (since *Griffin*) but still not at their trial. These were all objective considerations that coincided with the increasingly high value placed upon liberty in the shared “ideas” of the polity. No mechanical rule of “incorporation” was necessary to reveal that a “fundamental right” was being denied, as the unanimous *Gideon* Court agreed.

With the contentions of the *Adamson* dissenters, developed in the course of the “debate” on the Court, that judicial free-wheeling is the only alternative to an “incorporated” rigidity the Institutional approach is in complete disagreement. These jurists distrust, almost as thoroughly as do Justices Black and Douglas, the pretensions of a “subjective natural law”. But they insist that there is objective soundness in the combination of an intelligent sociological appraisal of the “idea” of the society, with careful verification of the relevant social facts.

The mechanical tests of the *Adamson* dissent and of “selective incorporation” are not acceptable to the Institutionalist approach to due process formulation. But neither is the *Palko* formula in its present form. “A hardship so acute and shocking that our polity will not endure it” may be too strict a test for delineating a national minimum for rights deserving of constitutional protection. For rights may be seen from time to time as “implicit in the concept of ordered liberty” without being “fundamental” in the sense that a contrary view with respect to giving them 14th Amendment protection would seem “shocking”. Furthermore, every trace of the language of “absorption” in *Palko* should be expunged from the *Palko* formula. Justice Cardozo used the word in that case with apparent discomfort in referring to the signal development since *Twining*—the cases in which 14th Amendment protection had been given to speech-press-assembly freedoms that were protected against
the federal government by the 1st Amendment. Justice Brennan later sought to draw from this casual use in *Palko* Cardozo's endorsement of his "selective incorporation" or "absorption" doctrine. In any event, the legitimate role of the Court to perceive and to proclaim minimum protection of federal rights necessary to keep pace with the increasing demand and recognition of individual liberty should be recognized without the fictitious ritual of an "incorporation" formula. Urging such a role for the Court does not entail undue expansion of its power, but brings into the open and makes vulnerable to legitimate public criticism pragmatic, or result-oriented, decisions now obscured and made invulnerable by a false historical mystique, or by the mythical certainty of arbitrary judicially contrived formulae, such as "incorporation".

The earnestness with which members of the Court are presently engaged in reexamination, and in search for viable constitutional criteria in the due process area, is highly promising. Perhaps encouragement may be drawn from the French Institutionalists. We return to an exposition of their views: first by way of resume, then of amplification, and finally, in an Epilogue, to make one special application.

C. Resume

The four institutional themes noted at the outset are recalled here as a framework for review of various points observed in the course of this introductory study.

1. Law, as purposeful and dynamic, is concerned with developing social objectives.

   This involves discussion of the notions of the "idea" of the social group, and its development—a fact ascertainable by sociological observation. The increased valuation of liberty and equality in American society in this century is the prime example of the developing "idea".

2. The notion of the significance of social facts in the emergence of juridical rules.

   This emphasizes the social matter or content of judicial rules, rather than considering them as mere logical intellectual exercise. The social facts themselves often demand judicial ratification in the form of a rule. For example, from the obvious lack of success of the *Betts* "special circumstance" rule, and from the growing ratification by the states themselves of the need for counsel, emerged the new *Gideon* rule on right to counsel.

3. The law is an art, but subject to scientific conditions.

   Under this heading we see the contribution of sociology, politics, economics, psychology, and other sciences, as well as philosophy, to the jurist. And yet the object of each of these disciplines is distinct, a point we shall return
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... to in the Epilogue; one aspect will be analyzed there in some detail, the special object of constitutional law in its broad areas such as "equal protection" and "due process".

The great role of experience, inductive as it is, is evident here. From experience we learn that it will not do to deny out of hand a subjective blind spot in even the ablest judges. This leads to recommending use of rules rather than ad hoc judicial judgment when sufficient experience has developed to found a sound rule. The affirmation of a full-bodied "right to counsel" after years of the Betts "fair trial" formula, and the opposition to the dual standard (state-federal) formula in the Mapp situation as well, furnish apt examples here. Experience of centuries affirms the human disability in handling power that leads to establishment of institutional checks, and to recognition of the social value of power balance that cannot always be struck effectively a priori, and similarly to finding value (not always necessarily conclusive) in smallness itself. Yet experience reveals the opposing claims of bigness in terms of production for human needs. This dualism calls attention to the fact of constant tensions throughout the social system.

4. Moral presuppositions and values.

Certain common presuppositions are accepted by the Institutionalists as integral to their analysis: natural sociability of man, existence of a common human nature (with existence only in concrete individual men), priority of man over the social group. But the persistent inquiry of the Institutionalists is into the presently accepted values of the particular group; for these constitute a large element of the "idea" of the society. Achievement of this "idea" is the object of legislation, and in a certain measure perhaps of constitutional decision, as well.

The Institutional approach thus insists that there is a reasonably objective content of law that may be marked out by conscientious and skilful effort.

- Former Attorney General Biddle in a review of Mendelson, *Justices Black and Frankfurter—Conflict in the Court*, 75 HARV. L. REV. 1042 (1962) underlined some of the author's statistics:

  Of the fifty-nine FLSA cases decided through June 1959, with the exception of four, "where the issues were simple enough to be settled unanimously, Mr. Justice Black voted consistently 'prolabor.'" *Id.* at 1045 . . .

  From 1938 to 1958 . . . more than sixty FELA decisions turned on the sufficiency of the evidence, and it does not appear (except in one case where the plaintiff in effect repudiated his claim) that Justices Black and Douglas ever voted against a workman (p. 24). Justices Murphy and Rutledge, who both died in 1949, followed with similar consistency, as have Chief Justice Warren and Mr. Justice Brennan more recently." *Id.* at 1046.

Biddle, an old New Deal appointee, concludes with some observations of his own:

The New Deal "activists" read their preferences into the law as much as Van Devanter, McReynolds, Sutherland and Butler—only with more consistency. Towards the end of his career Harlan Stone complained to a friend that, history repeating itself, the Court was in as much danger as in the old days of becoming a legislative body by "enacting into law its own predilections." [Citing Mason, Security Through Freedom 146 (1955)].
D. Amplification

A short amplification of the Institutional approach as relevant to the constitutional area we have explored would include the following headings:

The Constitution—a written basic law, constant in its main lines, with room for development within its broad standards (such as due process) as the “ideas” of the society develop. When such “ideas” as the Federal-state relationships take new form constitutional interpretation must reflect it.

Judicial self-restraint—In contesting the argument that justice is illusory when there is no positive limitation upon law-making, Hauriou agreed that logically a nation-state’s “self-limitation” is nonsense, but where it works in practice, “sociologically it is the living truth.” A tradition of self-restraint on the Court in matters of substantive economic due process that is already a quarter of a century old, may be “sociologically” more effective in keeping judicial hands off state welfare legislation, than would Justice Black’s “incorporation” theory that would limit due process to the first eight amendments so as to tie the Court down mechanically.

State-Federal relationships—Events of the past half-century suggest that there has been a shifting emphasis in the Federalism. In two areas, it is true, great respect has been shown the states: (1) the Erie rule disavowing the general “diversity” federal common law, (2) the popular reaction, and belatedly the Court’s208 against the substantive economic due process by which the Court had declared unconstitutional state social legislation. But in most areas this has been an era of national predominance. The shift has been evident in due process matters affecting liberty and equality. Discernment of the fact stage of this development in the “idea” of the national society, is a starting point for reasoning in the Institutional approach to a particular problem in evolving due process. Other accepted objective principles compete for consideration in the context of a particular problem. To take one example, the guide of human experience as to man’s lack of restraint in handling concentrated power is the root of the constitutional principle of separation of powers, both within the structure of the national (or of a state) government, and in the interrelation of national and state governments within a federalism. The Court has often been alert to the desirability of leaving to states what can be done by them. This consideration is still viable in many areas: two of these were referred to at the outset of this paragraph, a third is in the administration of criminal law, and was exemplified in the cautious approach of Betts v. Brady. But when the states have proven unable to handle the task left to them, the Court more and more has inclined, in areas involving liberties, to insist upon an explicit national minimum standard. The shifts from Betts to Gideon, from Wolf to Mapp, from Plessy to Brown, and from Colegrove to Wesberry ride comfortably with this analysis. Justice Clark came close to such an ex-

planation of the Mapp decision, but backed away from it in the end as "irrelevant". Possible future developments in federal constitutional supervision of criminal law administration that might be explained by this Institutional approach towards a workable national minimum standard include: an extension of the McNabb-Mallory rule, and of the federal standards on double jeopardy (cf. Palko), and on self-incrimination (cf. Twining and Adamson) to guide state action. And this could be done if and when appropriate without reference to a ritual of "incorporation".

Institutional balance—The ultimate external control of judicial excesses comes from the other institutions of society. The balance is not kept perfectly, but history shows that a headstrong Supreme Court is often followed by a milder one. The Court may be checked immediately by public opinion (if it has not followed Mr. Dooley's election returns), or more slowly by presidential appointment.

Ultimate ratification of institutional changes—The ultimate criterion of the endurance of any major change in institutional relationships or basic rule of law is public acquiescence. This is obscured with regard to the Court in constitutional matters because of the relative difficulty of direct constitutional amendment. But, as noted above, there are indirect ways of resisting unacceptable constitutional innovation. The chief bar to public reversal of constitutional "legislation" (a non-pejorative use) is judicial mystique, a masking of the reality of the constitutional process. The Institutional approach is straightforward and frank; it makes clear where the rules came from and it responds directly to changing basic social objectives.

VII

Epilogue

The general claim asserted here is that the French Institutionalists give some hope to our developing an objective constitutional methodology. A slender sheaf of their ideas has been measured against the concrete development of the right to counsel, and the various formulations, past and present, by the Court of "due process". Is the claim justified in the result? There is an inevitable objection that must be faced. It is interesting, you say, to put the notion of objectivity in the context of ascertaining the "idea" of the society itself, and accepting that "idea" as the judge's guiding goal. But does this not merely obscure the subjective value judgment rather than avow it honestly? Did not Gunnar Myrdal revolutionize sociology by admitting that sociological facts cannot be compiled without reflecting values of the compiler?209

And is not this supposed objective sociology of the Institutionalists, which is,

in effect, their compilation of contemporary intellectual history, just as subjective as the evaluation by Mr. Justice Black of more remote history, in *Adamson* and in *Wesberry*, for example? If so, where is the gain?

The Institutionalists answer that (1) unlike Justice Black, they ask the correct question: what are the fundamental ideas of a society today, not what were they in its origin two centuries ago, or after the Civil War; (2) realists from Aristotle to Cardozo insist that you can only expect the degree of certainty that is possible in the matter with which you are dealing. Mathematics and physics furnish subject matter that is more knowable in itself than are ideas concerning common human objectives, and what is more, we are more dispassionate ourselves in dealing with the matter of these sciences than with human affairs. Nevertheless while we must, as Myrdal says (with Aristotle), avow and not deny these limitations, we must not renounce compiling our data with such care as we can. In this sense we are on our way to attaining the maximum of objectivity that is available. And surely, it is the profession of the judge to strive for "objectivity" of this sort, and seek to use as his guide not personal preference (disciplined or undisciplined) but the "idea" of the society itself to the extent that it is objectively verifiable in this sense.

No society which puts as high a premium as does our own upon individual liberty of conscience and personal responsibility requires as part of its "idea" that a judge must enforce an "idea of the state" that violates his own fundamental personal values; but it may justly require that he not impose upon the "institution" his values that it clearly does not share. There is no puzzle here, but a hard practical choice: translate the objectively verifiable "idea" into law or resign. If the judge does not see it as it is, so be it. But he is not then to be held up, in his ineptness, as a model of the wise and upright judge.

Professing these views, the French Institutionalists still share with Justices Black and Douglas dissatisfaction with the fact that under the *Betts v. Brady* rule in each case the Court evaluated the situation anew to ascertain if special circumstances showed that the indigent defendant had been prejudiced by the failure of the state to supply counsel. The clear general rule formulated in advance is one of the foremost assurances of objectivity. A Court must approach generalization cautiously because the succession of individual cases, and not hearings and debate, furnish it with its surest basis for generalization.

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210 See, for example, Aristotle, *Ethics*, Bk. I, Ch. 1, 1094b, 25: "... It is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject permits."

Then there is his classic warning against impatience or overconfidence in guiding human affairs:

We must be content, then, in speaking of such subjects and with such premises to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premises of the same kind to reach conclusions that are no better. (*Id.* at 1094b, 20-23.)
But once the evidence is clear, as it was in the "right to counsel" situation some time before *Gideon* appeared, it is time to generalize.

Up to this point there is no shocking departure from previous analyses. The Institutional approach may, perhaps, tie by a common thread certain ideas that have been advanced by jurists as disparate as Duguit, Laski, Holmes, Pound, Cardozo and Frankfurter; but it also rejects significant positions taken by all of them except Cardozo, with whom it finds its greatest compatibility in the common law world. But the most central Institutionalist note as applied to American constitutional law, to which we now turn, is beyond the most advanced outpost of the common law jurists named above. The implications of this central note place the Supreme Court in a frankly political context with respect to broad areas of constitutional decision; in summarizing these implications here we return to the question with which we began: objectivity in constitutional formulation.

This central Institutionalist position stems from the Institutionalists' distinction between the object of legislation, (the general public interest or shared common good) and the object of judicial decision, (justice to party litigants). It might be adapted in this way: the legislative authority in a society has the political function of enacting laws calculated to achieve accepted aims of the society. There is wide choice as to methods to be used, timing, priorities—but always the object of legislation is the common good, public interest, general welfare, the "idea" that has been accepted by this society. The legislative inquiry as to the present state of the "idea of the society" is a sociological one, preliminary to the exercise of its strictly political function of enacting such laws. In performing its task the legislature calls upon not only the resources of sociology, but also of economics, psychology and other sciences to indicate the means best adapted to achieving the accepted goals, considering the *de facto* conditions, resources, strengths and weaknesses of the people living in the society. The legislature may or may not be circumscribed by a written constitution or by a supervising judiciary as in our society. It is always subject to the effective supervision of some kind of popular election, and to the directive guideline of the society's common good.

The judicial tribunal in a society has a more circumscribed function. Its chief object is to achieve justice between the parties that have brought to it their disputes for adjudication. Such justice connotes decision upon the basis

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231 The same distrust of judicial subjectivity often voiced by Justices Black and Douglas (see text accompanying notes 155-157, 188-189, *supra*) is shared by classical objective natural law. It is a fact sometimes lost sight of that both Aristotle and Aquinas distrusted the "animated justice" of the judge. "It is better", wrote Aristotle, "for all things to be ordered by law than to be submitted to the will of judges." (*Rhetoric*, Ch. 1, 1354a, 31). In commenting favorably on this passage Aquinas suggested three reasons in its support, one of which has special relevance here: that legislators make general provision, and for the future, whereas judges are affected in their judgment because of the individual situations before them. (*Summa Theologicae*, I II, q. 95, a. 1, ad 2.)
of some preexisting rule of law. But rights of individual litigants find reality in the total social situation in which they live; there is a social function in every right of property, for example, that may impose limitations upon its use. (These limitations may be clearly perceived for the first time in a particular contested case.) But the basic focus of a traditional judicial decision is this inter-individual justice, qualified as it may be by special social demands, and by the general social requirements of order and respect for law.

By common acceptance the legislative function is exercised with prospective effect, and in the form of general rules. Conversely, the judicial function is ordinarily exercised in individual cases on the basis of rules conceived to preexist the decision, either explicitly or implicitly. The earlier theory that judges merely "discovered" the law already existing came under wide attack a half century ago and grudgingly it came to be said that judges do "legislate" but only "interstitially" (Holmes' word, taken up by Cardozo). But "judicial legislation" continues to have a pejorative sense in the common law world, as if it were something unclean that "decent" judges should avoid wherever possible. In public law the Institutionalists shed the traditional common law prejudice. To them, in many broad areas of the field of constitutional law the judges do, and should, "legislate", and in no pejorative sense.

In a system where the judiciary is kept in a place subordinate to the legislature, as in England and France, the implications of the traditional analysis are very much in touch with reality. Conceivably, under our written constitution a popularly accepted institutional balance might have restricted the judiciary to deciding cases upon the basis of precedent alone, leaving all corrective change to the legislature. But in fact the American system has not developed in this way. It has, fortunately, the Institutionalists would certainly say, recognized a place for judicially effected constitutional change including frank reversal of earlier decisions. There would be otherwise no alternative but a constant resort to the tortuous process of constitutional amendment, since the legislature is not often available here. Basic adherence to precedent, but willingness to break sharply with it under sufficient provocation is the de facto story of American constitutional growth. Is the traditional opposition to judicial legislation unrealistic here?

The Institutionalists would say "Yes". It is the contemporary society with its presently accepted "ideas", and not colonial or reconstruction society that is being governed. Even unanimous assent as to the historic setting and intent of constitutional words does not put an end to inquiry. Constitutional law, like legislation, must be kept up to date. Conceivably, a method of periodic constitutional conventions might have been employed, or a frequent use of the amending process. But could even these theoretic alternatives deal adequately with the broad constitutional categories such as "due process" and "equal protection"? Is elaboration of these concepts not by design and by in-
evitable need for suppleness in a constitutional system the task of an institution constantly in being? Since it cannot be the legislature, as the constitutional system has developed, it must be the Court. But is the Court's work here truly comparable to the ordinary judicial adjudication where ordinary litigants seek justice on the basis of existing rules? Or is it not closer to the mark to see the Court's prime objective in these cases, as with a legislature, the public interest, the general welfare, the common good, perhaps embodied in concrete form by the competing claimants before it? And if so, why profess that it is carrying out a function that is in the mold of traditional adjudication? The liberty of this man is significant in the context of the constitutional case because liberty is a rule for each man in the whole society that looks to this decision for its rule. The constitutional judge, in this area, then, is a legislator constantly revising and adapting. There is undoubtedly some difference from legislation: whereas on-again, off-again of a particular law or course of legislation at successive legislative sessions would be acceptable, in a Court it would not. But with this obvious qualification, might the Supreme Court not frankly avow that its decisional development in broad areas committed to its care is directed towards orderly achievement of currently accepted social goals? This would permit dispensing with contested historical accounts, strained analogies, and the fictitious techniques such as "incorporation" or "absorption", as starting points for judicial reasoning. History, analogy and technique all have their place in the decision of cases, but not as a camouflage of the vitality of the constitutional process.

Objectivity is obtainable in constitutional decision, the Institutionalists would insist. But it is derived by impartial ascertainment by the Court of the "ideas", including the accepted political, social and moral values of the society, and by decision in the light of this data. If the Court is mistaken in its assessment of these values it is subject to correction, self-correction first, but at any rate correction by other available institutional means (e.g. congressional withdrawal of jurisdiction, constitutional amendment, presidential appointment, and, above all, by public opinion). If the society's values themselves are unworthy it is the function of the moral forces in the society—religious, ethical and social leaders—to strive for their correction. And such extra-legal and extra-judicial pressures are themselves fundamental to securing acceptance of "good ideas" and achievement of "the good society". The Court can be blamed if it misreads these "ideas" or ignores the fruit of these pressures, the Institutionalists would concede, but the Court should not be expected to take their place.