Chapter 19

The Right to Counsel

Television courtroom dramas have made the assistance of counsel during criminal proceedings one of the most recognizable of all rights guaranteed by the Constitution.We witness countless scenes of defendants refusing to cooperate without the presence of an attorney and of defense lawyers jousting in court with prosecutors to win an acquittal for their client. On "Law and Order" and "Boston Legal," it also does not matter whether the defendants are rich or poor, well-known or anonymous, members of a majority group or not. They all have a lawyer representing them, as we now understand the Sixth Amendment to require.

This unremarkable scene in which every defendant has a lawyer has not always been present throughout American history. Most often, class and race have influenced, if not governed, access to counsel. Still, the idea that defendants needed the assistance of counsel was an early addition to the list of American rights. English law did not provide this guarantee until 1836, yet twelve of the thirteen colonies long before had adopted some form of this protection. State constitutions in the new nation included the right to retain a lawyer for all persons accused of crimes; however, none required the appointment of counsel for poor defendants. This limited understanding, while advanced for its time, is what appears in the Sixth Amendment: "In all criminal cases, the defendant shall enjoy the right...to have the Assistance of Counsel for his defense." The framers recognized access to a lawyer was necessary for a fair trial, but the guarantee meant only that those who could afford a lawyer could have one.

With the rise of a professional bar of lawyers in the nineteenth century, criminal cases began to resemble trials we recognize today, with prosecuting attorneys for the state and defense attorneys for the accused. Questions remained, however, about the extent of the right to a lawyer. How did it apply, for instance, to defendants who could not afford an attorney? Some states assigned counsel at public expense to indigent defendants in felony trials. The Indiana Supreme Court in 1854 was the first to recognize this protection as one of the "principles of a civilized society." But most states did not go this far, and many people who were accused faced the justice system without the advice of a lawyer. Did a fair trial require states to provide a defender at public expense? The emergence of plea bargaining as the typical way to process offenders through the legal system raised another question. What is the right to counsel when the location of criminal justice moves from the courtroom to the police station, which is what happens when suspects confess during interrogation in exchange for more lenient punishment? Do defendants have a right to counsel during police interrogations and other pretrial stages of the criminal process?

The American system of divided government, federalism, has complicated answers to these questions. For most of our history, the control and punishment

"Every man that findest himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noo fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him."

—Massachusetts Body of Liberties (1641)

of crime was a state responsibility. State law defined crimes, and each state established its own rules for a fair trial. Although most states agreed on the basic elements of due process, no national standard existed until the 1930s when, in Powell v. Alabama, the Supreme Court recognized a right to counsel in capital cases. This decision began a series of cases that tested what this obligation meant in practice, but judges produced no uniform rule on when states were required to provide a lawyer. Finally, two cases in the 1960s, one from Florida and one from Illinois, helped to establish the national standards we see portrayed in television dramas. One of them met widespread approval; the other began criticism still heard today.

Clarence Earl Gideon was a habitual thief. A runaway at fourteen, he stole some clothes, and upon his mother's request, went to a reform school for three years. Shortly after his release, he was convicted of robbery and drew a ten-year prison term. Soon, his life fell into a pattern common to habitual criminals—release from prison, another crime, another term, another release, another crime. All the convictions were for small-scale robbery. In between his stints in prison, he married three times and had five children. An alcoholic, he never held a job for long and could not provide for his family.

On June 3, 1961, Gideon was arrested once again, this time for breaking into a bar in Panama City, Florida, where he had moved hoping for a fresh start. He requested the court to appoint counsel to represent him, but the judge refused, citing state law that granted it only to defendants in capital cases. Lacking funds, Gideon defended himself, but he was outmatched. He questioned witnesses inexpertly, and he did not raise a single objection. The attorney who later represented him on appeal characterized his effort as pitiful, concluding, "A lawyer—not a great lawyer, just an ordinary lawyer—could have made ashes of this case." Convicted of breaking and entering with intent to commit a misdemeanor, the court sentenced him to five years in prison.

Sitting in prison, Gideon petitioned the Supreme Court in longhand on five pieces of lined paper, asking the justices to take the case because he did not get a fair trial. "The question is very simple," he wrote, "I requested the court to appoint me an attorney and the court refused." Gideon filed as a pauper, and, as an indication of the importance of the questions at issue, the Court appointed a highly regarded Washington lawyer,Abe Fortas, to represent him on appeal. (Fortas later became a Supreme Court justice.) The case ultimately rested on the straightforward argument that for all serious crimes, the due process clause of the Fourteenth Amendment, which applied to all states, incorporated (or included) the right to counsel as required by the Sixth Amendment. If defendants were too poor to afford a lawyer, then states had to provide one for them. More than twenty state attorneys general urged the justices to adopt this rule because previous decisions had left the law too confused. The Court agreed, even though the justices had to abandon earlier decisions that left this matter to state discretion. It was "an obvious truth," the Court ruled, that otherwise a defendant too poor to hire a lawyer could not be guaranteed the fair trial guaranteed by the Constitution.

Gideon won a new trial, this time with a public defender paid for by the state. An effective cross-examination persuaded the jury to return a verdict of not guilty, and finally Clarence Earl Gideon was a free man. The decision made little difference in his life; he continued to get in trouble with the law. He died as he lived, a pauper, but his appeal made history, as he appeared to recognize in a

letter to his attorney while waiting for the Supreme Court to decide his case. In a phrase now on his tombstone, he wrote, "Each era finds an improvement in the law for the benefit of mankind."

Gideon v. Wainwright (1963) was a call for a new definition of fair trial, and most people agreed with its conclusion: at a minimum, due process required an attorney for poor defendants, regardless of where they lived. Another case, decided the next year, *Escobedo v. Illinois*, also extended the right to counsel but was far more controversial. Danny Escobedo was a twenty-two-year-old laborer of Mexican descent who was accused of the murder of his brother-in-law in January 1960. He had no previous police record. Questioned for fifteen hours, he was released only to be picked up ten days later after another suspect told police that Escobedo had done the shooting. An officer told Escobedo he might as well confess because "we have you sewed up pretty tight," but Escobedo refused to talk and asked to speak with his attorney. Even though the lawyer came to the station to consult with his client, as allowed by Illinois law, the police kept the two men apart and continued to use standard interrogation tactics to get his confession. Finally, Escobedo made incriminating statements after police implied he would get immunity, a claim the police denied later. Based on his "confession," he was convicted of murder and sentenced to twenty years in the state penitentiary. No one had told Escobedo of his right to remain silent.

Like Gideon, Escobedo filed an appeal as a pauper, but unlike Florida law, state law in Illinois provided a public defender assigned from a pool of lawyers. Drawing the case was a former military lawyer from Chicago who, when arguing the case before the Supreme Court, quickly focused on the critical issue: "[Danny Escobedo] convicted himself in that police station....What could [his lawyer] do?" To have the effective assistance of counsel, he told the justices, "you've got to have the assistance at the time you need it."

Representing Illinois was James Thompson, assistant state's attorney and later governor. He sought to persuade the justices that the police and prosecutors needed wide latitude in their investigations to be effective in protecting society against criminals. If the Supreme Court ruled that a suspect had the right to an attorney during questioning at the precinct house, the result would be no more confessions. Police would become less efficient in putting criminals away; society would not be as safe. Law enforcement officials echoed this concern: if the court decides police cannot talk to a suspect before giving him a lawyer, a Houston police chief said, "you're going to see a lot of killers and rapists walking out of police stations with thumb to nose."

The Court divided 5 to 4 in deciding that the Sixth Amendment guaranteed a right to counsel during interrogations. The majority opinion swept aside warnings of disaster: history taught that "law enforcement which depends on the 'confession,' will, in the long run, be less reliable and more subject to abuse" than one which depends on vigorous investigation. No system of criminal justice should fear the exercise of a defendant's rights, the justices concluded. If constitutional protections thwart the effectiveness of law enforcement, "then there is something very wrong with that system."

Unlike *Gideon*, strong public disapproval greeted the decision. In the first case, most Americans agreed that a defendant too poor to hire a lawyer could not be assured a fair trial unless the state provided counsel for him. But Escobedo seemed different to many people who were becoming increasingly concerned about rising crime rates, urban riots, racial conflict, and youthful challenges to

middle class values. Restraining the police—"handcuffing" was the term used most often by critics of the decision—would encourage criminals and lead only to more crime and greater disorder.

Danny Escobedo's later life provided support for this public alarm. Drifting from job to job, he repeatedly got into trouble with the law. By the time he was arrested in Mexico City in 2001 for parole violations and flight from a warrant in a 1983 stabbing death, he had gained a spot on the U.S. marshal's list of its fifteen most-wanted fugitives. During his adult life, Escobedo had been arrested twenty-five times on charges from narcotics to murder. With such records, opponents of this and later decisions asked, why would we as a society guarantee a right that put public safety at risk by increasing the chance that habitual offenders would go free? Although numerous studies have revealed that insistence on this right has not hampered law enforcement unduly, it is a reasonable question—and it is one the framers answered when they drafted the Constitution.

In its Anglo-American meaning, a fair trial rests upon a unique foundation, the adversarial process, which pits two sides against each other in a legal contest judged or decided by representatives from the community, the jury. It is quite unlike the European inquisitorial system, with a judge or panel of judges empowered to question the accused and decide guilt and innocence. The adversarial process allows each side—prosecution and defense—to lay out its strongest arguments, and it trusts the jury to decide between them. The primary goal of this process is not simply to convict the guilty but also to protect the innocent who are wrongfully accused. Americans at the time of the Constitution's creation understood and endorsed this goal. They accepted the maxim of English law since the fifteenth century that "one would rather twenty guilty individuals should escape punishment. . . than one innocent person should be condemned."Without this assurance, the founders believed, no one could truly be free.

Without an attorney, this adversarial process is a mismatch that puts the defendant at a disadvantage. The reason for this result is twofold. Not having the aid of counsel, the Supreme Court has noted, a defendant "may be put on trial without a proper charge and convicted upon improper evidence. He lacks both the skill and the knowledge to prepare his defense, even though he may have a perfect one." But another reason goes far beyond the legal knowledge required to navigate the court system. Government by definition has great power. It alone has the authority to accuse, prosecute, and punish. It can marshal a vast array of resources to carry out these responsibilities. Officials can use their power, at times, for less noble purposes, such as benefiting themselves and their supporters or persecuting their opponents. The founding generation knew this, and they limited governmental power, in part, by protecting the rights of individuals. They insisted that government follow due process and abide by the rules that guarantee a fair investigation and a fair trial. The presence of counsel to represent the accused and to insist that the government follow its own rules helps to protect us against the abuse of power.

Since the decisions in *Gideon* and *Escobedo*, the Supreme Court has extended the right to counsel to virtually all parts of the criminal process, including when juveniles are charged in delinquency proceedings, in misdemeanor cases when there is potential for a loss of liberty, and in lineups, pretrial hearings, and plea negotiations. In the process, it has tied the right to an other guarantee of the Bill of Rights, the Fifth Amendment's protection against self-incrimination. These two rights operate together to guard against the chance that people

"An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless."

—Justice Lewis Powell, *Argersinger v. Hamlin* (1972)

accused of crime will be forced or tricked into confessing a crime and thereby sacrifice their right to a fair trial.

Ultimately, the right to counsel is essential to our conception of fairness in criminal proceedings. "Of all the rights that an accused person has," the Supreme Court has written, "the right to be represented by counsel is by far the most pervasive right for it affects his ability to assert any other rights he may have." The Sixth Amendment lists the elements of a fair trial—a speedy and public trial, an impartial jury, the right to confront witnesses, and the right to compel testimony. The final clause of the amendment, the right to an attorney, offers assurance that we as a society will keep this promise of fairness.

The Right to Be Heard

In the Scottsboro case of Powell v. Alabama (1932), the Supreme Court had to decide if the state's failure to provide effective counsel violated the due process clause of the Fourteenth Amendment. Writing for the 7-to-2 majority, Justice George Sutherland noted that the counsel designated for the defense had actually been a member of the prosecution a short time earlier. He concluded that "the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period [before trial] as at the trial itself." Justice Sutherland then discussed the reasons why a fair trial depended upon the assistance of counsel.

The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution. . . .

It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. . . . Mr. Justice Field. . . said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard....

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

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court. . . to assign counsel for him. . . and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. . . .

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

"You Cannot Have a Fair Trial without Counsel"

Future Supreme Court justice Abe Fortas was a prominent Washington attorney who agreed to represent Clarence Gideon in his appeal to the Supreme Court. Gideon won his appeal in Gideon v.Wainwright *(1963), which established the right to counsel as a guarantee of the Sixth Amendment that was incorporated as a restraint on the states through the Fourteenth Amendment. Fortas made the case in his oral argument that under our adversarial system of justice, assistance of counsel is necessary to ensure fairness.*

I believe that this case dramatically illustrates the point that you cannot have a fair trial without counsel. Indeed, I believe that the right way to look at this. . . is that a court, a criminal court, is not properly constituted—and this has been said in some of your opinions—under our adversary system of law, unless there is a judge and unless there is a counsel for the prosecution and unless there is a counsel for the defense. Without that, how can a civilized nation pretend that it is having a fair trial, under our adversary system, which means that counsel for the state will do his best within the limits of fairness and honor and decency to present the case for the state, and counsel for defense will do his best, similarly, to present the best case possible for the defendant, and from that clash there will emerge the truth. That is our concept, and how can we say, how can it be suggested that a court is properly constituted, that a trial is fair, unless those conditions exist.