

The Social History of Crime and Punishment in America: An Encyclopedia

Legal Counsel

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Book Title: The Social History of Crime and Punishment in America: An Encyclopedia

Chapter Title: "Legal Counsel"

Pub. Date: 2012

Access Date: December 09, 2014

Publishing Company: SAGE Publications, Inc.

City: Thousand Oaks

Print ISBN: 9781412988766

Online ISBN: 9781452218427

DOI: <http://dx.doi.org/10.4135/9781452218427.n393>

Print pages: 998-1005

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<http://dx.doi.org/10.4135/9781452218427.n393>

As stated in the familiar Miranda warning, those involved in the criminal process have a right to an attorney, also referred to as the right to legal counsel. This right is afforded to people being interrogated, accused, prosecuted, and convicted of crimes. However, the actions and protections associated with the right vary according to the stage of the criminal process, the punishment associated with the crime, and characteristics unique to the person such as mental capacity and financial situation.

The right to legal counsel is a constitutionally guaranteed federal right. A right to “Assistance of Counsel” for “all criminal prosecutions” is explicitly stated in the Sixth Amendment. The right to counsel is seen as an integral part of both the right to due process before being deprived of life or liberty and the right not to incriminate oneself afforded by the Fifth Amendment. States are also obligated to respect these rights since both amendments have been incorporated to the states through the Fourteenth Amendment.

However, until the 20th century, the right to counsel was available to only the privileged few. There were no guarantees that counsel would be appointed for those who could not afford an attorney. There were no guarantees that a person would be represented by counsel prior to appearing in court. And since people were not informed that they had a right to counsel, those who were unfamiliar with the legal system were left alone through a process that could result in their imprisonment or death.

Through the late 20th and early 21st centuries, the U.S. Supreme Court has developed extensive case law interpreting, applying, and distinguishing the Fifth and Sixth Amendment rights to counsel. The two most famous cases, *Gideon v. Wainwright* (1963) and *Miranda v. Arizona* (1966), have ensured that the indigent have access to legal representation and that those subjected to custodial interrogation are informed of their right to counsel, respectively. However, the right to legal counsel is far more nuanced than these two cases indicate.

Role and Types of Legal Counsel

The right to legal counsel is grounded in the principle of fairness and the adversarial nature of the American legal system. In America, the criminal legal process is adversarial as characterized by the presentation of opposing arguments by the prosecution and defense to an impartial jury. It is expected that the jury will be able to identify the truth and decide the guilt or innocence of the defendant. In this system, the defendant's legal counsel is to act as an advocate for the defendant, challenging the prosecution's case and ensuring that the defendant's rights are protected and the process is fair.

Representation by legal counsel is important to ensure that the criminal legal process remains fair. The criminal legal process is initiated by and driven by government, whether state or federal, action that may be inherently unfair. It is the role of legal counsel to ensure that the defendant is treated fairly throughout the process. Legal counsel is expected to understand the process itself as well as the implication of the defendant's choices and actions throughout the process. As a result, legal counsel is expected to assist and advise the defendant, thus ensuring that the government actors, such as the prosecution and police, do not take unfair advantage of the defendant or the situation. The principle of fairness also dictates that the government not restrict or impede the ability of the defendant and legal counsel to prepare and present a defense.

It is possible for a criminal defendant to waive the right to legal counsel at any point or for the entire criminal legal process. However, this is not recommended and is rarely done. Few criminal defendants have an understanding of the criminal legal system necessary to adequately protect their rights or ensure fairness. Even when the defendant has some legal training, as in *Crooker v. California* (1958), involvement in the process and lack of experience risks incriminating or detrimental actions that may have been avoided by advice from legal counsel.

Criminal defendants can be represented by either privately retained or publicly appointed legal counsel. If the defendant has the financial means, he/she can choose to retain a lawyer privately. If, however, the defendant cannot afford a lawyer and meets the state or federal considerations for indigence, the court will appoint a lawyer.

Financial standards for indigence vary by state, and some states do allow for partial indigence. The financial status of those claiming indigence is verified by the court, and the defendant is required to report any changes in financial status to the court. Courts can require reimbursement for the costs of legal counsel if the defendant's financial status improves.

When appointing legal counsel, the court may appoint a public defender or a panel attorney. Some states have established an office of public defenders. These are lawyers who focus solely on representing indigent criminal defendants. Panel attorneys are lawyers who have a private practice but spend a portion of their time providing legal counsel for indigent criminal defendants. Although, in essence, a court-appointed lawyer is an employee of the government because fees are paid by the government, he/she is expected to represent and advocate for the defendant. The principle of fairness requires that the government not interfere in the defense through the manner of appointing legal counsel, including who is appointed and the time provided for preparation of the case.

[p. 999 ↓]

Right to Counsel

As mentioned, the right to legal counsel is guaranteed in both the Fifth and Sixth Amendments. There is a difference between these two rights, and the Supreme Court has enforced that difference through its decisions. The right to legal counsel guaranteed in the Fifth Amendment is to ensure the defendant's rights as well as fairness of the process. The Fifth Amendment right to counsel is applicable in processes and procedures before the government has taken formal action to prosecute. Although a person has a right to an attorney during this period, it is not an absolute right because there must be a request for legal counsel. In other words, it is the responsibility of the person desiring legal counsel to take action.

Conversely, the Sixth Amendment right to counsel applies once the government has indicated that it will prosecute and, therefore, has begun criminal proceedings. In this situation, the right to counsel is absolute because the person must take action to waive the right. Even if the person waives the Sixth Amendment right to counsel and chooses

to self-represent, the court may deny the request if it is in the best interest of either the defendant (e.g., if the defendant is illiterate or has mental issues) or justice (e.g., if self-representation would significantly impede the trial). The court also has the right to appoint a “standby” attorney in the event that the defendant has a change of mind.

Before the *Miranda* decision, exercise of the Fifth Amendment right to counsel was dependent on the person knowing the right, the police notifying the person of the right, and the person understanding that he/she could exercise the right. Even when the person chose to exercise the right, he/she was not afforded immediate protections. For example, in 1958, the Supreme Court found that there was no violation of a right when the police refused to honor the request for counsel until after a confession was made (*Cicenia v. Lagay*, 1958). On the same day, the Supreme Court found in *Crooker* that there was no violation of right to counsel when a confession was made absent counsel because the person had an understanding of the legal process and had previously refused to exercise his right to counsel. Presaging *Miranda*, the Supreme Court ruled in *Escobedo v. Illinois*. (1964) that denial of counsel during custodial questioning after counsel had been requested and without warning was a violation of the right to counsel.

By 1966, the Supreme Court realized that the variety of procedures in place to make people aware of their Fifth Amendment rights was inadequate. In the *Miranda* decision, the Supreme Court indicated a warning that is to be given before a person is questioned or interrogated or makes a statement that could be self-incriminating. The Supreme Court believed that after this warning, the person could knowingly and intelligently waive or exercise his/her rights, including the right to having legal counsel present.

During the 1970s, the Supreme Court announced two decisions that could be seen as limiting the Fifth Amendment right to counsel. In *Kirby v. Illinois* (1972), the Supreme Court refused to extend the right to counsel to identification by a victim before the prosecutorial process has begun. Reinforcing that the request for legal counsel must be specific, the court, in *Fare v. Michael C.* (1979), determined that the request by a juvenile for his probation officer was a knowing and intelligent waiver of the right to counsel.

The Supreme Court continues to require that exercise of the Fifth Amendment right to counsel requires an explicit request for counsel. For example, the right to invoke

counsel could not be established when the person contradicted himself by making limited requests for counsel as well as statements of willingness to speak with authorities (*Connecticut v. Barrett*, 1987). Furthermore, merely mentioning a lawyer or making comments about a lawyer is not sufficient to exercise the right to counsel (*Davis v. United States*, 1994).

In 1981, the Supreme Court clarified and reinforced *Miranda*. In *Edwards v. Arizona*, the Supreme Court held that once a person has requested an attorney, it cannot be considered that the right was subsequently waived because he responded to continued custodial questioning unless the person initiated the communication. Because of the coercive conditions that exist when a person is in the custody of the government (including police stations and prison) there is a risk that the person will be unfairly influenced to provide information that would not be provided in other, less coercive, situations. The Supreme Court agreed to apply this ruling retroactively in [p. 1000 ↓] situations where it was decided before a direct appeal of a final conviction could be heard (*Shea v. Louisiana*, 1985).

A man being searched during an arrest in Tulsa, Oklahoma, in May 2001. The Fifth Amendment right to counsel is applicable in processes and procedures before the government has taken formal action to prosecute. This means that although a person has a right to an attorney during this period, it is not an absolute right because there must be a request for legal counsel.



The Supreme Court continues to refine and reinforce *Edwards*. In *Arizona v. Roberson* (1988), the Supreme Court found a violation of Fifth Amendment rights when the

person invoked the right to counsel but police interrogated him regarding a separate investigation without the presence of counsel while he remained in custody. In other words, once a person in custody requests a lawyer, that right has attached for the entire time that he/she is in custody. Since the court recognizes that the mental effects of being in custody continue even after release, the right to counsel remains attached for 14 days after release (*Maryland v. Shatzer*, 2010).

However, the Supreme Court also clarified that invocation of the right to counsel is specific to the offense (*Texas v. Cobb*, 2001). As different offenses require different elements of proof, they also separate invocation of the right to counsel. Therefore, the right to counsel invoked during one custodial interrogation does not extend to another custodial interrogation even if it is on related charges.

The Supreme Court is reinforcing and refining the Miranda warnings in three general areas. First, the Supreme Court has refined what constitutes adequate warnings. In *Wyrick v. Fields* (1982), the Supreme Court explained that in order to determine whether the right to counsel has been waived, the “totality of the circumstances” must be considered. This is consistent with the rulings that clarified *Edwards* because those rulings looked at the impact of the circumstances in which the questioning occurred. Furthermore, a person can waive his/her Fifth Amendment right to [p. 1001 ↓] counsel with knowing and understanding without having knowledge of all possible charges or having the consequences of his/her actions explained (*Colorado v. Spring*, 1987). It is also not necessary to explicitly explain that legal counsel can be present during questioning as long as there is an explanation that legal counsel can be consulted prior to questioning and the right to counsel can be invoked at any time (*Florida v. Powell*, 2010).

Second, the Supreme Court has clarified the consequences of questioning after invoking the Fifth Amendment right to counsel. If counsel is requested after the Miranda warning but the person responds to questions before counsel arrives, those responses cannot be used to question the validity of the request for counsel (*Smith v. Illinois*, 1984). In addition, the right to counsel does not end once a person has consulted with his/her legal counsel (*Minnick v. Mississippi*, 1990). Once a person has requested legal counsel, further questioning cannot occur without the presence of the legal counsel unless the person specifically initiates the communication in the absence of counsel.

Third, the Supreme Court continues to reiterate that there is a difference between Fifth and Sixth Amendment right to counsel. To illustrate, the court has ruled that invocation of the Sixth Amendment right to counsel during the first court appearance does not carry the implication that the Fifth Amendment right to counsel had been invoked (*McNeil v. Wisconsin*, 1991).

Sixth Amendment Right to Counsel

When considering the Sixth Amendment right to counsel, the Supreme Court has been concerned with identifying those parts of the criminal legal process that require the presence of counsel. In general, the Supreme Court has applied the Sixth Amendment right to counsel to proceedings associated with conviction beginning with the first judicial appearance. The intent is that the right to counsel attaches when the government has indicated its intention to prosecute. This right extends through the right of first appeal. Although a defendant is allowed to have legal counsel at any time prior to the first judicial appearance and during discretionary appeals, these actions are not covered by the Sixth Amendment right to counsel.

The importance of the Sixth Amendment right to counsel is that it prevents actions and proceedings that could harm the defendant from occurring without legal counsel's knowledge or participation. For example, once the Sixth Amendment right to counsel is in effect, government agents, including police and informants, are not allowed to solicit information or confessions from the defendant without the presence of his legal counsel.

Historically, the Supreme Court afforded defendants charged in capital offenses greater protections under the Sixth Amendment right to counsel due to the severity and irrevocability of the punishment. More recently, Supreme Court decisions have recognized the importance of legal counsel in any case where the defendant may lose his or her liberty. A "critical stage" assessment is used to determine if legal counsel is available at the points in the criminal legal process that directly impact the outcome of the process. This change toward the critical stage assessment began in *Hamilton v. Alabama* (1961). When the Supreme Court viewed the impact of the pleading at arraignment under Alabama law, it ruled that it was a critical stage in the process and, therefore, the defendant required the benefit of counsel. Two years later, the Supreme

Court used this same logic to determine that preliminary hearings under Maryland law are a critical stage in the process, thus requiring counsel to ensure that the defendant can plead intelligently (*White v. Maryland*, 1963).

Beyond the critical stage assessment, the Supreme Court found other conditions under which counsel was required beyond the trial process. In *Gagnon v. Scarpelli* (1973), the Supreme Court acknowledged that legal counsel should be available when warranted by the complexity of issues. As a result, the determination of whether legal counsel is necessary should be made on a case-by-case basis. This assessment also applies to probation hearings. Unfamiliarity with the law and mental illness necessitate legal counsel to ensure that the trial process is fair (*McNeal v. Culver*, 1961).

The Supreme Court has since extended right to counsel protections to post-indictment lineups (*United States v. Wade*, 1967), preliminary hearings (*Coleman v. Alabama*, 1970), pretrial interactions with the government (*Kansas v. Ventris*, 2009), identification after initiation of adversarial proceedings (*Moore v. Illinois*, 1977), sentencing [p. 1002 ↓] (*Estelle v. Smith*, 1981), a psychiatric exam to determine future dangerousness (*Powell v. Texas*, 1968), suspension of a sentence that could result in loss of liberty (*Alabama v. Shelton*, 2002), a parolee's response to notification of review (*Moody v. Daggett*, 1976), and capital case clemency hearings (*Harbison v. Bell*, 2009).

The Supreme Court has also identified procedures that are not covered by the Sixth Amendment right to counsel. These include post-conviction hearings (*Pennsylvania v. Finley*, 1987), prison disciplinary hearings (*Baxter v. Palmigiano*, 1976), and summary court-martial (*Middendorf v. Henry*, 1976). In making these determinations, the Supreme Court considered such factors as the impact on loss of liberty as well as the impact on the process and its intended goals.

The Supreme Court generally affords fewer rights to prisoners than to those who have not been convicted or who are on probation. However, it also acknowledges and protects the prisoner's rights to make claims. Although prisoners do not have a protected right to counsel after the first appeal, the Supreme Court has mandated that states provide meaningful access to the courts, including stationery supplies, law libraries, and assistance with filing legal papers (*Bounds v. Smith*, 1977).

Appointment of Counsel

In order to ensure protection of the Sixth Amendment right to counsel, both the federal and state governments are required to provide legal counsel to indigent defendants. Historically, this requirement has been subject to several limitations beyond the need to prove indigence. Since the requirement to appoint counsel is grounded in the Sixth Amendment, the government is only required to appoint counsel for those portions of the criminal legal process protected by that right as described above. For example, appointment of counsel is not required for discretionary appeals.

Appointment of counsel has also been limited by the type of case. Indigent defendants charged with capital offenses have historically been appointed counsel because of the consequences of the punishment. Furthermore, the appointment of counsel was originally only available for federal crimes because the Sixth Amendment was not applicable to the states. This position was established in *Betts v. Brady* (1942) when the Supreme Court upheld Maryland's limitation on crimes eligible for appointment of counsel. The Supreme Court began to move away from this position in 1956 with the *Griffin v. Illinois* decision that indigent prisoners, even those not convicted of capital offenses, had the same right of appellate review as nonindigent prisoners.

However, it was not until *Gideon* that the Sixth Amendment right to counsel was incorporated to the states. *Gideon* specifically overruled *Betts* and found that the right to counsel is one of the fundamental rights that are applicable to the states through the due process clause of the Fourteenth Amendment. This ruling also extended the right to have counsel appointed beyond capital cases. On the same day, the Supreme Court extended the right to have counsel appointed to the first appeal in *Douglas v. California* (1963). With these rulings, the Supreme Court brought appointment of counsel in line with the Sixth Amendment right to counsel application from first judicial appearance through first appeal.

In its jurisprudence, the Supreme Court continues to grant appointment of counsel in a manner consistent with its rulings on the Sixth Amendment right to counsel. In *Mempa v. Rhay* (1967), the Supreme Court decided that counsel must be appointed for indigent defendants at all parts of the criminal legal process where the rights of the defendant

could be affected. Conversely, the Supreme Court has refused appointment of counsel in post-conviction proceedings because these are not considered part of the criminal process (*Murray v. Giarratano et al.*, 1989). However, if the crime occurs in prison, the Sixth Amendment right to counsel, and therefore appointment of counsel, is not triggered until formal charges are filed (*United States v. Gouveia et al.*, 1984).

In *Argersinger v. Hamlin* (1972), the court clarified that the Sixth Amendment right to counsel is based on whether a person will be deprived of his/her liberty, not on the type of offense. Appointment of counsel for indigent defendants, therefore, should be available in all cases where there is a potential for loss of liberty. This ruling has been refined in two respects. Appointment of counsel is not required if loss of liberty is authorized for the crime charged but it will not be imposed by the court (*Scott v. Illinois*, 1979).

[p. 1003 ↓]

New York organized crime figures Louis Capone and Emanuel “Mendy” Weiss during their trial for murder in September 1941. Weiss is consulting with an attorney, while Capone (no relation to Al Capone) looks at the camera. Both were convicted and, after several years of appeals, executed in the electric chair at Sing Sing prison in March 1944 along with another conspirator.



However, if a defendant's charge includes additional punishment as a habitual offender, counsel is required (*Chewning v. Cunningham*, 1962).

Ineffectual Counsel

As the right to counsel and appointment of counsel have evolved to cover a greater variety of cases, concerns about ineffective counsel have been increasingly raised and addressed by the Supreme Court. These claims are based on the principle that the right to counsel implies that legal counsel will be effective. When a claim of ineffective counsel is raised, the burden of proof lies with the person raising the claim.

In 1984, the Supreme Court established the Strickland test as a guide for claiming ineffective counsel (*Strickland v. Washington*, 1984). This is a two-pronged test. First, the claimant must prove that the actions of counsel fell below an objective standard of reasonableness. Second, the claimant must prove that those actions resulted in prejudice so great that there was reasonable probability that they altered the outcome of the trial.

Proving both criteria of the Strickland test is difficult for three reasons. First, the claimant must specifically state the actions that were not objectively reasonable. Second, the Supreme Court has indicated that there is a presumption that legal counsel acted reasonably. This is based on the understanding that in preparing and presenting a case, legal counsel chooses among a range of strategies and tactics. A hindsight review of these choices can unfairly find fault and impose a biased judgment of actions. Third, [p. 1004 ↓] the claimant must prove that a reasonable probability exists that the outcome of the trial would be different if not for the actions of the legal counsel. This requires proving more than just a possibility or an expectation that the outcome would have been different.

The Supreme Court has issued two rulings that have further clarified its position on ineffective counsel. In *United States v. Cronin* (1984), the Supreme Court explained that the right to effective counsel is based on the need for the defense to provide a meaningful adversarial test of the prosecution's case. Most recently, the Supreme Court has reiterated that effective legal counsel is to ensure the fairness of the process. A fair process does not necessarily mean that the outcome will be favorable to the defendant (*Cullen v. Pin-holster*, 2011).

Supreme Court decisions since *Strickland* have also provided guidance in meeting the Strickland test. To meet the reasonableness test of Strickland, the Supreme Court has explained that the circumstances of the case must be considered (*Roe v. Flores-Ortega*). In *Bell v. Cone* (2002), the Supreme Court provided three instances where the prejudice standard of *Strickland* would be met: (1) the effect of actions resulted in the complete denial of legal counsel at a critical stage, (2) counsel did not subject the prosecution's case to adversarial testing, and (3) counsel was expected to assist in a situation where competent legal counsel could not provide effective assistance.

This does not mean that the Strickland test is insurmountable. Litigants have successfully claimed ineffective counsel when no pretrial discovery was done (*Kimmelman v. Morrison*, 1986), when the case file was not appropriately reviewed (*Rompilla v. Beard*, 2005), and in cases where counsel failed to discover or present mitigating circumstances at sentencing.

Although it is the intent that the defendant and legal counsel will work together on the case, legal counsel is allowed latitude to act in the best interests of the defendant. For example, legal counsel's authorization is seen as sufficient to allow a judge to preside over voir dire (*Gonzalez v. United States*, 2008), to make trial scheduling decisions (*New York v. Hill*, 2000), and to provide assurances that the defendant was properly informed of the nature and elements of the charge (*Bradshaw v. Stumpf*, 2005).

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<http://dx.doi.org/10.4135/9781452218427.n393>

See Also:

- 1921 to 1940 Primary Documents
- [Adversarial Justice](#)
- [Appeals](#)
- [Bill of Rights](#)
- [Capital Punishment](#)
- [Constitution of the United States of America](#)
- [Defendant's Rights](#)
- [Gideon v. Wainwright](#)
- [Miranda v. Arizona](#)

- [Prisoner's Rights](#)
- [Suspect's Rights.](#)

Further Readings

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