

resale to underclassmen, preferring instead to retain the volume for future use.<sup>14</sup>

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THE RIGHT TO COUNSEL IN AMERICAN COURTS. By William R. Beaney. Ann Arbor: University of Michigan Press. 1955. Pp. xi, 268. \$4.50.

The story of the right to counsel in criminal cases comprises a fascinating chapter in the annals of Anglo-American jurisprudence. One might think that the basic principles would be reasonably clear. Our whole concept of law enforcement as an accusatory process, our theory of the trial as a contest staged before judge and jury, our traditional concern lest a powerful state overwhelm an isolated citizen, our feeling for the worth and indeed the salvation of the individual human being — to say nothing of the complexities of criminal law and procedure — all would seem to demand that the accused in a criminal case always and at all times be furnished with the aid of counsel. How else can the accused play his allotted role in the criminal process? How else can the protections theoretically accorded to the individual be realized in practice? Is not the spectacle of an accused trying to hold up his end of the balance, alone and unaided, an obvious mockery of the whole criminal process?

Yet the right to counsel was surprisingly slow in receiving recognition. Some jurisdictions have never fully accepted the principle. And in practice an effective right to counsel is still far from accomplished.

In England it was not until 1836 that persons accused of a felony, other than treason, were in theory at least permitted representation by counsel. In America the Sixth Amendment to the Federal Constitution and comparable provisions in state constitutions or legislation guaranteed a right to retain counsel in all criminal cases. But recognition of the right to retain counsel is only the beginning. It assures counsel to those with the knowledge or experience to appreciate their right and with the funds to pay for it; but it does nothing for the ignorant or the indigent. Full realization of the right to counsel comes only when each accused is advised of his rights at an early stage and provided with counsel if he wants one but cannot afford it.

Development of the law toward this goal, even in principle, was hesitant. Prior to 1932 a handful of states had interpreted consti-

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<sup>14</sup>Ray, *supra* note 1, at 537. For these purposes, however, a much more detailed index would be of immeasurable value. While the second edition is an improvement over the first in this respect, it still is lacking as a useful "key" to the wealth of material available.

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tutional provisions to guarantee a right to have counsel provided in all criminal cases. A number of others by legislation or court rule reached the same result. All came eventually to make provision for counsel in capital cases and most made some provision, often seriously qualified by technicalities, for felony cases. In the federal courts provision for counsel was accorded in practice in an increasing number of jurisdictions. But substantial gaps remained and a constitutional right was only narrowly recognized.

Pressures for full acceptance of the right to counsel were slowly accumulating. With increasing industrialization and urbanization came a greater sense of social responsibility, a more acute awareness of the problem of implementing individual rights in contests with the government, and the general growth of a humanitarian spirit. At the same time came increasing complexities and refinements in the law, an increase in the extent of government regulation, and a growth in the volume of crime. The impersonal nature of city life made practical adjustments for providing counsel on an informal basis somewhat outmoded and less effective. Knowledge of the causes of crime and of the psychology of the offender added further complications to the criminal system. The assumption of social responsibility by the government in economic and welfare fields accustomed the public to a more affirmative role for government and made the notion of government responsibility for providing counsel more acceptable.

There came, also, new concepts in federal-state relationships. Here the major instrument was the Fourteenth Amendment. Passed in a futile effort to force the states to grant the Negro full status as a free man, transformed to a device for checking state regulation of business enterprise, the Fourteenth Amendment by the 1920's was being revived and urged as tool for employing federal power to compel state protection of individual procedural rights.

These mounting pressures came dramatically to a head in the *Scottsboro* cases, which reached the Supreme Court in 1932.<sup>1</sup> The widely publicized issue was whether the courts of Alabama had afforded a fair trial to seven Negro boys accused of raping two white girls on a moving freight train. The Supreme Court was presented with an unusually appealing case for federal relief. Actually the major issue stressed by counsel for the defendants in the Supreme Court was whether mob pressures at the trial had prevented a fair consideration of the issues. But it is hardly surprising that the Supreme Court chose to rest its decision upon a somewhat more definite and manageable issue — the right to counsel. Writing for a majority of seven, Justice Sutherland held that the Alabama

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<sup>1</sup>Powell v. Alabama, 287 U.S. 45 (1932).

courts had denied the defendants an effective right to counsel in violation of the due process clause of the Fourteenth Amendment. But the opinion went considerably beyond the immediate facts of the case. In a vigorous rationale of the holding Justice Sutherland insisted upon the fundamental fact that failure to provide defendants with counsel in a criminal case was virtually the same as denying them a hearing altogether.<sup>2</sup>

Six years later, in *Johnson v. Zerbst*,<sup>3</sup> the Supreme Court largely completed the doctrinal picture. The opinion was written by Justice Black, with his customary ability to see the vital issue and his profound regard for the rights of the individual in an age of growing governmental power. It ruled that the Sixth Amendment required that the defendant be furnished with counsel in all criminal cases in the federal courts and that this guarantee could be waived only if the defendant knew of his right and made an informed decision to forego it.

*Johnson v. Zerbst* laid the basis for a sensible and effective solution of the problem in the federal courts. Together with the *Scottsboro* case, the way seemed open for a similar solution of the more extensive problem in the state courts. For reasons already noted, the case for providing counsel as a matter of right in all criminal cases is compelling. Objections on the part of some police, prosecutors and trial judges, mostly based on fear of delay and obstruction in the administration of criminal laws, should hardly carry much weight when the rich and the professional criminal are assured of representation by counsel, and the only real issue is whether the poor and the ignorant should be accorded equal privileges. The federal-state issue arises in its easiest form: the federal government is not taking over administration of the state criminal law but is merely prescribing general rules of minimum protection. Satisfactory legal doctrine is readily available: the Court can hold either that the Sixth Amendment is incorporated in the Fourteenth or that "the fundamental principles of liberty and justice" require the assistance of counsel as much as they require a hearing.

Subsidiary questions would, of course, remain. The stage of the proceeding at which counsel must be furnished, the circumstances under which waiver will be allowed, the showing which must appear on the record, the competency of assigned counsel, and many other similar issues would have to be settled by the courts. But these could be solved.

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<sup>2</sup>287 U.S. at 68-69. Professor Beaney's account of the *Scottsboro* case contains two minor inaccuracies. The Negroes were taken off the train not at "Pointed Rock" (p. 151) but at Paint Rock. And there were not "four trials completed on that same day" (p. 152), but three trials completed in three days.

<sup>3</sup>304 U.S. 458 (1938).

Unfortunately in subsequent cases a majority of the Supreme Court have chosen a wavering and timorous course. They have applied the federal rule to state court cases in which a capital offense has been charged. But in other state cases they have held that the right to have counsel provided turns upon the facts of each case, as they appear to the Court after the trial is over. Moreover, a majority on the Court have permitted various technical obstructions to stand in the way of a clear-cut application of minimum requirements for the state courts. The result leaves the right to counsel highly uncertain and probably satisfies nobody.

Apart from the failure of the Supreme Court to establish a simple and straight-forward doctrinal basis for the right of counsel, the major problem has been the development of institutions and methods for making the right effective in practice. Relatively little is known of the actual operation of the various systems for providing counsel, but it is clear that in many areas, if not most, administration is haphazard and ineffective. This represents a not unusual lag in social achievement. But the problem is certainly not beyond man's capacity and, if public pressures were maintained, could be met.

Such, in the briefest outline, is the story of the right to counsel. Professor Beaney's book is a good survey of legal decisions on the subject. It traces the history of the right in English and American law, analyzes the right as it developed in the federal courts under the Sixth Amendment, considers the major cases in the state courts, and discusses federal control over state court procedures under the Fourteenth Amendment. The material is handled in a careful, thorough and competent fashion. The book has a broader coverage and more detail than previous writings in the field.<sup>4</sup> It will be of substantial value to practicing lawyers, law teachers and students, political scientists and others interested in the problem.

I suppose, in view of the ordinary level of legal writing, it is unfair to criticize a legal book as uninspired. One cannot help but feel, however, that a great topic has been handled in a pedestrian manner. The book fails to bring the subject to life or to examine it in its broader context. One wishes also, and here perhaps a reviewer is on firmer ground, that the author had been a little more outspoken in giving his own judgments and conclusions on some of the matters treated. That issues are controversial is no reason for not dealing with them firmly and boldly.

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<sup>4</sup>Professor Fellman's articles, which cover much of the same ground, appeared after Professor Beaney's book had been drafted but before actual publication. Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 *Neb. L. Rev.* 559 (1951); Fellman, *The Federal Right to Counsel in State Courts*, 31 *Neb. L. Rev.* 15 (1951). See also Heller, *The Sixth Amendment*, c. VI (1951).

In a chapter at the end of the book Professor Beaney attempts a brief exploration of the right to counsel in practical operation. The author is fully aware that the legal doctrines as announced in the opinions of appellate courts provide only an abstract framework in which the problem is set. Ultimately the important thing is what happens to an individual accused in the police station, the prosecutor's office and the trial court. Professor Beaney's research here was necessarily limited but it tends to confirm two important points: first, that the strict rule of the federal courts and the minority of state courts providing counsel in all criminal cases can be made to work in practice; and, second, in general, achievement of the right falls considerably short of the ideal. On the other hand, the chapter throws little light upon the reasons why some officials object to full provision for counsel or upon the validity of their position. Nor does the chapter deal with the special issues of securing right to counsel for unpopular minorities in political trials.

As Professor Beaney is the first to acknowledge, he has barely been able to scratch the surface of this aspect of the problem. Indeed it is hardly a job that one man, with modest research assistance, can do. The task could only be performed by a heavily subsidized study or, perhaps better, by a series of studies under local sponsorship and with the aid of local groups in the legal profession. Any worthwhile study along these lines would take courage to break through vested interests, local pressures and inertia. Here also, though one again hesitates to set too high a standard, a survey of the problem such as Professor Beaney has undertaken could prick the conscience of the community and perhaps stir it to action. Unfortunately Professor Beaney's book will probably have little effect in this direction.

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MATRIMONIAL PROPERTY LAW. University of Toronto School of Law Comparative Law Series, Volume 2. Edited by W. Friedmann. Toronto: The Carswell Company. 1955. Pp. v, 472. \$8.50.

This second volume in the comparative law series of the University of Toronto School of Law should prove, in my opinion, to be intensely interesting to anyone interested in the field of marital property law. The division of the volume is in four parts: first, a group of treatises on community property jurisdictions;<sup>1</sup> second, a group on separate property (or what might also be termed common law) jurisdictions;<sup>2</sup> third, a group of so-called intermediate

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<sup>2</sup>Canada (common law provinces), England and New York.