truth or falsity of any confession obtained, they would serve as a possible means of curbing those practices. This would assist in affording each individual suspected of a crime the rights which ought not be infringed but which have been subjected to multifarious encroachments in the past. Moreover, the rules would provide some objective certainty with respect to the admission of confessions and their "fruits," and to that extent, at least, would eliminate the necessity for omniscient insight in determining the presence or absence of "coercion" in particular cases.

THE SUBSTANCE OF THE RIGHT TO COUNSEL

In federal prosecutions the courts are obligated by the Sixth Amendment to furnish counsel for all indigent defendants. No such inflexible guarantee is afforded the defendant in a state prosecution. Since the Supreme Court's decision in Betts v. Brady, an absolute right to counsel prevails only in capital cases. Trial without counsel for a noncapital offense will not offend due process unless, viewing the "totality of facts," the proceedings are found lacking in fundamental fairness. Relevant to the question of fairness are the age, intel-

1 U.S. Const. Amend. 6. "In all criminal prosecutions the accused shall enjoy the right ... to have the assistance of counsel for his defense." In Johnson v. Zerbst, 304 U.S. 458, 463 (1938), it was held that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." See Foster v. Illinois, 332 U.S. 134, 136-37 (1947). This provision, however, applies only to the federal courts. Betts v. Brady, 316 U.S. 455, 461-62 (1942).

2 See Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948), where Justice Reed stated the majority opinion as being that "when a crime subject to capital punishment is not involved, each case depends on its own facts." Justice Douglas, dissenting in Bute v. Illinois, 332 U.S. 134, 136-37 (1947), cited Powell v. Alabama, 287 U.S. 45 (1932); Williams v. Kaiser, 323 U.S. 471 (1945); and DeMeerleer v. Michigan, 329 U.S. 663 (1947). In Powell v. Alabama, supra, at 71, despite the broad dictum, the holding was strictly limited to "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..." The holding in Williams v. Kaiser, supra, at 473, was limited to "cases of this type," and the case was of the type which was not only capital, but which involved complex distinctions between different degrees of robbery. In the DeMeerleer case the conclusion that due process had been denied was based not only on the fact that the charge was capital, but also that the defendant was very young and inexperienced, the charge complicated and the proceedings hurried. The significance of factors other than the capital or noncapital nature of the offense is discussed in note 5 infra, in connection, primarily, with noncapital cases.

In Betts v. Brady, 316 U.S. 455 (1942), it was pointed out that the previous statements of the Court, indicating that the right to counsel in all cases came within the safeguards of the Fourteenth Amendment, were dicta. Similarly, there have been no direct holdings that the requirement is absolute in capital cases.

4 Betts v. Brady, 316 U.S. 455, 473 (1942). This decision was considered by many, on as well as off the Court, to be an unjustifiable retreat from the position previously taken by the Court in Powell v. Alabama, 287 U.S. 45 (1932), and Grosjean v. American Press, 297 U.S. 233 (1936), in which cases the right to counsel was said to be fundamental. Justice Black,
ligence, education and experience of the accused, the gravity of the charge, the complexity of the issues raised and the conduct of the court or prosecuting officials. The uncertainty of the rule is acknowledged. While efforts by a minority of justices to overrule Betts v. Brady have failed, the recent decision in Gibbs v. 

dissenting in Betts v. Brady, supra; Orfield, Criminal Procedure from Arrest to Appeal 418 (1947); and 21 Chi.-Kent Rev. 107 (1942), 16 So. Calif. L. Rev. 55 (1942) and 17 Tulane L. Rev. 306 (1942), noting Betts v. Brady. The significance of calling a right fundamental is that the specific guarantees which fall within the scope of the Fourteenth Amendment are so comprehended because the rights are fundamental, not because they are found in the first eight amendments. Twining v. New Jersey, 211 U.S. 78, 94 (1908); Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). For a contrary view, see the dissenting opinion of Justice Black in Foster v. Illinois, 332 U.S. 134, 139 (1946).

5 See generally Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948); Wade v. Mayo, 334 U.S. 672, 684 (1947); and Powell v. Alabama, 287 U.S. 45 (1932). In the following noncapital cases tried in state courts due process was found lacking on the bases indicated: Uveges v. Pennsylvania, supra, youth (seventeen years old), lack of experience in criminal procedure and serious charges (burglary, carrying maximum sentences totaling eighty years); Wade v. Mayo, supra, youth (eighteen years old) and inexperience; and Rice v. Olsen, 324 U.S. 786 (1945), an unusually complex issue (conflicting state and federal jurisdictions). In DeMeerleer v. Michigan, 329 U.S. 663 (1947), and Williams v. Kaiser, 323 U.S. 471 (1945), two capital cases, the Court discussed, and apparently considered relevant, other aspects of the cases. In the former, the youth and inexperience of the defendant, and in both, the complexity of the charges. The experience of the accused is particularly relevant to the issue of whether or not counsel was waived. Gryger v. Burke, 334 U.S. 728 (1948) (no denial of due process in a state trial under an habitual criminal statute); O'Keith v. Johnston, 129 F. 2d 889 (C.A. 9th, 1945) (a conviction in a federal court unsuccessfully challenged on the basis of an alleged violation of the requirement of counsel in the Sixth Amendment). While the question of waiver is of constitutional importance primarily in federal prosecutions, note 1 supra, it is also significant in a state trial in which the accused would otherwise be entitled to counsel.

Under the "rationalizing principle which gives to discrete instances a proper order and coherence," Palko v. Connecticut, 302 U.S. 319, 325 (1937), are found the following cases in which due process was complied with despite the circumstances indicated: Canzio v. New York, 327 U.S. 82 (1946), in which the nineteen year old defendant jeopardized his cause by a plea of guilty while without counsel, though counsel was subsequently appointed; Bute v. Illinois, 333 U.S. 640 (1948), where the fifty-seven year old defendant, wholly without counsel, was sentenced to a maximum of forty years on the difficult charge of taking indecent liberties with minors. The Bute case illustrates the fallacy of the capital-noncapital distinction discussed in note 3 supra.

The importance of "the conduct of the court or prosecuting officials" is taken up in the text at note 14 infra in connection with the case of Gibbs v. Burke, 337 U.S. 773 (1949).

6 In Betts v. Brady, 316 U.S. 455, 462 (1942), the Court stated: "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 the light of other circumstances, fall short of such a denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed." See also Uveges v. Pennsylvania, 335 U.S. 437, 442 (1948); Wade v. Mayo, 334 U.S. 672, 684 (1947); and Gibbs v. Burke, 337 U.S. 773, 780-81 (1949), where the Court most recently acknowledged the existence of the problem and its inability to do anything about it. "We cannot offer a panacea for the difficulty. . . . The due process clause is not susceptible to reduction to a mathematical formula."

Burke\textsuperscript{8} may have the practical effect of eliminating the disparity between the assistance of counsel provided in the state courts and that already available in the federal courts.

Gibbs, the petitioner, was a man in his thirties, apparently of ordinary intelligence, and no stranger to the criminal courts.\textsuperscript{9} Unable to afford counsel, he conducted his own defense against a charge of larceny. The record failed to show that counsel had either been requested by him or offered by the court. Upon the jury's finding of guilt he was sentenced to a term of two and one-half to five years in the state penitentiary. His petition for habeas corpus was denied by the supreme court of Pennsylvania and the United States Supreme Court granted certiorari.\textsuperscript{10} Claiming that he had been denied due process, he pointed to a number of mistakes made during his trial. Inadmissible hearsay and other incompetent evidence had been admitted without objection by the petitioner. The judge had ruled, contrary to Pennsylvania law, that testimony of the prosecuting witness elicited on recross was binding on the petitioner. The latter was not allowed to introduce evidence showing that the prosecuting witness had previously made a baseless criminal charge against him.\textsuperscript{11} Further, in advising the petitioner of his right to refrain from taking the stand, the judge made reference to possible past convictions.\textsuperscript{12} Finally, it was alleged that in passing sentence the judge had displayed an attitude of hostility toward the petitioner. By giving weight to this claim, the case could have been decided under the ruling in Townsend \textit{v.} Burke.\textsuperscript{13} In that case due process was found lacking because the judge, in passing sentence, had failed either through carelessness or design, to distinguish between the past convictions and acquittals disclosed by the defendant's record.\textsuperscript{14} In Gibbs \textit{v.} Burke the alleged judicial hostility was expressly excluded from the factors which combined to show a lack of fundamental fairness.\textsuperscript{15} On the basis of the mistakes per se, without inquiry into

\textsuperscript{8} 337 U.S. 773 (1949).
\textsuperscript{9} A transcript of the petitioner's record showed "eight convictions and nine acquittals, discharges, and no true bills." Ibid., at 775.
\textsuperscript{10} 335 U.S. 867 (1948).
\textsuperscript{11} The petitioner was attempting to prove that the articles had been taken and some of them sold pursuant to an agreement between him and the prosecuting witness.
\textsuperscript{12} There was no mention in the record as to whether or not the jury was present at the time and the Court assumed that it was.
\textsuperscript{13} 334 U.S. 736 (1948).
\textsuperscript{14} The judge, not improperly, was influenced by the defendant's criminal record. However, his failure to distinguish between charges on which the defendant had been convicted and those on which he had been acquitted was considered inexcusable. While holding that under the circumstances due process had not been complied with, the Court stated that "even an erroneous judgment, based on a scrupulous and diligent search for the truth, may be due process of law." Ibid., at 741. Compare Smith \textit{v.} O'Grady, 312 U.S. 329 (1941), in which a finding that due process had been denied was based on an allegation that the court had not lived up to an agreement under which the defendant had entered a plea of guilty.
\textsuperscript{15} "We take no note of the tone of the comments at the time of the sentence. The trial was over." 337 U.S. 773, 781-82 (1949).
their cause, the Court concluded that Gibbs had been "handicapped by lack of counsel to such an extent that his constitutional right to a fair trial had been denied." The decision leaves unanswered the question of how serious the mistakes must be in order to show a denial of due process. Yet, despite this uncertainty, it is clear that criminal judgments rendered in state courts against uncounseled defendants have lost a considerable measure of stability. Moreover, when judgments are overturned there must generally be a new trial, and new trials mean expense to the state. In order to determine whether or not the trial came up to the requisite standard of fairness, the defendant has a limited right to a hearing. The ruling in *Gibbs v. Burke* may expand the scope and

16 Ibid., at 781.

17 The Court did not consider the mistakes in terms of reversible error. Compare Fisher v. State, 11 So. 2d 866 (Miss., 1943), in which it was held on an appeal that the admitted disadvantages suffered by the defendant did not show error since they did not constitute a denial of due process.

18 The hearing, if required, may be had in either a state or a federal court depending on the procedure followed. If the state has refused to grant a hearing and certiorari is taken to the United States Supreme Court, the latter makes no determination as to the truth of the allegations, but if it finds, prima facie, a denial of due process, the case is sent back to the state courts for a hearing. If the state has already conducted a hearing the decision of the Supreme Court will be on the basis of the facts as found. The defendant is not, however, by an adverse ruling, in the state courts, and in the Supreme Court on certiorari, precluded from pursuing habeas corpus in a federal district court. In *Betts v. Brady*, 316 U.S. 445 (1942), the Supreme Court heard the case on certiorari to a Maryland judge. The Maryland courts had twice granted habeas corpus and, on hearings, twice denied relief. The Supreme Court found no denial of due process. In *Rice v. Olsen*, 324 U.S. 786 (1945), the Supreme Court granted certiorari to the supreme court of Nebraska which had affirmed the decision of a lower Nebraska court dismissing the petition for habeas corpus without a hearing. The Supreme Court concluded that the petitioner was entitled to a hearing to ascertain the truth of his allegations. *Williams v. Kaiser*, 332 U.S. 471 (1945), and *Tompkins v. Missouri*, 323 U.S. 485 (1945), were heard on certiorari to the supreme court of Missouri. Habeas corpus had been refused in the state courts and the United States Supreme Court found that due process had been denied on the basis of the facts alleged, subject to a hearing to determine their truth. In *Foster v. Illinois*, 332 U.S. 134 (1947), heard on certiorari to the supreme court of Illinois which had denied a petition for a writ of error, the Court held that state remedies had not been exhausted but suggested that if relief could not be had in Illinois, and appropriate relief would presumably include a hearing, then the petitioner should bring "a new claim of denial of due process for want of such relief." Ibid., at 139. The alternative avenue open to the defendant is a petition for habeas corpus in a lower federal court, after exhausting state remedies. While the Court in *Darr v. Buford*, 70 S. Ct. 587 (1950), declined to say whether or not a petition for certiorari to the Supreme Court was part of the state remedies, it held that the petition comes within the "exhaustion principle," and is a condition precedent to the availability of habeas corpus in a lower federal court. If this method is chosen the district court conducts the hearing. In *Wade v. Mayo*, 334 U.S. 672 (1948), the petitioner had obtained relief on habeas corpus in a federal district court and the warden appealed to the circuit court which reversed. The Supreme Court, on certiorari, reinstated the judgment of the district court, stating, at 683–84, that "[t]his is a judgment which is peculiarly within the province of the trier of facts ... [a]nd we do not find that the ... determination was clearly erroneous." In *Collingsworth v. Mayo*, 173 F. 2d 695 (C.A. 5th, 1949), it was held that the district court in which the petitioner had sought relief on habeas corpus could not accept the facts as found by the Florida supreme court, but must make its own independent determination.
number of these hearings. While the hearing may be conducted in a federal rather than a state court, the state will in any event be inconvenienced by the defendant’s actions in exhausting his state remedies. A consideration of these factors, the time and expense of post-trial proceedings and the instability of judgments, should lead to an abandonment of the practice of conducting trials without defense counsel. The effectiveness of the pressure upon the states will, however, depend on the as yet undetermined attitude of the lower and intermediate federal courts. The importance of the district court’s role as fact finder is reinforced by the severe limitation upon the number of cases that the Supreme Court can consider.

Even if assistance of counsel is made as readily available in state as in federal courts, a further problem remains: To what quality of defense is the indigent accused entitled? The prevalent system is to appoint, ad hoc, any available member of the bar, with little regard for his experience, special training or concern for the interests of the defendant. A number of jurisdictions have either replaced or supplemented this much criticized system by establishing the office of public defender. The latter has many advantages but at the same time is

Prior to the Gibbs case there was no direct precedent for finding a denial of due process on the basis of errors made during the trial. Townsend v. Burke, 334 U.S. 736 (1948), and Smith v. O'Grady, 312 U.S. 329 (1941), were cases in which pleas of guilty had been entered. It would seem that the prisoner, with an increased chance of success because he need no longer prove more than the fact that mistakes were made, would be more apt to seek a hearing (though how serious the mistakes must be is uncertain, note 17 supra).

Ex parte Hawk, 321 U.S. 114, 117 (1944); Darr v. Buford, 70 S.Ct. 587 (1950); cases cited note 18 supra.


The practice of appointing counsel has its theoretical foundation either in the premise that all attorneys are competent to defend in criminal cases and that lawyers who are busy with a paying practice will drop it in order to devote their full energies to a nonpaying client, or else that the indigent defendant does not deserve an effective defense. Neither basis is defensible either in theory or in practice. The inadequacies of the system have been discussed in a number of recent articles. Bennett, To Secure the Right to Counsel, 32 J. Am. Jud. Soc. 177 (1948); Pollock, The Voluntary Defender as Counsel for the Defense, 32 J. Am. Jud. Soc. 174 (1948); Freeman, The Public Defender System, 32 J. Am. Jud. Soc. 74 (1948). Jacobs, Public Defenders, 17 Fort. L. J. 88 (1945); Baird, Compensation for Court Appointed Counsel, 31 J. Crim. L. 731 (1941). Several states provide compensation for appointed counsel, but this is generally inadequate, Garrison, Legal Service for Low Income Groups in Sweden, 26 A.B.A.J. 215 (1940), and even where it does amount to anything the results have not been wholly satisfactory. Baird, op. cit. supra, at 734-35. Various solutions have been attempted in other countries. Schweinburg, Legal Assistance Abroad, 17 Univ. Chi. L. Rev. 270, 279 (1950).

The writing on the subject of the public defender has generally overlooked the system's drawbacks. See articles cited note 22 supra; but cf. Stewart, The Public Defender System Is Unsound in Principle, 32 J. Am. Jud. Soc. 115 (1948). It is generally recognized that rich or poor, innocent or guilty, a person accused of a crime is entitled to have his case decided by a judge or jury, not his attorney. Freeman, op. cit. supra note 23, at 76, suggests, however, that the defender should sift "the deserving from the non-deserving cases." A recent California
not a panacea. Political control and inadequate staffing are inherent problems, as is displacement of the attorney-client relationship by a defense machine.\(^2\)

The courts have not been untroubled by the problem of the competency of counsel and the effectiveness of defense. The Supreme Court has stated that in federal prosecutions the Sixth Amendment requires effective assistance of counsel at all stages of the proceedings.\(^2\) The Court of Appeals for the District of Columbia has taken a view somewhat less favorable to the defendant. It has held that once competent counsel is appointed, and it is presumed that the trial judge would not appoint incompetent counsel, the Sixth Amendment is satisfied. Counsel's subsequent negligence may then violate the Fifth Amendment but not the Sixth.\(^2\) The one strict rule is that if counsel is appointed to represent two or more defendants whose interests conflict, then, so far as any prejudiced defendant is concerned, the Sixth Amendment has not been satisfied.\(^2\)

A second requirement, more flexible than the first, is that counsel must have adequate time to prepare the case. The accused cannot be assigned counsel one minute and put on trial the next,\(^2\) though less than a day may be sufficient.\(^3\) More serious, and administratively far more difficult, is the problem raised by asserted negligence or incompetence of counsel. What are alleged to be mistakes may be defensible as strategy,\(^3\) but even beyond this, the Constitution does not guarantee a perfect defense, and few trials are conducted without errors on both sides.\(^3\)

The Court of Appeals for the District of Columbia appears to recognize a distinction between capital and noncapital cases.\(^3\) Just as due process re-

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\(^{27}\) Diggs v. Welch, 148 F. 2d 667 (App. D.C., 1945). Compare United States v. Wight, 176 F. 2d 376 (C.A. 2d, 1949), and Conley v. Cox, 138 F. 2d 786 (C.A. 8th, 1943), in which the courts, while holding that the assistance of counsel was adequate, fail to suggest which amendment they considered crucial.

\(^{28}\) Glasser v. United States, 315 U.S. 60 (1942); Wright v. Johnston, 77 F. Supp. 687 (Cal., 1948).


\(^{31}\) Burton v. United States, 151 F. 2d 17 (App. D.C., 1945) (defendant had retained his own counsel).


\(^{33}\) Johnson v. United States, 110 F. 2d 562 (App. D.C., 1940), decided on appeal from the district court. A new trial was granted because of the discovery of evidence which had not been presented at the trial. The defendant had, however, had the assistance of counsel appointed by the court, and the evidence could have been discovered in time for the trial. The court held that in such a case (first degree murder) counsel's failure to bring forward all the evidence should not be held against the defendant.
quires the state courts to provide counsel in all capital cases, so it would seem
that the defendant faced with the death penalty may be entitled to a better
defense than one who can lose only his freedom.

The standards of representation which must be met in state trials, while
similar to those in the federal courts, may be even less stringent due to the
Supreme Court’s general reluctance to interfere in state affairs. Whatever con-
trol is exerted comes under the Fourteenth Amendment, and while the Court
denies that due process can be reduced to a “mathematical formula,” still the
single factor—presence or absence of counsel—is used to distinguish cases which
are on a par as to “fundamental fairness.” It is doubtful indeed that if, in Gibbs
v. Burke, the Pennsylvania court had appointed an attorney for the defendant
and the same mistakes had occurred, a violation of due process would have been
found. Yet who could say that the trial would have been less fair in one case
than in the other?

The problem of ineffective representation may arise even when the defendant
has engaged his own attorney. To show an infringement of his constitutional
guarantees the federal prisoner must prove a flagrant disregard of his rights by
counsel resulting in a manifest miscarriage of justice. Surprisingly enough such
a case has arisen. A violation of due process was found where counsel had made
no objection to the admission of a “third degree” confession, had failed to call
important witnesses and finally had taken no steps to allow the jury to compare
the defendant’s handwriting with alleged forgeries. The harsh rules which
make it virtually impossible to establish such a case are perhaps a necessary
concomitant of our reliance on an adversary system in criminal proceedings.

34 Note 3 supra.

35 See Tompsett v. Ohio, 146 F. 2d 95 (C.A. 6th, 1944), and cases there cited. The presump-
tion is that appointed counsel is competent. Feeley v. Ragen, 166 F. 2d 976 (C.A. 7th, 1948);
Sweet v. Howard, 155 F. 2d 715 (C.A. 7th, 1946); cf. Shuble v. Youngblood, 225 Ind. 169,
73 N.E. 2d 478 (1947). As to the amount of time required, see Avery v. Alabama, 308 U.S.
444 (1940), a capital case in which two attorneys had approximately one day to prepare the
defense. This was held, under the circumstances, to be sufficient. Compare Dolan v. State,
148 Neb. 317, 27 N.W. 2d 264 (1947), in which it was held error to put the defendant on trial
the same day that counsel was appointed. There had been a showing that more time was needed
to procure an important witness. Jackson v. Commonwealth, 215 Ky. 800, 287 S.W. 17 (1926).

36 Similarly, the control over federal trials has been based on constitutional provisions.
Note 1 supra. Such reliance seems unnecessary in view of the rationale in McNabb v. United
States, 318 U.S. 332, 347 (1943), in which the rule excluding confessions obtained after illegal
detention was based on a general supervisory power over the procedure followed in the lower
federal courts. The same reluctance to invoke the Constitution should not, therefore, be operative
in federal trials as it is in state proceedings.

37 Note 6 supra.


40 The theory is that acts of the attorney are imputed to the defendant who employs him.
Tompsett v. Ohio, 146 F. 2d 95, 98 (C.A. 6th, 1944). The defendant can disaffirm his attorney’s
acts, but this is a rather meaningless alternative since he will presumably be unaware of any
but gross errors and, further, since the most common piece of lay knowledge about the law in
action is that it should be left to lawyers.
Still there appears no justification for the lengths to which the stamp of constitutional approval has been applied simply because the defendant hired his own lawyer. One would think that the Sixth Amendment guaranteed sober counsel. The Court of Appeals for the Tenth Circuit has held otherwise:

"The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. But what of it? Appellee employed him; . . . "

EXTENSION OF RELIEF FOR UNILATERAL MISTAKE

The modern trend of the law of mistake in contracts is toward wider relief for both mutual and unilateral error. For most types of unilateral mistake, rescission is opposed by adherents of the rigidly "objective" view of mistake in contracts. Occasionally courts hesitate to give relief for any type of unilateral error, although paying lip service to the doctrine permitting rescission under certain conditions. In United States v. Jones; the War Assets Administration made a special offering of certain universal gear joints declared as surplus property by the U. S. Maritime Commission and fully described in the declarations. The WAA asked for bids upon the property, and, receiving none, later put it up on a negotiated sale basis. Jones, the defendant, asked an employee of the WAA if there were jeep motors for sale and was told that there were but that they might only be purchased as part of an entire odd lot. In the lot Jones recognized the universal gear joints as equipment worth perhaps $60,000. Jones knew that the agent of the government was not aware of the nature or value of the equipment. By negotiation he lowered the asking price from $250 to $75 and bought at the latter price. Upon learning of its mistake the government refused delivery and brought suit for rescission of the contract.

The court admitted that rescission was proper on this state of facts, applying the test of whether the mistake was one as to the identity of the subject matter or merely as to a collateral characteristic. The metaphysical character and inutility of this test have misled courts into dubious and occasionally startling

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41 Hudspeth v. McDonald, 120 F. 2d 962, 967 (C.A. 10th, 1941). The district court had found that the defendant had had no effective assistance of counsel as required by the Sixth Amendment. McDonald v. Hudspeth, 41 F. Supp. 182 (Kan., 1941). Compare Wade v. Mayo, 334 U.S. 672 (1948), where the district court's finding that the defendant was handicapped by lack of counsel was upheld as "not clearly erroneous." The district court's finding in the McDonald case appears to be clearly "not clearly erroneous."

176 F. 2d 278 (C. A. 9th, 1949).

2 Adoption of this test rather than the modern fundamental assumption test might indicate the court's desire to restrict relief for mistake, for, as pointed out in 5 Williston, Contracts §1570A (rev. ed. 1937), "under the modern basic assumption test the way is opened for further development of the law toward greater extension of relief. . . ." The court cites Frank's concurring opinion in Ricketts v. Pennsylvania R. Co., 153 F. 2d 757 (C. A. 2d, 1946), but is noncommittal as to his recommendation of extension of relief for unilateral mistake. 176 F. 2d 278, at 286 n. 4 (C. A. 9th, 1949).