MR. JUSTICE HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented "an abrupt break with its own well considered precedents."*Ante,* p. 372 U. S. 344. In 1932, in *Powell v. Alabama*, 287 U. S. 45, a capital case, this Court declared that, under the particular facts there presented -- "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and, above all, that they stood in deadly peril of their lives" (287 U.S. at 287 U. S. 71) -- the state court had a duty to assign counsel for Page 372 U. S. 350 the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, *see* 287 U.S. at 287 U. S. 52, 287 U. S. 57-58, 287 U. S. 71, and were clearly regarded as important to the result.

Thus, when this Court, a decade later, decided *Betts v. Brady,* it did no more than to admit of the possible existence of special circumstances in noncapital, as well as capital, trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, *see Johnson v. Zerbst,* 304 U. S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v. Alabama,* was not limited to capital cases was, in truth, not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts*, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the *Betts* decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. [Footnote 4/1] Such dicta continued to appear in subsequent decisions, [Footnote 4/2] and any lingering doubts were finally eliminated by the holding of *Hamilton v. Alabama,* 368 U. S. 52.

In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts,* there were cases in which the Court Page 372 U. S. 351 found special circumstances to be lacking, but usually by a sharply divided vote. [Footnote 4/3] However, no such decision has been cited to us, and I have found none, after *Quicksall v. Michigan,* 339 U. S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. [Footnote 4/4] The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted, in itself, special circumstances requiring the services of counsel at trial. In truth, the *Betts v. Brady* rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. [Footnote 4/5] To continue a rule which is honored by this Court only with lip service is not a healthy thing, and, in the long run, will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions. Page 372 U. S. 352

In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" [Footnote 4/6] and thus valid against the States, I do not read our past decisions to suggest that, by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. *Cf. Roth v. United States*, 354 U. S. 476, 354 U. S. 496-508 (separate opinion of this writer). In what is done today, I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut*, 302 U. S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

[Footnote 4/1]

Avery v. Alabama, 308 U. S. 444, 308 U. S. 445.

[Footnote 4/2]

E.g., Bute v. Illinois, 333 U. S. 640, 333 U. S. 674; *Uveges v. Pennsylvania*, 335 U. S. 437, 335 U. S. 441.

[Footnote 4/3]

E.g., Foster v. Illinois, 332 U. S. 134; *Bute v. Illinois*, 333 U. S. 640; *Gryger v. Burke*, 334 U. S. 728.

[Footnote 4/4]

E.g., Williams v. Kaiser, 323 U. S. 471; *Hudson v. North Carolina*, 363 U. S. 697; *Chewning v. Cunningham*, 368 U. S. 443.

[Footnote 4/5]

See, e.g., Commonwealth ex rel. Simon v. Maroney, 405 Pa. 562, 176 A.2d 94 (1961); *Shaffer v. Warden,* 211 Md. 635, 126 A.2d 573 (1956); *Henderson v. Bannan,* 256 F.2d 363 (C.A. 6th Cir.1958).

[Footnote 4/6]

Palko v. Connecticut, 302 U. S. 319, 302 U. S. 325.