in *Hamilton v. Alabama*,[362] the Court noted that arraignment under state law was a "critical stage" because the defense of insanity had to be pleaded then or lost, pleas in abatement had to be made then, and motions to quash on the ground of racial exclusion of grand jurors or that the grand jury was improperly drawn had to be made then. In *White v. Maryland*,[363] the Court set aside a conviction obtained at a trial at which the defendant's plea of guilty, entered at a preliminary hearing at which he was without counsel, was introduced as evidence against him at trial. Finally, in *Coleman v. Alabama*,[364] the Court denominated a preliminary hearing as a "critical stage" necessitating counsel even though the only functions of the hearing were to determine probable cause to warrant presenting the case to a grand jury and to fix bail; no defense was required to be presented at that point and nothing occurring at the hearing could be used against the defendant at trial. The Court hypothesized that a lawyer might by skilled examination and cross-examination expose weaknesses in the prosecution's case and thereby save the defendant from being bound over, and could in any event preserve for use in cross-examination at trial and impeachment purposes testimony he could elicit at the hearing; he could discover as much as possible of the prosecution's case against defendant for better trial preparation; and he could influence the court in such matters as bail and psychiatric examination. The result seems to be that reached in pre-*Gideon* cases in which a defendant was entitled to counsel if a lawyer might have made a difference.[365]

Custodial Interrogation.—At first, the Court followed the rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel that his subsequent trial was tainted.[366] It held in *Spano v. New York* [367] that, under the totality of circumstances, a confession obtained in a post-indictment interrogation was involuntary,

---

[362] 368 U.S. 52 (1961).

[363] 373 U.S. 59 (1963).

[364] 399 U.S. 1 (1970). Justice Harlan concurred solely because he thought the precedents compelled him to do so, id. at 19, while Chief Justice Burger and Justice Stewart dissented. Id. at 21, 25. Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the factfinding process as the role of counsel at trial, *Coleman* was denied retroactive effect in Adams v. Illinois, 405 U.S. 278 (1972). Justice Blackmun joined Chief Justice Burger in pronouncing *Coleman* wrongly decided. Id. at 285, 286. *Hamilton* and *White*, however, were held to be retroactive in Arsenault v. Massachusetts, 393 U.S. 5 (1968).

[365] *Compare* Hudson v. North Carolina, 363 U.S. 697 (1960), *with* Chewning v. Cunningham, 368 U.S. 443 (1962), *and* Carnley v. Cochran, 369 U.S. 506 (1962).

[366] Crooker v. California, 357 U.S. 433 (1958) (five-to-four decision); Cicenia v. Lagay, 357 U.S. 504 (1958) (five-to-three).

[367] 360 U.S. 315 (1959).