SCOPE OF THE RIGHT TO AID OTHER THAN COUNSEL

In the last decade the judiciary has moved to destroy financial barriers to justice. This movement has reformulated prior concepts of the state's role in redressing the inequalities that are attendant upon poverty in the administration of criminal justice. Beginning with *Griffin v. Illinois*[1] in 1956, continuing through *Douglas v. California*[2] and expanding in a widening range of decisions to the present, these cases and their progeny suggest that indigent defendants are now constitutionally guaranteed a congeries of modes of assistance other than counsel that are ordinarily utilized in the legal process of truth-finding, yet have been out of reach for the man without means.[3]

I. The Need for Equal Resources in an Adversary System

Providing for such assistance to criminal defendants who cannot afford it is a necessity that is imbedded in the very marrow of the Anglo-American philosophy toward criminal justice. Unlike most other judicial systems, ours is one based on the premise that the truth prevails by the conflict of adversaries serving opposing self-interests, each presenting his point of view with the utmost determination born of that self-interest.[4]

The assumption inherent in such a system is that counsel for the defense will have at his disposal the tools essential for the conduct of a proper defense;[5] that the parties are roughly comparable in legal, investigative and expert resources.[6] Consistent with this assumption, the prestigious Allen Committee Report[7] recognized the danger to

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1 351 U.S. 12 (1956).

2 372 U.S. 353 (1963).

3 *See* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L. Rev. 1054 (1963) [hereinafter cited as 47 Minn. L. Rev.].

4 *See* Steinberg & Paulson, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 Prac. Law., May, 1961, at 25 [hereinafter cited as Steinberg].

5 Report of U.S. Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 46 [hereinafter cited as Att'y Gen. Rep.] ABA, Standards Relating to Providing Defense Services § 1.5 & Commentary (Tent. Draft 1967).

6 47 Minn. L. Rev., *supra* note 3, at 1065.

7 This is officially the Att'y Gen. Rep., *supra* note 5. The chairman of the Attorney General's committee was Professor Francis A. Allen of the University of Chicago Law School, now Dean and Professor at the University of Michigan Law School.

an adversary system when the resources of the accused are not on a substantial par with those of the accuser:

> The proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system . . . [T]he system is imperiled by the large numbers of accused persons . . . able to pay some part of the costs of defense, but unable to finance a full and proper defense.[8]

Indeed, at the trial level a self-evident proposition is that lawyers cannot successfully defend without facts and witnesses,[9] with the overall omnipresent problem for assigned counsel being lack of money.[10] This need for resources for investigation is a factor that helps destroy the equality that the adversary system requires, with the consequence that the system suffers in practice.[11]

This philosophy of an adversary system, which requires that some defendants be supplied with aid in addition to counsel in order to insure equality in legal resources, is embodied within the constitutional concepts of due process and equal protection. Justice Black in his *Griffin* opinion mentions that "equal justice for all" has been the ultimate goal of peoples everywhere from the beginning of time to the present,[12] and that "in this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons."[13] On this same subject the eminent champion of the indigent defendant's rights, Judge Jerome Frank, said

> [A] man [even with appointed counsel] may be jailed for life, or even electrocuted, because he hasn't the money to discover a

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8 *Id.* at 10; *see* Solomon, *"This New Fetish for Indigency": Justice and Poverty in an Affluent Society*, 66 COLUM. L. REV. 248 (1966).

9 Prettyman, *The Modern Problems in Criminal Law*, 18 WASH. & LEE L. REV. 187, 214 (1961).

10 *Id.* at 217; Steinberg, *supra* note 4, at 28, where the authors said

> [i]t takes money to have laboratory tests made; to have photographs made; to copy documents; to have necessary examinations made. It will take money for depositions. . . .

11 Steinberg, *supra* note 4, at 32.

12 351 U.S. 12, 16-17 (1956). Justice Black quotes from LEVITICUS 19:15 (King James) (". . . in righteousness shalt thou judge thy neighbor".) and the Magna Charta to illustrate his point.

13 *Id.* at 17.

> missing document to win his case or to employ a competent hand-writing expert or psychiatrist.
>
> This is not democratic justice. It makes a farce of "equality before the law," one of the first principles of a democracy.[14]

Thus we see that the desirability, the need and the constitutional vehicles for providing such services exist; but the implementation of such a program is fraught with problems, not the least of which is to determine the outer limits of the constitutional rights of indigents and the constitutional duty of a state to ensure those rights. The principal question is what types of aid a state must make available at a minimum to ensure the proper functioning of the adversary system with regard to those defendants too poor to pay for desired aid in addition to counsel. To answer it we must first decide the more fundamental question of what is the constitutional theory which underlies the right.

II. The Supreme Court Rationale for the Right to Aid in Addition to Counsel

The principal litigation in this area stems from state appellate procedures for review requiring the appellant either to procure a transcript or to pay a filing fee in order to have his appeal docketed. The constitutional challenges to such procedures invariably have been via the fourteenth amendment due process and equal protection clauses but, as will be seen, the decisions have increasingly been grounded solely upon the equal protection clause.[15]

The first case in this area, *Griffin v. Illinois*,[16] concerned a state requirement that a trial transcript be used in reviewing all criminal convictions. State law did not provide for free transcripts to be furnished to indigent defendants convicted of non-capital crimes. The petitioners, indigents convicted of non-capital crimes, alleged a denial of due process and equal protection when the state rejected

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14 Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93, 101 (1953). Judge Frank was so concerned by the plight of the poor in the administration of criminal justice that he once declared that he could not sleep knowing that "innocent destitute men may be behind bars solely because it will cost the government something to have their appeals considered." United States v. Johnson, 238 F.2d 565, 572 (2d Cir. 1956) (dissenting opinion).

15 As a preliminary matter, it should be noted that there is no problem here of finding the requisite state action. The procedures challenged are all specifically imposed either statutorily or judicially. See *infra* note 54 for further amplification.

16 351 U.S. 12 (1956).

their requests for free transcripts.[17] They asserted that this failure to supply free transcripts precluded them from raising nonconstitutional trial errors solely because of their lack of funds to purchase the transcript, and that the refusal thus constituted both a fundamentally unfair procedure and an invidious discrimination between rich and poor.

The case presented the first opportunity for the Supreme Court to focus on the effect of indigency in the administration of our criminal system.[18] Justice Black, speaking for four of the five majority justices,[19] seemingly rested the decision on both due process and equal protection grounds[20] when he stated that

> our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons . . . . Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice . . . ."[21]

Justice Douglas has since explicitly stated that equal protection was the basis of the decision,[22] and the dominant language of the opinion is that of equal protection.[23] But the language of due process

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17 It is to be noted that the defendant's requests for transcripts were denied in a direct appellate proceeding. The present questions were raised by a petition under the Illinois Postconviction Hearing Act, ILL. REV. STAT., ch. 38, §§ 122-1 to-7 (1963), collaterally challenging that denial on the direct appeal.

18 Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 10 (1957) [hereinafter cited as Willcox]:

> The record presented the issue of poverty in complete isolation, as if in the test tube of a chemical laboratory. It was uncontaminated by such factors as the ignorance or illiteracy of the man or the hostility of the crowd. . . . Griffin might have been the popular idol of the crowd; he might have been a learned doctor of jurisprudence; it would not have mattered. All that mattered was his lack of money.

19 Mr. Justice Black, joined by Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Clark. Mr. Justice Frankfurter wrote a separate concurring opinion.

20 *See* Willcox, *supra* note 18, at 10-11; Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 436-37 (1967) [hereinafter cited as 81 HARV. L. REV.].

21 351 U.S. at 17 (citation omitted).

22 Bandy v. United States, 81 S. Ct. 197 (1960) (Douglas, J., sitting as circuit judge). Referring to *Griffin* Douglas said, "we have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence." 81 S. Ct. at 197.

23 The opinion asserts that "the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence. . . ." 351 U.S. at 17-18.

is also present. While recognizing that due process does not require a state to provide either appellate courts or the right to appellate review, the Court also emphasized that where these are provided by a state they have become integral parts of the state's trial system for finally adjudicating the guilt or innocence of a defendant. Thus to deny their use to an indigent because of his poverty is an invidious discrimination which is so lacking in fairness as to violate due process as well as equal protection.[24]

To find a due process problem when there is no denial of a right guaranteed by that constitutional clause is not anomolous. Denial of a privilege which due process does not require to be provided in all cases may come to deprive a defendant of due process if the denial is arbitrarily applied to some persons but not to others.[25] The reason for this is that equal protection and due process overlap.[26] Equal protection of the laws is a more explicit safeguard of prohibited unfairness than is due process of law, but a discrimination may be so unjustifiable that it is also violative of due process.[27] In turn, equal protection is heavily affected by notions of fundamental unfairness.[28] The conventional limitations that the discrimination must be either intentionally discriminatory in purpose or else arbitrary in effect to offend equal justice do not apply where the discrimination results in something that shocks

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Further, Mr. Justice Black points out that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Id.* at 18.

Finally, he says

> Such a denial [of a transcript for indigents] is a misfit in a country dedicated to affording equal justice to all. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be affored as adequate appellate review as defendants who have money enough to buy transcripts. *Id.* at 19.

24 351 U.S. at 18-19.

> To deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. *Id.* at 19.

25 Willcox, *supra* note 18, at 11 n.41; *see* Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

26 81 HARV. L. REV., *supra* note 20, at 439.

27 *Compare* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) *with* Brown v. Board of Educ., 347 U.S. 483 (1954).

28 Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 126 (1956).

the sense of fundamental justice.[29] The net effect is that due process and equal protection differ more in emphasis than in content—due process emphasizes fundamental unfairness and equal protection dwells upon comparisons of the treatment by a state of different persons or groups of persons.[30]

The conclusion to be drawn from *Griffin* is that the Court was concerned with a situation in which it felt no compulsion to construct a rigid constitutional basis for decision. Arguably the justices could have decided the question under either clause of the fourteenth amendment. Such a course is, as we know, not an unusual one for the Court to take since it allows flexibility to formulate a workable theory as future developments shed more light upon the area.

In the next case that presented to the Court this question of the constitutionality of a denial of a free transcript, *Eskridge v. Washington Prison Bd.*,[31] it again refused to specify any particular fourteenth amendment ground for decision. Here, the state granted a right to appeal criminal convictions; the state conceded, however, that an effective appeal could not be prosecuted without a trial transcript, which was furnished to indigent defendants at public expense only if "justice will be promoted" thereby in the opinion of the trial judge. Petitioner was denied a free transcript by the trial judge on the ground that he received a fair trial with no prejudicial errors committed. On a petition for certiorari, the Supreme Court merely held that a constitutional right guaranteed by the fourteenth amendment was violated. The Court was concerned both with the adequacy of review and with a comparison of the review actually afforded with that available to a man of means. The need to retreat to the "more explicit safeguards" of equal protection presumably was not present in *Eskridge* because the spector of a trial judge sitting as a final arbiter on his own allegedly erroneous conduct of the trial is sufficient to arouse one's sense of unfairness.[32]

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29 Willcox, *supra* note 18, at 15; *see* Comment, *Constitutional Law—Post-conviction Due Process—Right of Indigent to Review of Non-Constitutional Trial Errors*, 55 MICH. L. REV. 413, 416-18, 422 (1957).

30 Willcox, *supra* note 18, at 15.

31 357 U.S. 214 (1958).

32 *See also* Draper v. Washington, 372 U.S. 487 (1963) (material facts similar to those in *Eskridge*), where the Court said that "[w]hat was impermissible was the total denial to petitioners of any means of getting adequate review on the merits in the State Supreme Court, when no such clog on the process of getting contentions before the State Supreme Court attends the appeals of defendants with money." *Id.* at 498.

These two decisions seem to develop a "joint clause" approach to the problem of denial of state aid in addition to counsel for indigents. Common to both constitutional guarantees is an assessment by the courts of the importance to the poor of the underlying privilege being asserted.[33] In these direct appeal cases, it seems the judges are concluding that deprivation of the right to appeal is not of itself violative of due process but, when taken in conjunction with the admittedly unequal treatment that a state affords an indigent by its appellate procedure, there is a wrong of sufficient moment to run afoul of the fourteenth amendment even if the discrimination might not meet the traditional test used to find a denial of equal protection.[34] The sum of two wrongs, though not enough separately to violate constitutional guarantees, is sufficient when taken together to violate the fourteenth amendment.

Unlike the early transcript cases, the Supreme Court used a pure equal protection analysis to strike down state provisions that conditioned entry into the appellate process upon payment of a filing fee or any other state-imposed costs. In *Burns v. Ohio*[35] the Court compared the right of a man who has the resources to pay the filing fee, and thus to have an appellate court consider his application for appeal regardless of frivolity, with that of a man who cannot afford to pay such costs. In holding that it was in effect an arbitrary discrimination by the state against the poor, the Court rejected an argument that filing fees served a legitimate governmental purpose by preventing frivolous appeals when it said "there is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants."[36] Thus, the means utilized by the state to deter frivolous appeals was not reasonably related to that purpose, assumedly because such fees are not usually high enough to have an effect upon the decision of an ordinary man of means to prosecute an appeal. This amounts to an equal protection violation under traditional analysis.[37]

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33 81 HARV. L. REV., *supra* note 20, at 439.

34 *Cf.* Willcox, *supra* note 18, at 24, and text accompanying notes 25-29 *supra*.

35 360 U.S. 252 (1959).

36 *Id.* at 257-58.

37 *See also* Smith v. Bennett, 365 U.S. 708 (1961), where the Court held that the *Burns* rationale applies as well to filing fees for collateral, habeas corpus proceedings. The Court said broadly that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Id.* at 709; Williams v. District

The different problems found in the filing fee cases and the transcript cases seemed to merge in *Lane v. Brown*,[38] where the defendant raised an equal protection claim because he was refused a transcript of a hearing denying a writ of error *coram nobis*. The Court recognized that one could question the applicability of the *Griffin* principle to collateral proceedings but, noting that *Smith v. Bennett*[39] had applied the *Griffin* rationale to collateral proceedings,[40] held that the state must supply a transcript even though there had already been one direct appeal on the merits.[41] The inference is that the Court was reluctant to apply the joint clause concept of *Griffin*, founded in part upon the notion that direct appeals are integral to the trial system and that to deny such appeals brings forth "fringe" due process notions, to collateral proceedings not integrally bound up with the initial truth-finding process. *Smith's* broad equal protection language[42] enabled the Court to support its result but it also seems to have forced the Court into impliedly asserting that *Griffin* actually could have been decided solely upon equal protection grounds. One aberrational characteristic of the *Lane* case, however, diminishes the force of such an inference and explains the Court's willingness to use *Smith* as a precedent—although *Lane* involved a transcript for use on appeal, and *Burns* and *Smith* were concerned with filing fees, the cases are similar in that Indiana required a transcript be filed to confer jurisdiction.[43] Thus the transcript operated much like a filing fee and could be seen as bringing *Lane* within those two unequivocal equal protection cases rather than within the mixed rationale of *Griffin*.

Any such doubts about the basis of *Lane* were resolved when the Court was faced in *Long v. District Ct. of Iowa*[44] with a situation in a collateral proceeding essentially like that in *Griffin* in a direct review context. The *Long* opinion utilized equal protection to guarantee the right, again apparently because the "fringe" due process

Ct., 417 P.2d 496 (Colo. 1966), for another application of equal protection to strike down filing fees as to indigents in collateral proceedings.

38 372 U.S. 477 (1963).

39 365 U.S. 708 (1961).

40 "In *Smith v. Bennett* the Court made clear that these *Griffin* principles were not to be limited to direct appeals from criminal convictions but extended alike to state post-conviction proceedings." 372 U.S. at 484 (citation omitted).

41 *Id.* at 485.

42 365 U.S. at 709.

43 372 U.S. 477, 480 (1963).

44 385 U.S. 192 (1966).

element that is present in a direct appeal situation seems less apparent in an appeal from a post-conviction hearing. Whether one labels it a privilege or a right, the opportunity to appeal directly a conviction is of unquestioned importance to the guilt-determination process.[45] If that opportunity is not administered on such terms as will insure that it is granted equally, a question of fundamental fairness is inextricably woven into the case with the question of equal protection. However, an appeal from a collateral proceeding—the post-conviction remedy—is not so bound up with the guilt-determining process as is an appeal from a direct proceeding, when one considers (1) what would seem to be a lower frequency of releases brought about through the post-conviction remedy as compared to reversals after direct appeal, and (2) the fact that in many cases the defendant in the collateral proceeding has already appealed his case on the merits, often through two or even three levels of a direct appellate proceeding.[46] The result is that the Supreme Court in *Griffin* was not compelled to supply a specific basis for decision, but when situations arose where the fundamental unfairness of a state's denial of some type of assistance was not so apparent, equal protection came to the fore. The Court might have but did not distinguish *Burns* and *Smith* as "access" cases from *Griffin* and *Long* as "adequacy of review" cases. Considering them as a single class of cases seems to mean that the Court has declared *Griffin* to be based solely upon the equal protection clause. It should also be noted that in *Long*, the equal protection clause was not triggered in a vacuum. While that collateral proceeding was not integral to guilt-determination, it was not insignificant, *i.e.*, there was a judgment

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[45] *Id.* at 194.

[46] *But see* Lane v. Brown, 372 U.S. 477, 485 (1963); Burns v. Ohio, 360 U.S. 252, 257 (1959). In *Burns*, Ohio tried to distinguish *Griffin* on the basis that it had already afforded defendant one review on the merits while Illinois had left defendant with *no* judicial review of his conviction. The Supreme Court said this was a distinction without a difference for, as *Griffin* held, once a state chooses to establish appellate review in criminal cases it cannot foreclose indigents from access to *any* phase of that procedure because of their poverty. The *Lane* case reaffirmed this position in a *coram nobis* context. It would thus seem that the Court makes no real distinction between the number of appeals provided or between whether the review is direct or collateral. However, there is a real distinction on the basis of efficacy of guilt-determination between collateral and direct reviews. The system of collateral review would not seem to be so integrally related to guilt-determination as is direct review, and thus the conclusion that due process is not so inextricably involved in such a setting.

about the worth of the requested assistance before invocation of the equal protection clause.[47]

III. Transcripts and Aids for Misdemeanants

The rationale of the aforementioned cases is useful to explain other decisions rejecting the contention that a state must furnish an indigent a transcript for appeal of a misdemeanor conviction. In *Toledo v. Smith*[48] a fourteenth amendment objection was raised after the state had refused to furnish a trial transcript to a man convicted of drunk and disorderly conduct and resisting arrest. The Ohio Supreme court first held that a narrative bill of exceptions would suffice to show the errors claimed,[49] thereby extracting from the case any quasi-due process claims. Thus, unless there was an equal protection claim meritorious in itself, the sum of the wrongs to the defendant was not sufficient to be constitutionally improper. The court then compared the indigent misdemeanant's position with that of a man financially capable of securing the transcript in question. Interestingly, they held that to require a state to furnish a transcript to an indigent defendant in every case would not be equal justice because such a rule would permit indigents to appeal frivolously while others must consider the costs.[50] This is the converse of the argument made in other cases that to deny an indigent a transcript because his appeal seems frivolous (and therefore would not warrant the cost of a transcript) violates equal protection when a richer man can appeal frivolously.[51] As support for the Ohio court's argument, *Griffin* language is quoted to the effect that when a state not only gives leave to appeal but must also pay for costs, it may protect itself against subsidizing frivolous appeals.[52]

The *Smith* position on this point is not inconsistent with that of the United States Supreme Court when one considers the context in which both courts were working. The Supreme Court was considering felony cases in which the ultimate result of a successful

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47 That judgment seems to be simply that any state-established reviewing procedure is at least valuable enough that financial considerations should not determine its practical availability. *Cf.* 81 Harv. L. Rev., *supra* note 20, at 439.

48 3 Ohio St. 2d 80, 209 N.E.2d 410 (1965), *cert. denied*, 383 U.S. 949 (1966).

49 *Id.* at 81, 209 N.E.2d at 411.

50 *Id.* at 81-82, 209 N.E.2d at 411.

51 *E.g.*, Burns v. Ohio, 360 U.S. 252 (1959).

52 3 Ohio St. 2d at 82, 209 N.E.2d at 411. The quote was from Frankfurter's concurring opinion, 351 U.S. at 24.

appeal was more personally valuable to a defendant; for example, a felony defendant is usually faced with long incarceration if he decides not to appeal. By contrast, a misdemeanant either pays a fine or serves a short jail sentence usually of no more than six months. The interests at stake in felony and misdemeanor cases, then, are widely disparate and a felony defendant would be less likely to be dissuaded by either the cost or the frivolity of an appeal than would a misdemeanant. Monetary factors, therefore, are not a serious consideration to a felony defendant and for the state to impose them in a felony case puts an unequal burden upon the indigent. But the less substantial personal interest of a misdemeanant in having his conviction reviewed is not valued highly enough to remove from his consideration the financial burdens of an appeal. Hence, it not only does not deprive an indigent of equal protection of the laws for a state to impose monetary conditions as a price for a frivolous appeal of a misdemeanor conviction, but to remove them would deprive non-indigent misdemeanants of equal protection because their decision to appeal is still influenced by financial considerations. The import of the decision is to restrict the duty of states to supply free transcripts to felons, even if a misdemeanant has a legitimate ground for appeal, provided however that the state makes an adequate alternative available (*e.g.*, a narrative or bystander's bill of exceptions) in order to insure that legitimate claims of misdemeanants will not be totally barred because of poverty.[53]

IV. Assistance Other Than Counsel at the Pre-conviction Level

Transcripts are aids other than counsel that are provided by the state for use on appeal. Extensive litigation has clearly secured their provision at no cost to an indigent felony defendant. The discussion now turns to the duty of a state to assist indigents in procuring services from private sources in the pre-conviction period that are not preconditions to presenting a defense, *i.e.*, the state does not affirmatively require their procurement, yet they are types of services without which the chances of a successful defense are seriously hampered.[54]

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53 *See* Long v. District Ct. of Iowa, 385 U.S. 192 (1966).

54 There is no problem of finding the requisite state action for purposes of invoking the equal protection clause. State action is to be found in the fact that it has established a criminal judicial system, has enacted and undertaken enforcement of laws, has endeavoured to bring offenders into its guilt-determination process against the defen-

We have already seen the expansion of *Griffin*; it is argued by many writers that the combined reasoning of *Griffin* and *Douglas v. California*[55] provide substantial support for requiring states to provide funds where needed for many additional types of assistance other than counsel, such as pretrial investigatory services, expert witnesses, discovery and securing of witnesses.[56] The judicial reasoning that has required counsel and transcripts on appeal in order to achieve some degree of "constitutional" equality seems to support with equal persuasiveness a constitutional right to other aid in addition to counsel at the trial level; in fact an effective trial would seem more important than the various forms of aid that the Court has required on appeal.[57] The underlying interest of the defendant in protecting his freedom is the same and the community interest in accurately determining guilt would be, if anything, better served.[58] Although the trials

dant's will, and has imposed a trial procedure that requires the defendant to use his own resources to defend himself against the wrath of the state. See Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964) where it was said:

> When the poor are denied equal justice in a criminal trial, there can be no question of state action, involvement, and responsibility. The state is the "plaintiff"; it elects or appoints the judges; it hires the prosecutors; it retains and compensates expert witnesses and investigators; it arrests and often incarcerates the accused; and it lodges the convicted in its jails. *Id.* at 217.

55 372 U.S. 353 (1963). California law provided appellate counsel for indigents only after a preliminary showing by the defendant of meritorious grounds for appeal. The Court held that this was a denial of equal protection. It reasoned that although a state may "provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination'," *id.* at 356, California had drawn an unconstitutional line between rich and poor. Justice Douglas, in conjunction with this, goes on to say that

> [t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself. *Id.* at 357-58.

The practical effect of the California law, pure on paper, was to deny equal treatment to paupers. *See also* Anders v. California, 386 U.S. 738 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); Hardy v. United States, 375 U.S. 277 (1964).

56 *E.g.*, 81 HARV. L. REV., *supra* note 20, at 448; Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 299 (1966); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218, 222 (1964); 47 MINN. L. REV., *supra* note 3, at 1058; Goldstein & Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1088 (1962). *See also* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192 (1960); Rosen, *Contemporary Winds and Currents in Criminal Law, with Special Reference to Constitutional Procedure: A Defense and Appreciation*, 27 MD. L. REV. 103, 122 (1967).

57 47 MINN. L. REV., *supra* note 3, at 1074.

58 *See generally* 81 HARV. L. REV., *supra* note 20, at 440-42.

themselves perhaps would be somewhat more expensive, they assumedly would result in fewer erroneous convictions. The higher cost of trials conceivably would be offset by the fact that society is neither wasting productive human beings, nor burdened with the care and maintenance in prisons of erroneously convicted indigents.

To this point, the problem considered has been simply whether equal protection is the proper constitutional vehicle to guarantee such services; the question now becomes what aid should be extended and to whom?

A. *Who is an Indigent?*

The Allen Committee has recommended that an "indigent" be defined as a defendant who cannot afford a particular service at the time of trial.[59] Thus a defendant who can absorb the cost of counsel and discovery may well be an indigent for purposes of securing the services of an expert witness or private investigator. Such a definition would balance the opportunities available to defendants of varied financial circumstances.

B. *What Aid Must Be Provided?*

It would seem that the equal protection clause would require a greater variety and scope of aids to be provided than would the due process clause. Equal protection is a concept less amenable to judicial flexibility in interpretation than is due process' "fundamental fairness" concept because equal protection is a more specific guarantee than the fundamental fairness guarantee of due process; its scope is wider.[60] Thus, due process certainly does not impose upon a state the duty to furnish a defendant with a Hart, Shaffner & Marx suit merely because the prosecutor nor the defendant in the next courtroom is wearing one, or the duty to finance an indigent's search for a witness whose testimony will be the same as that of an available witness although the available witness may be an ex-convict subject to impeachment. It is in this netherland where the limits of *Griffin*, *Douglas* and equal protection will be found.

1. Transcripts and Fees at the Pre-Conviction Level

In the last two years, the courts have extended the right to free transcripts to include the furnishing by the state of preliminary hear-

59 ATT'Y GEN. REP., *supra* note 5, at 45-49; Solomon, *"This New Fetish for Indigency": Justice and Poverty in an Affluent Society*, 66 COLUM. L. REV. 248, 255-56 (1966).

60 *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

ing transcripts for use at the trial of the indigent,[61] and of transcripts of prior mistrials for the purpose of impeaching witnesses at a new trial.[62] But courts have denied the motion for a transcript of a prior trial or mistrial for use at a hearing for a new trial on the ground that such uses of transcripts are equally denied to all.[63] The purposes for which the latter transcripts were proposed to be used were ones for which even affluent defendants could not use them. It is probable, therefore, that if a legitimate use for a transcript should arise at the trial level, and if the state permits their use, equal protection would impose upon the state a duty to furnish free transcripts to indigents.[64] The *Burns* and *Smith* cases also require a state to waive payment of any trial court fees, including "court costs." The *Long* rationale applies once a judgment is made by the court that a requested transcript or waiver of a fee would be a "not insignificant" aid in developing the truth, even though it would not be fundamentally unfair to refuse the request.

2. Expert Witnesses

There have been a number of cases considering the constitutional duty of a state to financially aid indigents in acquiring expert witnesses, but most have been decided by a due process fair trial approach. In *People v. Watson*[65] the defendant had been indicted for an attempt to commit forgery; the primary issue was whether the signature on a check was that of the defendant. The court held that due process required a handwriting expert be supplied to aid the defendant. This was a case in which lack of funds completely precluded the defendant from developing his primary defense; the discrimination was held to be so arbitrary as to constitute a denial of due process. The court also hinted that the equal protection clause had been violated under these facts but avoided this question because of the omnipresence of the due process violation.[66]

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61 *E.g.*, Roberts v. La Vallee, 389 U.S. 40 (1967); People v. Montgomery, 18 N.Y.2d 993, 224 N.E.2d 730, 278 N.Y.S.2d 226 (1966).

62 *E.g.*, People v. Delafosse, 36 Ill. 2d 327, 223 N.E.2d 125 (1967); People v. Miller, 35 Ill. 2d 615, 221 N.E.2d 653 (1966).

63 *E.g.*, People v. Putty, 59 Cal. Rptr. 881, 887 (Ct. App. 1967); Brown v. State, 1 Md. App. 571, 574, 232 A.2d 261, 263 (1967).

64 *Cf.* Brown v. State, 1 Md. App. 571, 574, 232 A.2d 261, 263 (1967). "When the State constitutionally or statutorily affords a defendant a right, the exercise thereof cannot be conditioned upon the defendant's ability to pay." People v. Montgomery, 18 N.Y.2d 993, 994, 278 N.Y.S.2d 226, 227, 224 N.E.2d 730, 731 (1966) (citations omitted).

65 36 Ill. 2d 228, 221 N.E.2d 645 (1966).

66 *See id.* at 232-33, 221 N.E.2d at 646.

Two other cases point up the apparent overlap of these two constitutional guaranties in the area of providing for expert witnesses. These cases involved psychiatric testimony. In *Bush v. McCollum*[67] psychiatrists treated the defendant for eighty-nine days in a state mental hospital. Later these psychiatrists testified as prosecuting witnesses at a sanity hearing that defendant was sane. The state trial court denied the indigent defendant's request for a psychiatrist of his own to aid him in his defense. As a consequence he was unable to secure a favorable witness to testify in support of his defense, or to effectively cross-examine the State's psychiatric witnesses. On habeas corpus, the federal district court held that the state court's denial was a violation of due process. But *Jacobs v. United States*[68] reached the same result under an equal protection rationale.

> . . . [D]efendant, if financially able, would have had the right to call a privately retained psychiatrist as a witness. It is obvious that only his inability to pay for the services of a psychiatrist prevented a proper presentation of his case.[69]

These three cases all establish that, so long as our criminal justice is determined by the techniques of an adversary system, a state has a duty to provide an indigent defendant with expert assistance in the trial of technical issues when those issues are germane to the indigent's defense and when the only expert testimony in the case is that which is provided by a witness for the prosecution. In such a case, there is no conflict of adversaries. The trial, devoid of even a minimally adequate litigation of the issues, does not meet the standards of due process. Neither, however, is equal protection satisfied when one considers that all defendants possess a right to have witnesses testify in their behalf,[70] a right which holds no meaning for the man who cannot afford to compensate the witnesses whom he subpoenas.

The disparity in the constitutional vehicles by which these three cases proclaimed the duty to exist can be explained on a jurisprudential basis. The factual situations are consistent with the concept that both the due process and the equal protection guaranties are violated when there is a discrimination so arbitrary in effect as to also violate notions of fundamental fairness—in these cases the inequality resulting from the defendants' poverty utterly destroyed their possi-

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67 231 F. Supp. 560 (N.D. Tex. 1964).

68 350 F.2d 571 (4th Cir. 1965).

69 *Id.* at 573.

70 U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

bilities for a successful defense. Thus, the courts in *Bush* and *Watson*, like the Supreme Court in *Griffin*, had the luxury of deciding the cases by the more familiar and more traditional due process clause. There was no compulsion to strike out into new areas with the equal protection clause. That *Jacobs* was decided by a federal court of appeals tends to explain the court's lack of hesitancy to invoke the equal protection clause, for courts of appeals interpret the Constitution as a routine function. On the other hand district courts, such as the court which decided *Bush*, whose overwhelming mass of work is merely the litigation of cases according to established law, are understandably reluctant to extend the reach of a constitutional provision to an area to which the highest Court has not yet addressed itself. As for *Watson*, decided by a state supreme court in the context of a federal system of government, it is again understandable that such a court would be more hesitant to interpret the federal constitution in a manner not yet adopted by the Supreme Court.

The real force of equal protection to impose a constitutional duty on a state to pay the costs of securing expert witnesses for indigent criminal defendants must be evaluated in light of a situation where there is no strong due process element. Such a situation occurs when a state has provided for an impartial expert to analyze the relevant data and give his conclusions on such issues as sanity, the authenticity of a signature or the results of a lie detector test. The state thereby assures at least a minimally adequate trial of that issue. The problem under equal protection arises in those instances when conclusions of the impartial, court-appointed expert are adverse to the defendant's assertions on the question being argued. If the state then permits a defendant to employ an independent psychiatrist or other expert witness, the rich man may have a significant advantage over the indigent. On the other hand, if the state prohibits all defendants from employing an independent expert witness, regardless of the conclusions of the impartial expert or of the means of the defendant, it would seem that constitutional inequities are extracted from consideration.[71]

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71 However, it is possible that equal protection may be denied by indirection. For example, one could agree that the Sixth amendment right to effective assistance of counsel is denied a defendant if his attorney cannot utilize the aid of a privately retained expert to examine the neutral witness, or that due process is denied if a defendant is denied the benefit of expert rebuttal testimony. Success in either argument would then restore the heretofore discussed advantage of the rich over the poor. *Cf.* Goldstein & Fine, *The Indigent Accused, The Psychiatrist, and The Insanity Defense*, 110 U. PA. L. REV. 1061 (1962) [hereinafter cited as Goldstein & Fine].

In two pre-*Griffin* cases, where impartial psychiatric witnesses were provided, the Supreme Court and a federal court of appeals rejected requests for state-financed independent psychiatric witnesses on the ground that there was no deprivation of a fair trial, and hence of due process.[72] A recent state court case, *People v. Hill*,[73] also denied an equal protection claim on a similar issue. The constitutionality of blanket denials of such requests, however, are questionable under an equal protection rationale. Even though an impartial expert is provided—to examine a defendant and testify to his sanity, or to analyze either a signature or lie detector results and testify to his conclusions—it is of no litigious help when the expert draws a conclusion contrary to the trial position of the defendant. The defendant is back where he began, without expert assistance in preparing and buttressing his defense. Indeed, the indigent defendant may have a greater need for independent expert help in this situation than in the situation where no impartial expert has been appointed. It is now incumbent upon him to attempt to undercut the impartial expert's testimony either by informed cross-examination or by opposing expert testimony. During cross-examination he is not adequately prepared to question the expert effectively on technical matters. Furthermore, he has no expert to give opposing testimony. For both methods, money is the obstacle to preparing an adequate defense to countervail the state's witness. In addition, the defendant now is disadvantaged because of a jury's tendency to give greater weight to impartial testimony. Thus, although there is an ostensible assurance of a trial of the issue, there still remains an undeniable inequality between rich and poor defendants.[74] It may be noted that in *Hill* the court had no occasion to consider this precise question. The defendant there refused an examination by a court-appointed impartial psychiatrist and instead requested funds to hire an independent psychiatrist. If the defendant had acquiesced in an examination by an impartial expert and then, when it became apparent that the expert would testify against him, had requested independent assistance to aid him in cross-examination and in rebuttal testimony, equal protection might have required the *Hill* court to grant his request.

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72 United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 568 (1953); McGarty v. O'Brien, 188 F.2d 151, 157 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951). *See* Goldstein & Fine, *supra* note 71, at 1086-88 for an interesting analysis of the impact of the equal protection clause in this area.

73 66 Cal. 2d 536, 568, 58 Cal. Rptr. 340, 360, 426 P.2d 908, 928 (1967).

74 *See generally* Goldstein & Fine, *supra* note 71, at 1061.

Appointment of impartial experts has proliferated as a method of avoiding the often deplored "battle of experts." The argument against permitting conflicting expert testimony is that it tends to confuse a jury and cloud the issue. But, if the goal of trial procedures is to promote rational fact-finding, the advantages of using opposing experts far outweigh the advantages of using an impartial expert. The "battle of experts" is a process that allows jurors to pierce expert testimony and discover why that expert concludes as he has. In the field of psychiatry, for example, there is no consensus of opinion on the conclusions to questions that are likely to arise at a trial or sanity hearing. Likewise, there is no consensus of opinion on the qualifications of persons competent to present such answers, nor on the techniques that should be utilized to arrive at conclusions. The reasons for the disparate results are usually found in the individual backgrounds of the expert witnesses. Psychiatrists differ over the proper work systems, their value systems and the school of psychiatry to which they adhere. These factors may explain differences in their conclusions or may point up the fact that there are alternative expert interpretations of the same set of relevant facts. Yet, by use of an impartial expert, these factors remain unknown to a jury. There is no effective cross-examination or rebuttal testimony without the "battle of experts."[75]

The conclusion to be drawn is that indigents, because of their poverty, are at a disadvantage in the litigation of a technical issue upon which an impartial expert has concluded against the trial position of the defendant, when the state permits an independent expert to be privately retained. This disadvantage could be a significant influence on the ultimate outcome of the issue. The Supreme Court has commanded, at the least, that a state minimize those inequities in the administration of criminal justice that are the result of poverty;[76] where a state permits the man of means to secure his own expert to testify in his behalf even though an impartial expert witness is provided, the state has fostered a condition that denies equal protection of the laws to indigent defendants. It has lessened the inequities through appointment of an impartial expert, but so long as there is no prohibition upon a defendant retaining his own expert witness, a state has failed to *minimize* these inequities.

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75 *Id.* at 1067-70.

76 *See* 47 MINN. L. REV., *supra* note 3, at 1074. *Cf.* ATT'Y GEN. REP., *supra* note 5, at 96.

A further problem is the question of how extensively a state must endeavour to assure an indigent of the services of an expert witness. Obviously, it is not necessary to finance a countless number of examinations until the defendant finds an expert who will support his opinion. The limitations of the state's duty may have been implied in *Toledo v. Smith*[77] where the Ohio Supreme Court suggested that misdemeanants do not usually purchase three hundred and fifty dollar transcripts for appeal.[78] The implication is that the duty of a state to provide for an exert witness does not extend beyond financing the efforts that the reasonable man of means would usually take in securing a favorable expert. Thus, a state need not compensate every handwriting expert or psychiatrist doing business on Main Street because they all examined a defendant during the latter's door-to-door search for a favorable expert opinion. The reasonable defendant paying from his own pocket would make a selective, efficient search.

3. Investigation and the Securing of Witnesses

Pre-trial investigators, a search for witnesses and factfinding in general are often as essential to the process of rational truth-finding as is the need for expert witnesses. The difference is that once the issues have been defined the need for the assistance of an expert witness is readily ascertainable at that point, whereas the extent of the need for pre-trial investigation must be determined on a particular basis. Even if it is assumed that all defendants in all cases have some need for such services,[79] the amount to be provided each defendant will vary from case to case.[80] The problem of course is to determine at what point a state can refuse to render an indigent further assistance without running afoul of the equal protection clause.

Again, as in the cases concerning provision of expert witnesses, both due process and equal protection may be violated. The state has established an adversary trial system that assumes equality of resources among the parties and places upon the defendant the burden of presenting his case; that system assumes that on identical issues in

77 3 Ohio St. 2d 80, 209 N.E.2d 410 (1965).

78 *Id.* at 81-82, 209 N.E.2d at 411.

79 Which assumption of course is not true. For example, if the only issue in the trial is whether the defendant signed a forged check, it is conceivable that the testimony of a handwriting expert is all that will be needed.

80 *See* 81 HARV. L. REV., *supra* note 20, at 449.

identical circumstances, different defendants will possess a similar capacity to present their views with a similar probability of success. If the indigent has no money for even the bare essentials of an investigation, or to pay a material witness traveling expenses and per diem costs, or to travel himself to interview a witness, due process of law is denied if the result of the defendant's poverty is to deprive him of a minimally adequate trial.[81] However, due process is not denied when the indigent's request for funds to employ investigators is refused on the ground that the state has already given him other assistance, adequate and sufficient to insure a minimal litigation of the primary issues.[82] The state has provided assistance in sufficient degree to alleviate any *distressing* results of a lack of the requested service.

But equal protection under *Griffin* and *Douglas* requires more than this. The Supreme Court seemed to be concerned with the reliability of our adversary process and its capacity to determine accurately the guilt or innocence of an accused; their command to states to minimize the litigious inequities resulting from differences in the economic circumstances of rich and poor must be understood in light of this concern. Thus, in considering an indigent's request for particular pre-trial services to aid him in the preparation of his defense, a judge cannot grant or deny those requests on a categorical basis because the duty to grant or the freedom to deny the request will vary. For example, the first inquiry would be whether or not the defendant intends to use the funds for a "fishing expedition" that has a low probability of adding to the truth-finding process. Denial of such requests would not affect the reliability of our adversary process. The second inquiry might be the purpose for which the defendant seeks the aid. If it is to establish an alibi, for example, he may have the burden of proof beyond a reasonable doubt. He thus would require more extensive financial assistance to aid him in gathering facts than a defendant whose purpose is only to prevent the prosecutor from establishing his case beyond a reasonable doubt. Even here, however, the duty to aid extends only so long as the investigation or search for witnesses may yet produce evidence or testimony that will affect the reliability of the truth-finding process.

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81 Whittington v. Gaither, 272 F. Supp. 507 (N.D. Tex. 1967).

82 State v. Corliss, 430 P.2d 632, 639 (Mont. 1967) (defendant had been given at the state's expense a psychiatric examination, a lie detector test and a daily transcript of the trial).

V. Conclusion

The administration of our criminal justice system has been one of the primary concerns of the Supreme Court in the last decade. The concern of the courts is no longer whether states have a duty to supply aid in addition to counsel to indigent defendants, but rather how extensive the aid must be.

The equal protection clause, considered in light of our adversary system of adjudication and its accompanying assumptions, requires that indigents have available to them substantially the same tools of litigation that would be utilized by a non-indigent defendant in the same circumstances, exercising prudence and concerned with a selective, efficient use of his personal resources. Such a standard to measure the scope of a state's duty to aid indigents would enhance reliability on our guilt determination process while satisfying the essential requisite of our existing adversary system—equality of resources. The immediate financial cost will be out-weighed by increased efficiency at the trial level, and by the many personal and community economic savings that will result from fewer erroneous convictions.

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