RIGHT TO COUNSEL

I. INTRODUCTION

In recent decisions the Supreme Court has required many fundamental changes in our system of criminal justice. The Court has placed particular emphasis upon expanding protections for the indigent as guaranteed by the fourteenth amendment and the Bill of Rights. One of the most significant areas in which protection has been extended is that of appointed counsel for those who cannot afford retained counsel.

Historically the Court has distinguished between a right to retained counsel, which is guaranteed in most confrontations with the state in our criminal system, and a right to appointed counsel, which has been circumscribed.[1] But recent decisions concerning the right to counsel have significantly reduced the importance of this distinction by increasing the opportunity for appointed counsel. The Court's present position on the right to appointed counsel can be briefly summarized: an impoverished suspect who has been taken into police custody must be told of his right to have counsel appointed before the police may subject him to interrogation.[2] If the police decide not to interrogate, an indigent has a right to have counsel at the first critical stage in the criminal proceedings,[3] and, if he does not wish to exercise that right, he must intelligently and understandingly waive it.[4] If the indigent should be convicted, he has a right to request and obtain counsel for his first direct appeal;[5] even if that appeal appears frivolous, appointed counsel must submit a brief to the appellate court arguing all possible meritorious points of petitioner's appeal.[6] This is the minimum degree of constitutional protection beneath which the state cannot go in administering its system of criminal justice.

But the full extension of the guaranty of appointed counsel has not been delineated and the boundaries of its scope are not apparent. Where does the right to counsel attach—what is a "critical stage?" Does the right to counsel extend to appeals to the state supreme court, to writs of certiorari to the United States Supreme

1 *See* Reynolds v. Cochran, 365 U.S. 525, 530-31 (1961); Chandler v. Fretag, 348 U.S. 3, 9 (1954).

2 Miranda v. Arizona, 384 U.S. 436, 471 (1966).

3 Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961).

4 Carnley v. Cochran, 369 U.S. 506, 512-13 (1962).

5 Douglas v. California, 372 U.S. 353 (1963).

6 Anders v. California, 386 U.S. 738, 744 (1967).

Court? Does a person charged with a misdemeanor have the same right to counsel as a person charged with a felony? What about collateral attacks on other quasi-criminal suits? Does an indigent have the right to appointed counsel in a purely civil proceeding in which the state is a party? Could he have this right in a purely civil proceeding in which the state takes no part?[7]

II. Existence of the Right

On March 18, 1963, The Supreme Court handed down *Gideon v. Wainwright*[8] and *Douglas v. California*.[9] *Gideon* completed the erosion of *Betts v. Brady*[10] by providing a right to appointed counsel at trial for all defendants—at least in felony cases. The Court based its decision on the incorporation of the sixth amendment into the due process clause of the fourteenth amendment. But the Court did not limit its language to incorporation alone; the decision contains the following statement:

> [Any] person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . [D]efendants who have the money hire lawyers. . . . From the very beginning, our state and national constitution and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[11]

The Court seems to be saying that since a man with means can have counsel, a poor man can have counsel—because counsel is a necessary safeguard to the achievement of our goal of fair trials. The Court's reasoning is thus an amalgam of due process and equal protection.

In *Douglas* the right to counsel was expanded in language which could extend to all cases of appeals as of right. The court based its decision on a finding of a denial of equal protection:

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7 *See generally* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 4-9 (1963).

8 372 U.S. 335 (1963).

9 372 U.S. 353 (1963).

10 316 U.S. 455 (1942), which had held that the totality of the circumstances determined whether a right to counsel existed at the trial level. Among the factors the Court considered important were the intellectual qualifications of the defendant and the complexity of the case. *Id.* at 472.

11 372 U.S. at 344.

> There 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, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[12]

But it also contained the following due process language:

> When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.[13]

Thus a convincing argument can be made that in neither case does the court rest its outcome exclusively on one doctrine.

If *Douglas* were based solely on due process the paradoxical result would be for due process to require the appointment of counsel on appeal even though it does not require the state to provide an appellate system.[14] This may well be the underlying reason *Douglas* was decided on predominantly equal protection grounds.[15] Justice Harlan in his dissent discards equal protection as a basis for the Court's decision and, after recognizing that previous decisions hold that due process does not require the States to offer an appeal, concludes that the real question is "whether the state's rules with respect to the appointment of counsel are so arbitrary or unreasonable . . . as to require their invalidation."[16] Justice Harlan is thus applying the due process test which the Court applies to substantive legislation. Since 1937 the Court has been very hesitant to use the substantive due process test to find legislation unconstitutional.[17] Clearly, given the premise that procedural due process does not require the state to provide an appeal, if a constitutional right to counsel on appeal had to be based on due process, it would not be based on sturdy grounds. But the right to counsel on appeal is not based solely on due process; rather on a combination of equal protection and due process.

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12 372 U.S. at 357-58.

13 *Id.* at 357.

14 McKane v. Durston, 153 U.S. 684, 687 (1894).

15 This reasoning also applies to Griffin v. Illinois, 351 U.S. 12 (1956).

16 372 U.S. at 365.

17 In one of the early cases applying the "modern" substantive due process test, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court upheld a state minimum wage requirement for women stating:

> Legislative response to that conviction [that a minimum wage is necessary] cannot be regarded as *arbitrary or capricious*, and that is all we have to decide.

Griffin v. Illinois[18] and *Douglas* mark a chance in the Court's application of equal protection. In the normal equal protection case, prior to *Griffin*, the Court would search for a state policy of discrimination against a certain class bearing no reasonable rela-

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Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment. *Id.* at 399 (emphasis added).

In a line of cases dealing predominantly in matters of economic regulation the Court has declared that it will not apply the due process clause to sit in judgment of the wisdom of legislation but will very narrowly construe the limitations imposed upon the states' police power by the due process clause and very rarely overturn its exercise. *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949); Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n., 313 U.S. 236, 246-47 (1941).

But the Court has made it clear that due process is one thing when applied to economic legislation and quite another when applied to questions involving individual freedom; the Court is much more willing to find state legislation unconstitutional where there is an infringement upon individual freedoms guaranteed by the Bill of Rights. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966); Sherbert v. Verner, 374 U.S. 398 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

A reason generally given for the sharp distinction is that in the latter case judicial discretion is limited to determining whether a specific guaranty contained within the Bill of Rights and incorporated by the due process clause has been violated, whereas in the former the Court, because it has no specific standards, is in danger of sitting as a super-legislature. Griswold v. Connecticut, 381 U.S. 479 (1965), weakens this explanation because the Court may have used due process to overturn state legislation infringing individual freedom without incorporating specific amendments of the Bill of Rights into the due process test. *Id.* at 486 (Goldberg, J., concurring) & 499-502 (Harlan, J., concurring). *See* Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 439 (1967). *But see* Justice Douglas' opinion, 381 U.S. at 484-85. *Griswold* (and all of the problems in interpreting it) aside, the Court has not been quick to venture outside the Bill of Rights in declaring legislation unconstitutional as violative of the substantive due process test. Therefore Justice Stone's footnote may still be an accurate explanation for the Court's decision:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938). *See also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring, makes a distinction between the due process rule applied to property and the due process rule applied to liberty). If, therefore, it is true that a substantive due process test is now limited to incorporation (whether selective or complete) of the Bill of Rights or the "arbitrary or capricious" test of *West Coast* v. *Parrish*, then *Douglas*, given the Court's position that an appeal is not required by the fourteenth amendment, could not have been decided on a pure due process ground.

[18] 351 U.S. 12 (1956).

tion to a legitimate state purpose.[19] The Court might find the discrimination spelled out in the legislation on its face[20] or implicit in the state's method of administration,[21] but the Court would not find a violation of equal protection in the absence of an affirmative state policy of discrimination. In *Douglas* the Court finds an invidious discrimination by the state against the poor because the state had failed to furnish counsel in a legal proceeding instigated by the state for which counsel was necessary. The Court has thus shifted its focus from an examination of state policy to an examination of the realistic consequences of state action. Thus under the *Griffin* and *Douglas* approach the Court need only find a causal connection between the state action and resulting discrimination to find a violation of the equal protection clause. The end result of this reasoning is to create an affirmative duty on the part of the state to remove the cause of the discriminatory consequences.[22] The end result of a "pure" equal protection reasoning could be to find an affirmative duty on the part of the state to remove completely the effects of poverty in a criminal proceeding.[23] The equal protection test would then be very simple and easy to apply—whenever lack of resources places a burden upon the defendant to his detriment in a criminal proceeding, the state must remove that burden and put him in the same position as a man with resources. The problem with this test is, of course, that it says too much by saying too little. It puts no express limitations upon the reach of its application.[24]

However if *Douglas* is based on an underlying principle that fairness demands equality because counsel is absolutely necessary to achieve an adequate appellate review,[25] a due process element is introduced. Two possible conclusions can be drawn about the equal protection doctrine: either due process and equal protection are so commingled that what equal protection demands due process also demands, or the equal protection doctrine is based upon a

19 *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 126-27 (1956).

20 *E.g.*, Baxstrom v. Herold, 383 U.S. 107 (1966).

21 *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

22 Cox, *The Supreme Court, 1965 Term, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91-93 (1966).

23 Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 436 (1967).

24 Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1070 (1963).

25 Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 15 (1957); *cf.* 47 MINN. L. REV. at 1072.

preliminary finding that an interest is important enough that in pursuit of fairness it should be protected by the equal protection clause. *Griffin's* statement that due process does not require appellate review[26] would seem to exclude the possibility that what is demanded by equal protection is also always required by due process. Therefore only the latter conclusion remains: the Court must evaluate the importance of an interest to determine whether equal protection should be applied.

If *Douglas* is saying simply that because a rich man can obtain counsel a poor man should be placed in a similar position, an evaluation of the underlying interest, *viz.*, a right to counsel on the first appeal of right, would not be necessary. But *Douglas* does not say that. *Douglas* says that a rich man can obtain counsel to review the record, to research the law and to present arguments.[27] Thus *Douglas* is based on two steps: one, that a rich man will have counsel, and two, that counsel is necessary to present an adequate appeal. The latter appeals to our due process instincts and requires an evaluation of the importance of the interest the poor man is claiming. In short, the equal protection test as developed in *Douglas* requires the Court to examine the consequences of its criminal procedure to determine (1) whether a man without funds is denied an "interest" afforded a man with means and (2) whether that interest is significant enough to be deserving of equal protection.

In evaluating the significance of a particular interest the Court can profit from its experience with due process. Evaluation probably should be accomplished by some type of a balancing test weighing the importance to the individual of the interest under adjudication against the importance to the state of retaining the status quo.[28] Clearly then the concept of due process is intertwined with the equal protection doctrine.[29] But equal protection seems to reach areas where due process will not reach by protecting lesser interests than those protected by due process.[30] *Griffin* and *Douglas*, since due process does not require an appeal, are examples of this.

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26 351 U.S. 12, 18 (1956).

27 372 U.S. 353, 358 (1963).

28 *See* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 350-52 (1957).

29 Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Willcox & Bloustein, *The Griffin Case —Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 11 (1957).

30 Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435, 438-39 (1967).

III. Extension of the Right

The remainder of this note will be devoted to an examination of the extension of the right to counsel in three areas: at what point prior to trial counsel should be appointed; how long after trial this representation should continue; and to which offenders the right to counsel should attach.

A. *Prior to Trial*

In 1934 Dean Justin Miller wrote:

> The time when an accused person really needs the help of the lawyer is when he is first arrested and from then on until trial. The intervening period is so full of hazards for the accused person that he may have lost any legitimate defense long before he is arraigned and put on trial.[31]

Many of the hazards with which Dean Miller was concerned have been removed, at least theoretically, by *Miranda v. Arizona*,[32] which requires the police to advise an accused of his right to remain silent, to warn him that anything he says can be used against him, and to offer appointed counsel to an indigent before beginning custodial investigation. The spirit of *Miranda* would seem to indicate that the right to counsel begins at the first significant contact with the police.[33] However, the decision was based upon the fifth amendment privilege against self-incrimination. Where there is no interrogation, the right to appointed counsel may not attach under the *Miranda* rationale in pre-trial proceedings which present no danger of self-incrimination. *Miranda* may have so decreased the effectiveness and practicality of interrogation that the police will use it only infrequently. The question of when the right to counsel attaches therefore remains significant.

Prior to trial an accused may be subject to several proceedings in which there is little danger of self-incrimination but which may affect the future development of the case. The pre-trial proceedings differ in every state; in a "typical" jurisdiction the following will occur: Shortly after arrest for a felony the suspect will be

31 Miller, *Lawyers and the Admn. of Criminal Justice*, 20 A.B.A.J. 77, 78 (1934). *See also* A. Wood, Criminal Lawyer 197-202 (1967) which suggests counsel must be made available at arrest by an extension of legal aid societies.

32 384 U.S. 436 (1966).

33 *But see* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 Colum. L. Rev. 645, 665 (1967) which emphasizes *Miranda's* failure to put much reliance on the sixth amendment right to counsel, and *Terry v. Ohio*, 392 U.S. 1 (1968), which allows stop and frisk.

brought before a magistrate[34] at what is called a preliminary hearing. The magistrate determines whether the prosecution has sufficient evidence for maintaining a criminal proceeding. If the magistrate finds sufficient evidence, he will bind the suspect over for further proceedings[35]—for either a grand jury hearing or directly to trial. If the case goes to the grand jury, it will investigate to find a "true" indictment.[36] Shortly prior to trial there will be an arraignment before the trial court at which the suspect is informed of the charges against him and asked to plead.[37] The preceding legal steps provide notice and hearings for the accused and serve as checks on the arbitrary exercise of power by the police.

Certainly the presence of counsel at any of these stages would aid in obtaining these goals. It is conceivable that counsel could be appointed upon arrest of a suspect or shortly thereafter in the station house. Appointment at one of these points would provide the most effective protection for an individual, but in many jurisdictions may not be feasible at present. Appointment of counsel at the arraignment is certainly feasible, but the arraignment may precede the trial by several minutes or several months.[38] Thus, appointment of counsel at this stage may not be early enough to allow counsel to perform his function adequately. Appointment of counsel at the preliminary hearing may be an acceptable compromise between the rights of an individual and the demands of the state; for, at the preliminary hearing, it would be administratively feasible for the state to provide representation.

The preliminary hearing serves several important functions: notice to the accused of the charges brought against him, an early stage of discovery, the first opportunity to defend, as well as (in many jurisdictions) the first chance for release on bail. Basically the preliminary hearing allows a judicial officer to determine whether there is probable cause to believe a felony has been committed and the accused is guilty of committing it. If the judicial officer finds unfavorably for

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34 L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 49-50 (1947) [hereinafter cited as ORFIELD].

35 ORFIELD 67-68.

36 ORFIELD 157.

37 ORFIELD 273. It should be noted, however, that in some jurisdictions the prosecutor's information can take the place of the preliminary hearing and the grand jury hearing, and in some jurisdictions the grand jury hearing can take the place of the preliminary hearing. D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 143, 149-50 (1967).

38 KARLEN, *supra* note 37, at 178.

the accused, he will bind him over for further proceedings;[39] if the prosecutor cannot show probable cause that the accused committed the felony, the judicial officer will discharge the accused. To show probable cause, the prosecutor must present some evidence of his case; and the accused is then able to cross-examine the prosecutor's witnesses.[40] The accused may present his own witnesses to refute probable cause.[41] In many jurisdictions, as a protection for the accused, he need neither assert a plea nor raise any defenses.[42] The preliminary hearing thus operates primarily for the benefit of the accused because, if probable cause is not shown, he will be spared further proceedings.[43]

Under current Supreme Court law, representation must be given a defendant if the pre-trial hearing is a critical stage of the proceeding.[44] *Powell v. Alabama,* a forerunner of the critical stage test, said:

> [D]uring perhaps the most *critical* period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, *when consultation, thoroughgoing investigation and preparation were vitally important,* the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[45]

Powell recognized the importance of counsel prior to trial. Two recent Supreme Court cases demanded the presence of counsel before trial. In *Hamilton v. Alabama*[46] the Court had to decide if arraignment was a critical stage. The Court found that the arraignment was a critical stage because under Alabama procedure certain pleas

39 *See* United States *ex rel.* Cooper v. Reincke, 333 F.2d 608, 612 (2d Cir. 1964); Kardy v. Shook, 237 Md. 524, 543, 207 A.2d 83, 94 (1965); ORFIELD at 67.

40 *See* Pointer v. Texas, 380 U.S. 400 (1965); Harris v. Wilson, 239 F. Supp. 204, 210 (N.D. Cal. 1965); CONN. GEN. STAT. ANN. § 54-76a (1958).

41 State *ex rel.* Hanagan v. Armijo, 72 N.M. 50, 53-54, 380 P.2d 196, 198-99 (1963); People v. White, 18 Misc. 2d 56, 58, 188 N.Y.S.2d 585, 588 (Orange County Ct. 1959); ARK. STAT. ANN. § 43-624 (1964).

42 Wells v. California, 234 F. Supp. 467, 470 (S.D. Cal. 1964); People v. Morris, 30 Ill. 2d 406, 197 N.E.2d 433 (1964); People v. Givans, 83 Ill. App. 2d 423, 228 N.E.2d 123 (1967); State v. Wilson, 22 Conn. Supp. 345, 172 A.2d 902 (App. Div. 1961).

43 State v. Minamyer, 12 Ohio St. 2d 67, 232 N.E.2d 401 (1967); W. LAFAVE, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 321 (F. Remington ed. 1965); Note, *The Preliminary Hearing—An Interest Analysis,* 51 IOWA L. REV. 164-65 (1965).

44 Hamilton v. Alabama, 368 U.S. 52 (1961).

45 287 U.S. 45, 57 (1932) (emphasis added).

46 368 U.S. 52 (1961).

had to have been made at that time or lost completely. After commenting that it would not stop to look for actual prejudice, the Court reversed for absence of counsel. In *White v. Maryland*[47] the Court reversed a Maryland decision because it found Maryland's preliminary hearing a critical stage. The case turned upon a Maryland trial procedure allowing the prosecution to comment at trial upon the defendant's plea at the preliminary hearing. White had pled guilty at the preliminary hearing but changed his plea to not guilty at arraignment; at the trial the prosecutor commented upon White's original plea. The Court again emphasized that it did not base its decision on a finding of prejudice but

> Whatever may be the normal function of the "preliminary hearing" . . . it was in this case as "critical" a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.[48]

There is a general concensus that a proper reading of *Hamilton* and *White* does not result in the requirement of counsel at all preliminary hearings because both involved special circumstances which created the danger of an unjust result in the absence of counsel. But courts have had much difficulty developing a test that would determine when a stage is critical and would require appointment. The *Betts* doctrine[49] that required reviewing courts to look at the totality of circumstances to determine whether prejudice to the defendant occurred seems to have been so completely destroyed by *Gideon* that it should not be resurrected to deal with this problem. The Court recognized this implicitly in *White* when, although there was clearly actual prejudice present, the Court expressly refused to rest its decision upon the presence of actual prejudice.[50]

Apparently three distinct tests have evolved since *White* for determining what is a critical stage.[51] (1) Whether lack of counsel at the pre-trial hearing worked to infect the defendant's subsequent trial with an absence of that fundamental fairness essential to the concept of justice. Thus this test looks for actual prejudice.[52] (2)

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47 373 U.S. 59 (1963).

48 *Id.* at 60.

49 Betts v. Brady, 316 U.S. 455 (1942).

50 373 U.S. at 60.

51 *See* Case Note, *Criminal Law—Preliminary Hearing: A Critical Stage of Criminal Proceedings Where Denial of Assistance of Counsel to the Accused Deprives Him of His Constitutional Right to Counsel*, 32 MO. L. REV. 305, 308-09 (1967).

52 *E.g.*, United States *ex rel.* Cooper v. Reincke, 333 F.2d 608, 613 (2d Cir. 1964).

Whether there was a likelihood of prejudice to the accused because of the absence of counsel.[53] (3) Whether the preliminary hearing was more than a mere formality; and if so, whether the absence of counsel could have affected the whole trial.[54] It is noticeable that these tests answer the question of when counsel must be appointed in a pre-trial hearing with a due process analysis instead of an equal protection approach.[55]

There seems to be a conceptual difficulty in the application of due process to the right to counsel in pre-trial hearings. The Supreme Court has ruled that due process does not require a preliminary hearing,[56] a grand jury investigation,[57] or an arraignment.[58] Although the logic behind these decisions seems to be based on an old fashioned view of due process, these cases have not been overruled. Can due process be used to find a right to counsel in a pre-trial hearing when such pre-trial hearing is not itself constitutionally required? In the case law in point judges have assumed due process can be used. Perhaps the best rationale for this is that, although due process does not require pre-trial proceedings themselves, due process does protect a defendant from that which might prejudicially affect his trial. Apparently judges have assumed due process can be used in these situations where the absence of counsel prejudicially affects the actual trial proceeding and thus the sixth amendment right to trial. Due process throws a constitutional womb of protection around the trial proceeding. Absence of counsel prior to trial affects the rights guaranteed by due process in the trial proceeding. Counsel's absence after the conviction does not relate back to that proceeding per se but only relates back to the trial insofar as the appeal is meant to safeguard the determination of the original trial court. The absence of counsel prior to trial relates directly forward to the trial and is thus a clear violation of due process.

Can equal protection supply a stronger rationale for a right to appointed counsel on pre-trial hearings? A man who can afford an attorney will obtain one prior to a pre-trial hearing in a case of any significance.[59] Is the accused's need for obtaining counsel at the

53 *E.g.*, Sigler v. Bird, 354 F.2d 694, 697 (8th Cir. 1966).

54 *E.g.*, Harris v. Wilson, 239 F. Supp. 204, 209 (N.D. Cal. 1965).

55 *See id.* at 211 n.4. However, this case also suggests the possible application of equal protection.

56 Lem Woon v. Oregon, 229 U.S. 586 (1913).

57 Hurtado v. California, 110 U.S. 516 (1884).

58 Garland v. Washington, 232 U.S. 642 (1914).

59 *See, e.g.*, OHIO REV. CODE ANN. § 2935.20 (Page Supp. 1966); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 4.01 (5), 5.07 (Tent. Draft No. 1, 1966).

pre-trial hearing significant enough for the equal protection clause to require the state to appoint counsel for all defendants who cannot privately afford an attorney at their pre-trial hearing? To find the answer it will help to weigh the competing interests of the state and the individual.

The individual will clearly benefit from an earlier introduction of an attorney to his case.[60] The attorney will give him a better idea of the gravity of the charge brought against him, describe the different proceedings he must undergo, and in general act as a buffer between the state and the individual at the points of confrontation.[61] As a result of the attorney's earlier introduction into the case, evidence can be preserved while it is still fresh and while there is a lower risk that witnesses will be unavailable.[62] Furthermore, the accused has an obvious interest in avoiding the stigma of a trial, and an attorney at the preliminary hearing can help establish a lack of probable cause which would lead to the release of the accused; or, if probable cause is found, an attorney can help secure a defendant's pre-trial release on bail. For example, counsel may demand some respect for the rules of evidence and thus make it more difficult to show probable cause.[63] The preliminary hearing also offers the attorney an opportunity for discovery and provides clearer notice of the prosecution's case. Counsel's earlier entry into the case will also give him a longer period to research the law, gather the facts and consider his arguments before trial.[64]

The state's interest in retaining the status quo is not insignificant. The primary state interest is the conservation of financial resources against the expense of appointing counsel at an early stage in the criminal process. This fear of a great financial burden resulting from "premature" appointment of counsel may not be as significant as it would at first appear. There are two reasons for this: first, in the absence of waiver, counsel must be appointed at the trial level in any event; and, second, where counsel is appointed at

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60 *See* E. BROWNELL, LEGAL AID IN THE UNITED STATES 140-42 (1951).

61 Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1048 (1964).

62 SPECIAL COMM. OF THE N.Y.C.B.A. & NAT. LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 23 (1959).

63 *See* Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164, 177-78 (1965).

64 Powell v. Alabama, 287 U.S. 45, 58-59 (1932), notes the necessity of preparation by counsel to present an adequate defense.

the preliminary hearing there would be a certain amount of savings from an increase in the number of charges dropped by the prosecution or the magistrate where probable cause is not found.

Because the finding of an absolute right to counsel at a pre-trial hearing could require relitigation of all prior convictions, the state has a substantial interest in preventing this outcome. Relitigation could be quite costly to the state, and the release of many of the "criminal element" could be dangerous to society. Recent decisions suggest, however, that the Court may use a method of prospective overruling in this type of situation[65] and this would seem an apt case for it. Arguably prospective overruling would be more acceptable where a right is based upon equal protection than where it is based upon due process. Where a right is so fundamental that a violation of it offends the universal sense of fair play the availability of relitigation would seem to be almost mandatory.[66]

Representation of counsel at the pre-trial hearing may not be important after all because this stage is primarily for the benefit of the defendant, by acting as a check on police power, and is not intended to serve as a prologue to be fully integrated into the trial stage. But, if the hearing is really for the benefit of the accused, the presence of counsel can only help to further the preliminary hearing's primary function because the individual will be more completely protected.

Because an attorney can significantly influence both the outcome of a trial and the procedural methods of reaching that outcome, equal protection demands the appointment of counsel at the first stage at which it is administratively feasible to appoint one. At present, this may be the preliminary hearing.

B. *After Conviction*

Douglas has decreed that convicted indigent defendants have the benefit of counsel at their first appeal of right. The equal pro-

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65 Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966), Linkletter v. Walker, 381 U.S. 618 (1965).

66 *But see* Stovall v. Denno, 388 U.S. 293 (1967), which limited to prospective operation United States v. Wade, 388 U.S. 218 (1967), in which the Court used a due process approach to require that counsel be present at post-indictment lineups. The Court in *Stovall* was careful to state, however, that it remained open to all persons to show actual prejudice in the totality of the circumstances of pre-trial proceedings. See Johnson v. New Jersey, 384 U.S. 719 (1966) which limited *Miranda*, a due process decision, to almost purely prospective operation while explicitly retaining the availability to defendants of old case law to overturn convictions.

tection language in *Douglas* could be understood to portend an extension of a right to appointed counsel to other post-conviction proceedings.[67] Two areas in which the principles of *Douglas* could be easily extended are direct appeals and collateral attacks.

In *Anders v. California*,[68] the Supreme Court clearly defined what it means by a right to appointed counsel on appeal. After *Douglas*, California followed the practice of appointing counsel for a first appeal of right in every case. If that counsel found the appeal to be without merit and notified the court of his conclusion, the reviewing court would undertake an independent review of the record. If the court found there was no merit in petitioner's appeal, it would deny him the further assistance of counsel. The Supreme Court struck this procedure down and provided that even if counsel should decide that an appeal has no merit, he must present a brief embracing all points that might arguably support the appeal before the appellate court can make an independent review of the record and decide whether or not to allow counsel for the appeal. Counsel is thus required to be an active advocate, not merely an amicus curiae. Clearly, the Court is underlining the importance of counsel on appeal.[69] *Anders* is evidence that the Court is not overly impressed with the state's attempt to protect its economic interests by avoiding the cost of appointing counsel where appeal may be frivolous; instead the Court seeks to insure that an indigent receive as complete a representation of counsel on his first appeal of right as that of a rich man.

Although *Douglas* was expressly limited to the first appeal of right, its theory could easily extend to all direct appeals. The dissenting opinion of Justice Harlan in *Douglas* supports this suggestion.

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67 Day, *Coming: The Right To Have Assistance of Counsel at All Appellate Stages*, 52 A.B.A.J. 135, 137-38 (1966).

68 386 U.S. 738 (1967); *see also* Swenson v. Bosler, 386 U.S. 258 (1967).

69 Swenson v. Bosler, 386 U.S. 258 (1967), also accentuates the importance of counsel on appeal. Here the Court struck down a Missouri procedure whereby appointed counsel could file a motion for a new trial arguing all possible grounds for reversal, file a notice of appeal and withdraw from the case. By Missouri law only those grounds raised in a motion for a new trial could be raised on appeal. Defendant could then submit this on appeal without the further help of counsel's briefs or oral arguments. It seems clear this procedure did not provide the assistance of counsel as demanded by *Douglas*. But the decision is significant because retained counsel in Missouri have also used this procedure to bring an appeal for their clients. Gerard, *The Right to Counsel on Appeal in Missouri: A Limited Inquiry Into the Factual and Theoretical Underpinnings of Douglas v. California*, 1965 WASH. U.L.Q. 463, 466, 468 (1965). The Court, then, finds counsel so important that there is a violation of equal protection even here where the procedure provided by Missouri counsel to those who cannot afford counsel is the same as that often provided for those who *can* afford counsel.

> What the Court finds constitutionally offensive in California's procedure bears a striking resemblance to the rules of this Court and many state courts of last resort on petitions for certiorari or for leave to appeal filed by indigent defendants *pro se* . . . .
>
> The Court distinguishes our review from the present case on the grounds that the California rule relates to "the *first appeal*, granted as a matter of right". . . . But I fail to see the significance of this difference.[70]

The equal protection test derived from *Douglas*[71] can be applied by the Court to determine if there is a right to appointed counsel. Undoubtedly a man with means could obtain counsel to take his case to any court that would hear it.[72] A defendant has as much at stake on the outcome of a second appeal as he had on the first.[73] However, since there may be a presumption of accuracy and fairness of the decision reached by a trial court and affirmed by a court of appeals,[74] and since there is no absolute guarantee that the outcome of a second appeal will be any more "correct" than a prior decision, it could be found that the interests which are protected by a second appeal are not significant enough to require appointment of counsel. Furthermore, the Court must seriously consider the difficulties that would be thrust upon the state by a decision requiring the appointments of counsel in all levels of the direct appeal. Most significant among these would be: (1) the practical problem in providing a sufficient number of attorneys, and (2) the cost incurred either directly or indirectly by the state. As our legal system makes the adjustment required by *Gideon*, *Miranda* and *Douglas* the supply of attorneys available to represent indigent defendants should increase and the cost per client should decrease. The feasibility of counsel on secondary appeal should be greater. As individual attorneys carry a case through all its possible steps justice should be better served because appeals will be handled by attorneys who are familiar with both the facts of the case and the

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70 372 U.S. 353, 365-66 (1963).

71 See text following note 27 *supra*.

72 In some states the only court for direct review will be the supreme court because the first appeal of right is to the state supreme court. *See, e.g.*, State v. Staten, 271 N.C. 600, 157 S.E.2d 225 (1967).

73 Comment, *The Right to Appointed Counsel at Collateral Attack Proceedings*, 19 U. MIAMI L. REV. 432, 451 (1965).

74 "It bears emphasis, however, that the ordinary processes of trial and appeal are presumed to result in valid adjudications." Traynor, J., in People v. Shipman, 62 Cal. 2d 226, 232, 397 P.2d 993, 997 (1965). However, this is not to deny that the same concerns of the defendant are at stake.

trial court's treatment of them.[75] Equal protection would, at least in the near future, demand the appointment of counsel at all direct appeals whether they are first or second, of right or discretionary.[76]

The competing interests involved in attempting to determine whether a right to appointed counsel exists in collateral proceedings are more evenly balanced than on direct appeal. State courts generally permit three types of collateral appeals: habeas corpus, coram nobis, and some kind of statutory post-conviction remedy.[77] Some state statutes provide for appointment of counsel at hearings in post-conviction attacks.[78] The more typical situation is for a state to declare the right to appointed counsel a matter of discretion in the hands of the court in which the action is brought.[79] This result is

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75 The public defender's system should supply the continuity not provided by the appointed counsel system described in Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 788-89 (1961), where new and different counsel generally handles appeals. *See also* SPECIAL COMM. N.Y.C.B.A. AND THE NAT'L LEGAL AID ASS'N, EQUAL JUSTICE FOR THE ACCUSED 61 (1959) which suggests that every defender system should provide for continuance of representation on appeal; Commonwealth *ex rel.* Firmstone v. Myers, 32 Pa. D. & C.2d 69 (Ct. Quarter Sess.), *aff'd*, 202 Pa. Super. 292, 196 A.2d 209 (1963), which requires appointed counsel to seek the highest appellate review consistent with trial errors.

76 *But cf.* Peters v. Cox, 341 F.2d 575 (10th Cir. 1965) (a per curiam decision affirming a denial of appointment of counsel by a state supreme court for appeal to the United States Supreme Court.)

77 In Ohio, habeas corpus is limited to testing the jurisdiction of the original court over person and subject matter. OHIO REV. CODE ANN. §§ 2953.21-.24 (Page Supp. 1967) provide a proceeding to test whether the conviction obtained was in violation of the United States or Ohio Constitution. Freeman v. Maxwell, 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965).

In Ohio there is no coram nobis proceeding. State v. Perry, 10 Ohio St. 2d 175, 180; 226 N.E.2d 103, 108 (1967). The writ of coram nobis is traditionally a discretionary writ granted for consideration of a fact which may change the decision and which was not known at the trial. State v. Randolph, 32 Wis. 2d 1, 144 N.W.2d 441 (1966). Although this note does not discuss the federal post-conviction proceedings under 28 U.S.C. 2241 *et seq.* (1964), federal decisions involving right to counsel in section 2255 actions are cited because of the similarity between such actions and state post conviction procedures. *See* 28 U.S.C. § 2255 (1964).

78 ILL. REV. STAT. ch. 38, § 122-4 (1963); IND. ANN. STAT. § 13-1402 (1956); N. C. GEN. STAT. § 15-219 (1965); OHIO REV. CODE ANN. § 2953.24 (Page Supp. 1967); ORE. REV. STAT. § 138.590 (2), (3) (1967). Although these statutory provisions are seemingly worded in mandatory terms, courts have found some of these provisions to be discretionary in effect. *See, e.g., In re* Sowders, 207 N.E.2d 629 (Ind. 1965).

79 We hold that the law in this circuit is that appointment of counsel for indigents in habeas corpus and section 2255 proceedings rests in the sound discretion of district courts unless denial would result in fundamental unfairness impinging on due process rights.

usually achieved by some combination of a three-pronged reasoning process: (1) collateral attacks are civil, not criminal actions, and thus the sixth amendment right to counsel in criminal proceedings does not inure;[80] (2) the sheer mathematics of appointing counsel in all such proceedings makes the initial judicial officer the appropriate agent to weed out unworthy attacks and prevent an undue burden upon the state or the bar;[81] and (3) in some cases of clear injustice, however, the protection of fundamental rights may require the appointment of counsel.[82] An increasing number of appellate courts require appointment of counsel for indigents whenever a prima facie case is stated sufficient to merit a hearing on the collateral attack.[83] These courts have found a right to appointed counsel in collateral hearings by piercing through the civil label, finding collateral attacks to be a substantive part of the criminal process[84] and, therefore, applying the principles of *Douglas* and *Griffin*.

Griffin and its progeny of transcript and filing fee cases seem to lead to only one conclusion: an indigent must be provided counsel whenever that indigent is granted a hearing. *Griffin* granted an absolute right to a transcript or other means of reporting the trial proceeding for use on direct appeal.[85] *Burns v. Ohio*[86] extended the indigent's protection by striking down a filing fee condition for appeal

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LaClair v. United States, 374 F.2d 486, 489 (7th Cir. 1967). *See Ex parte* Lott, 168 So. 2d 265 (Ala. Ct. App. 1964); Freeman v. State, 87 Idaho 170, 180-81, 392 P.2d 542, 548 (1964).

80 Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964); Collins v. Heinze, 217 F.2d 62 (9th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); State v. Hizel, 181 Neb. 680, 150 N.W.2d 217 (1967).

81 *See* McCrary v. State, 241 Ind. 518, 532, 173 N.E.2d 300, 306 (1961); Brine v. State, 205 A.2d 12 (Me. 1964); Commonwealth *ex rel.* Firmstone v. Myers, 32 Pa. D. & C.2d 69 (Ct. Quarter Sess.), *aff'd* 202 Pa. Super. 292, 196 A.2d 209 (1963).

82 LaClair v. United States, 374 F.2d 486 (7th Cir. 1967). The court in *LaClair* based its decision to uphold this discretionary rule on a reading of Sanders v. United States, 373 U.S. 1 (1963). This "special circumstances" application of due process may be somewhat suspect in light of the Court's non-application of due process in *Douglas* and the extinction of *Betts v. Brady*.

83 People v. Shipman, 62 Cal. 2d 226, 231, 397 P.2d 993, 997 (1965); Stahl v. Board of County Comm'rs, 198 Kan. 623, 625, 426 P.2d 134, 136 (1967) (dictum); Brine v. State, 205 A.2d 12, 15 (Me. 1964); State v. Randolph, 32 Wis. 2d 1, 5, 144 N.W.2d 441, 443 (1966).

84 People v. Shipman, 62 Cal. 2d 226, 231, 397 P.2d 993, 996 (1965); Stahl v. Board of County Comm'rs, 198 Kan. 623, 627-28, 426 P.2d 134, 137-38 (1967).

85 This became apparent in *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958), which refused to allow trial court discretion over the right to a transcript.

86 360 U.S. 252 (1959).

to the state supreme court. *Smith v. Bennett*[87] and *Lane v. Brown*[88] reached even further by striking down a filing fee required for a habeas corpus action in the former and requiring a free trial transcript for appeal from a coram nobis hearing in the latter.

These cases could have been explained as attempts by the Court to guarantee access to the courts to all men.[89] But *Douglas* has shown that the Court is doing more than providing access for appellate review; it is trying to provide an adequate appeal by removing those invidious discriminations previously suffered by the poor in criminal proceedings. In the preceding transcript and filing fee cases the expansion of protection has been to collateral attacks. True, the Court has refused to rule explicitly on right to appointed counsel at collateral proceedings,[90] but there is no escape from the logical conclusion these principles compel.

Chief Justice Traynor in *People v. Shipman* stated:

> Since the questions that may be raised on *coram nobis* are as crucial as those that may be raised on direct appeal, the *Douglas* case precludes our holding that appointment of counsel in *coram nobis* proceedings rests solely in the discretion of the court.[91]

The petitioner's interests protected by counsel at a collateral attack are almost identical to those protected on direct appeal, and they are significant. A state's interests, however, are more weighty than those considered on direct appeal. Collateral attacks have the unusual feature of not being subject to the doctrine of res judicata except with regard to the specific issues treated;[92] so a state may be bombarded by a large number of petitions, many of which may be frivolous or repetitious. Thus the number of petitions could make it financially

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87 365 U.S. 708 (1961).

88 372 U.S. 477 (1963).

89 Under an Indiana statute petitioner in *Lane* v. *Brown*, 372 U.S. 477 (1963), could not have appealed without the transcript which is only given to indigents through the public defender. *See also* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 12-13 (1963).

90 *But see* Hollingshead v. Wainwright, 384 U.S. 31 (1966), where the Supreme Court in a per curiam decision reversed a Florida decision, which did not grant appointment of counsel on appeal from a habeas corpus hearing, by merely citing *Douglas*. The meanings of the Supreme Court's brief decision is explained in Herzig v. State, 200 So. 2d 632 (Fla. Dist. Ct. App. 1967).

91 62 Cal. 2d 226, 231, 397 P.2d 993, 996, (1965).

92 Sanders v. United States, 373 U.S. 1, 7-8 (1963); Lipscomb v. United States, 298 F.2d 9, 11 (8th Cir.), *cert. denied*, 369 U.S. 853 (1962); Nicholay v. Kill, 161 Kan. 667, 669, 170 P.2d 823, 826 (1946).

difficult for a state to appoint counsel in every case. But this consideration is counterbalanced; since an attorney could raise all possible issues, the presence of counsel could cut down the number of petitions and thus add to the finality of the first proceeding by bringing more issues within the doctrine of res judicata.[93]

People v. Shipman limited appointment of counsel to those persons who presented petitions showing sufficient facts to merit a hearing.[94] The question whether counsel must be provided to aid an indigent in the drafting of the petition is difficult. It is the nature of a collateral attack that a hearing need not be granted. The aid of counsel in drafting a petition would certainly increase the likelihood that a hearing would be granted. Chief Justice Traynor feared this would require too many attorneys.[95] Perhaps at present this is true and the better solution would be to allow a very simple petition form which the prisoner can fill out for himself.[96] Given this limitation, equal protection seems to demand the extension of the right to appointed counsel in collateral attacks to all needy persons presenting a meritorious petition.

C. *A Misdemeanant's Right to Counsel*

Gideon and *Douglas* spoke in sweeping language about the indigent's right to the assistance of counsel. Nevertheless, they both concerned felony convictions and neither explicitly designated whether or not the right to counsel extended to misdemeanants.[97] Predictably, courts have drawn varied conclusions. They can be categorized in the following manner: (1) An indigent misdemeanant

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93 Comment, *The Right to Appointed Counsel at Collateral Attack Proceedings*, 19 U. MIAMI L. REV. 432, 453 (1965); Sanders v. United States, 373 U.S. 1, 20-22 (1963).

94 62 Cal. 2d 226, 232, 397 P.2d 993, 997 (1965). *Shipman* concerned a coram nobis proceeding but the right to counsel has been extended to all collateral attacks. Note, *The Indigent's Right to Counsel in Post-Conviction Collateral Proceedings in California: People v. Shipman*, 13 U.C.L.A. L. REV. 446, 449 n.21 (1966).

95 62 Cal. 2d at 232, 397 P.2d at 997.

96 Note, *The Indigent's Right to Counsel in Post-Conviction Collateral Proceedings in California: People v. Shipman*, 13 U.C.L.A. L. REV. 446, 453-54 (1966).

97 In *Gideon* the Court said:

> The right *of one charged with crime* to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. 372 U.S. at 344 (emphasis added).

In *Douglas* the Court said:

> We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike, *from a criminal conviction*. 372 U.S. at 356 (second italics added, citations omitted).

has no right to appointed counsel.[98] (2) An indigent misdemeanant has a right to appointed counsel when he is charged with a serious offense.[99] (3) An indigent misdemeanant has a right to appointed counsel unless his offense falls into the classification of a petty offense, *i.e.*, an offense not punishable by imprisonment of greater than six months or a fine or greater than five hundred dollars.[100] (4) A misdemeanant has a right to counsel in any case which may lead to incarceration in a penal institution.[101] (5) A right to counsel extends to appeal from a criminal prosecution including criminal prosecutions for misdemeanors.[102]

Two Supreme Court decisions are somewhat indicative of the tenor of the Court's thinking on this matter. *Patterson v. Warden*[103] was an appeal from a Maryland pre-*Gideon* decision refusing to appoint counsel to a misdemeanant charged with several counts of carrying a deadly weapon. Maryland then provided counsel only to an indigent charged with a serious offense and determined the seriousness of the offense by a consideration of three factors: the nature of the offense, the extent of the potential penalty, and the complexity of the case.[104] Here the maximum potential penalty under any count was two years. The Supreme Court in a per curiam decision granted certiorari, vacated the judgment, and remanded for further consideration in light of *Gideon*. The Maryland Supreme Court ordered reversal and remanded for a new trial in conformity with *Gideon*.[105] *Patterson* suggests that counsel must be appointed in at least some misdemeanor cases.

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98 State v. Thomas, 249 La. 742, 190 So. 2d 909 (1966); Cortinez v. Flournoy, 249 La. 742, 190 So. 2d 909, *cert. denied*, 385 U.S. 925 (1966).

99 State v. Anderson, 96 Ariz. 123, 131, 392 P.2d 784, 790 (1964). *Compare* State v. DeJoseph, 3 Conn. Cir. Ct. 624, 634-35, 222 A.2d 752, 759 (App. Div. 1966) *with* Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966).

100 18 U.S.C. § 1 (3) (1964). The Criminal Justice Act of 1964 excluded those indigents accused of petty offenses from representation. 18 U.S.C. § 3006A (a) (1964). *See, e.g.*, Florida v. Brinson, 273 F. Supp. 840 (S.D. Fla. 1967).

101 State v. Borst, 154 N.W.2d 888, 894 (Minn. 1967) (based on court supervisory power rather than Constitution).

102 People v. Mallory, 147 N.W.2d 66, 72-73 (Mich. 1967). There is a suggestion that violations of village ordinances may not be included. *Id.* at 73.

103 372 U.S. 776 (1963).

104 Patterson v. State, 227 Md. 194, 196, 175 A.2d 746, 748 (1961).

105 Patterson v. State, 231 Md. 509, 191 A.2d 237 (1963). By statute Maryland now provides counsel for all accused except those accused of petty offenses as defined by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964). MD. ANN. CODE RULE 719 (2) (a) (Supp. 1967). However, even those accused of petty offenses may have counsel appointed if the trial judge decides conditions demand it. Rule 719 (2) (b).

In *Winters v. Beck*,[106] a misdemeanant brought a habeas corpus action seeking reversal of his original conviction for immorality for which he was imprisoned for thirty days and fined two hundred and fifty-four dollars, claiming he had been denied appointment of counsel. The state supreme court denied his petition because *Gideon* concerned a felony and, therefore, the court felt a constitutional right to appointed counsel extended only to those accused of felonies. The Supreme Court denied certiorari[107] but Justice Stewart wrote a dissent in which he noted that because Winters was unable to pay his fine his period of imprisonment under Arkansas law was actually nine and one-half months, that Winters was denied as effective a trial as the presence of counsel would have provided, and that different jurisdictions have come to different conclusions about the misdemeanant's right to appointed counsel. Stewart stated that he did not suggest that *Gideon* extended to all misdemeanants, but that the decision as to whom it does extend should not rest upon arbitrary labels. Although it is a truism that no conclusions as to the Court's opinion of the substantive law can be drawn from a denial of certiorari,[108] one court has suggested that *Winters v. Beck* shows that *Gideon* does not require the states to appoint counsel for misdemeanants.[109] If anything, *Winters* does show that the Court was not ready to make a pronouncement on the subject.

But the Court will have to make its decision one day; when it does, it must consider the demands of due process and equal protection. The availability of retained counsel to those who can afford it is clear.[110] So the determinative factor in the Court's collective mind

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106 239 Ark. 1151, 1152, 397 S.W.2d 364, 365 (1965), *cert. denied*, 385 U.S. 907 (1966).

107 Winters v. Beck, 385 U.S. 907 (1966). The Supreme Court also denied review in two other cases on this question: Cortinez v. Flournoy, 385 U.S. 925 (1966) (denial of motion to file petition of habeas corpus); DeJoseph v. Connecticut, 385 U.S. 982 (1966) (denial of certiorari).

108 *E.g.*, Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (Frankfurter *op. on denial of cert.;* Atlantic Coast Line R. R. v. Powe, 283 U.S. 401, 403-04 (1931). *But cf.* Leet v. Union Pac. R. R., 25 Cal. 2d 605, 613, 155 P.2d 42, 46-47, *cert. denied*, 325 U.S. 866 (1945) (California court accepted denial of certiorari as persuasive of approval).

109 Toledo v. Frazier, 10 Ohio App. 2d 51, 58-59, 226 N.E.2d 777, 781-82 (1967). The court reasoned that in view of *Winters* and Harlan's concurring opinion in *Gideon* limiting *Gideon's* extension of a right to appointed counsel to crimes carrying substantial prison sentences, *Gideon* could not possibly embrace misdemeanants. *Id.* at 56, 226 N.E.2d at 780-81.

110 Chandler v. Fretag, 348 U.S. 3, 9-10 (1954) (retained counsel shall be allowed in any case, at any stage, on any issue of the criminal proceeding. Here, right to retained

should be the significance of counsel's presence at the trial of a misdemeanant. But since *Gideon*, by removing the special circumstances test at least from those "offenses which . . . carry the possibility of a substantial prison sentence,"[111] acknowledged the importance of counsel to the outcome of a trial, the decisive factor in the Court's consideration of the misdemeanant's right to counsel must be based upon a thorough analysis of the effect upon the individual of prosecution for a misdemeanor. The Court must decide to what extent it values the protection of an individual's liberty (from confinement and subsequent restrictions) and property (from fines and other adverse effects on one's income and reputation).

It is clear that the Court cannot allow the distinction to rest upon the states' differing use of the term "misdemeanor."[112] However, the Court may let itself be guided by a series of cases treating the right to jury trials as guaranteed by article III, section 2 of the Constitution and the sixth amendment.[113] In these cases the court has often declared that the words "crime and criminal prosecution" were not intended to include petty offenses, and thus there was no right to a jury trial. This line of cases could be discarded; it may well be that counsel is necessary to achieve a fair trial even though a jury is not. Therefore the words "criminal prosecution" could mean one

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counsel on habitual criminal accusation even though defendant waived right to counsel on charges of housebreaking and larceny). *See generally* Ferguson v. Georgia, 365 U.S. 570, 572, 596 (1961) (right to be questioned by counsel when presenting unsworn statement to jury).

111 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

112 Winters v. Beck, 385 U.S. 907, 908 (1966) (Stewart, J., dissenting from a denial of certiorari); Arbo v. Hegstrom, 261 F. Supp. 397, 401 (D. Conn. 1966); State v. Borst, 154 N.W.2d 888, 890 (Minn. 1967).

In Arkansas a misdemeanor may be punishable by imprisonment for up to three years. *E.g.*, ARK. STAT. ANN. § 41-805 (1964). In Minnesota a misdemeanor is punishable by a sentence of up to 90 days imprisonment or a fine, but there is also a third classification of crime called a gross misdemeanor which is punishable by imprisonment for up to one year. MINN. STAT. § 609.02 (4) (1964). In Ohio and Tennessee a misdemeanor is any offense other than those punishable by death or imprisonment in the penitentiary. OHIO REV. CODE ANN. § 1.06 (Page 1953); TENN. CODE ANN. § 39-103 (1953). New Jersey designates most crimes as misdemeanors. For example, kidnapping punishable by no less than 30 years and up to life imprisonment, forcible rape punishable by 30 years imprisonment, and robbery punishable by 15 years imprisonment are all called high misdemeanors. Florida v. Brinson, 273 F. Supp. 840, 846 (S.D. Fla. 1967). *E.g.*, N.J. REV. STAT. § 2A : 118-1 (1953) (kidnapping).

113 Dist. of Columbia v. Clawans, 300 U.S. 617, 624-25 (1937); Schick v. United States, 195 U.S. 65, 68-70 (1904); Callan v. Wilson, 127 U.S. 540, 549 (1888).

thing in a right to jury context and another in a right to counsel.[114] And, if so, the Court must still weigh the variables involved.

Three recent state decisions stand out as examples of attempts by state supreme courts to weigh the variables involved.

In *State v. Anderson*[115] the defendant appealed from a conviction for the misdemeanor of attempting to assist the escape of a prisoner from jail. Defendant claimed a right to the appointment of counsel at trial; the state supreme court agreed. The court relied on *Patterson* for authority, finding that the Supreme Court required the appointment of counsel for all serious offenses regardless of their label. It indicated that it would consider the nature of the offense, the extent of the potential penalty, and the complexity of the case in determining whether an offense is serious. The Court felt that a potential punishment of two years in jail and a one thousand dollar fine merited the classification "serious offense," but it did not devise a standard for defining serious offenses. The court's decision was based on what it thought the mandate of the Constitution to be.

In *State v. Borst*[116] the defendant Borst was charged with the misdemeanor of knowingly publishing a false statement about a candidate to be voted upon. Borst had asked that counsel be appointed and had been refused. The Minnesota Supreme Court considered the question in light of recent decisions and found that it could base no conclusions upon the Federal or state Constitution. Instead it invoked its "supervisory power to insure the fair administration of justice"[117] to declare that counsel should be provided in any case which may henceforth lead to incarceration in a penal institution. After considering the cost of this decision to the state the court when on to say:

> We are persuaded that the possible loss of liberty by an innocent person charged with a misdemeanor, who does not know how to defend himself, is too sacred a right to be sacrificed on the altar of expedience. Any society that can afford a professional prosecutor to prosecute this type of crime must assume the burden of providing adequate defense, to the end that innocent people will not be convicted without having facilities available to properly present a defense.[118]

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114 *See* State v. Borst, 154 N.W.2d 888, 894 (Minn. 1967) (reasoning that, although a jury was not necessary for a fair trial, counsel was).

115 96 Ariz. 123, 392 P.2d 784 (1964).

116 278 Minn. —, 154 N.W.2d 888 (1967).

117 278 Minn. —, 154 N.W.2d at 894.

118 278 Minn. —, 154 N.W.2d at 894-95.

The court postponed for later decision the question of the right to appointed counsel where only loss of property was at stake, but otherwise quite clearly enunciated a workable standard for the appointment of counsel.

People v. Mallory[119] decided that a misdemeanant had a right to appointed counsel on appeal. Defendant had been convicted of receiving and concealing stolen property worth one hundred dollars and sentenced to a ninety day term in a house of correction. *Mallory* is confusing because it involves several concurring opinions without a majority and involves both statutory and constitutional interpretation. Two justices reviewed recent decisions giving a misdemeanant right to counsel *at trial level,* then refused to adopt the federal petty offense distinction[120] saying:

> Scarcely can it be said, however, that a permissible maximum sentence of 3 months' imprisonment or $100 fine or both leaves the offense one to be regarded as so petty as not entitling the indigent accused to the assistance of counsel. His liberty is involved and in jeopardy in such case. For this the constitutional right is designed, to insure equality of treatment and chances for acquittal between the rich who can afford to hire counsel and the poor who cannot.[121]

Seemingly this opinion although on its facts limited to appeal could require appointment of counsel for misdemeanors at trial.

Two other judges said that although the rationale of *Douglas* required the appointment of counsel for misdemeanants on appeal as of right, that rationale did not require appointment of counsel here on a delayed appeal which, because it was delayed, was discretionary. But the Michigan constitution by the use of the term "in every criminal prosecution" demanded the provision of counsel to all misdemeanants on appeal. This opinion would not necessarily extend the misdemeanant's right to appointed counsel to the trial level. The second opinion in *Mallory* seems to agree with the first's dictum that the right to appointed counsel does not extend to violation of city ordinances, such as traffic offenses, which are not considered criminal offenses under the state constitution.

Courts in other states apparently found the Constitutional right to counsel to extend to most misdemeanants.[122] The New York Court

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119 378 Mich. —, 147 N.W.2d 66 (1967).

120 18 U.S.C. § 3006A(b) (1964).

121 378 Mich. —, 147 N.W.2d at 72-73.

122 State v. Blank, 241 Ore. 627, 628, 405 P.2d 373, 374 (1965) (the state conceded the right to appointment of counsel in a misdemeanor case); Tacoma v. Heater, 67

of Appeals has found a right to the appointment of counsel by statutory interpretation in a misdemeanor case involving the theft of two dollars worth of apples and a thirty day sentence with a twenty-five dollar fine,[123] but denied that right in the case of a traffic violation for which the fine was one thousand and thirty dollars and imprisonment of forty-two days.[124] Several states had provided appointment of counsel for the misdemeanant even before *Gideon*;[125] but many states await a Supreme Court decision before they are willing to appoint counsel for anyone charged with an offense less than a felony.[126]

The Supreme Court cannot long continue its reticence even in the interest of "creative ambiguity"; the scope of the right to appointed counsel for misdemeanants is in too great a disarray. There is no reason why both equal protection and due process grounds do not demand the appointment of counsel in many misdemeanor cases. Where the line is to be drawn will depend upon a balancing of the significance of a misdemeanor prosecution against the cost to the state of providing counsel.

IV. Conclusion

Recent cases on the right to appointed counsel are numerous, and traditional attitudes and decisions are being constantly reviewed and overturned. Decisions such as *State v. Borst* and *People v. Shipman* are prime examples of the vitality *Gideon* and *Douglas* have breathed into the constitutional guaranty of counsel at criminal proceedings. The courts may eventually make any distinction between the right to counsel and the right to appointed counsel mean-

Wash. 2d 733, 736, 409 P.2d 867, 869 (1966) (the court found that *Gideon* made no distinction between felonies and misdemeanors and therefore the right to counsel extended to both). However, neither case directly involves the right to appointment of counsel.

123 People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358 (1965).

124 People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670 (1965). Perhaps the following phrase explains this discrepancy: "Assigning counsel in but 1% of these millions of cases [traffic violations] could require the services of nearly half the attorneys registered in the State." *Id.* at 312, 213 N.E.2d at 672.

125 People v. Agnew, 114 Cal. App. 2d 841, 844-45, 250 P.2d 369, 371 (1952) (lewdness). The court looked at a totality of the circumstances to find a right to appointed counsel. Bolkovac v. State, 229 Ind. 294, 300-03, 98 N.E.2d 250, 253-54 (1951) (child neglect); Hunter v. State, 288 P.2d 425, 428 (Okla. Crim. App. 1955) (traffic violation).

126 Watkins v. Morris, 179 So. 2d 348, 349 (Fla. 1965); Toledo v. Frazier, 10 Ohio App. 2d 51, 60-61, 226 N.E.2d 777, 783 (1967).

ingless in criminal proceedings. But too rapid a change could cause grave disruption of our legal system. A judicial approach which will allow an evolution of decisions is necessary.

Both due process and equal protection must be considered in any attempt to discover the limits of the right to counsel. An equal protection test which demands balancing of the interests of the individual and the interests of the state offers a framework for a flexible judicial approach. In *Douglas* and *Griffin* the Court has adopted a test which fosters this flexibility. A court must find a discrimination resulting from a state procedure and must then determine whether that discrimination is significant enough to come within the purview of equal protection. This test requires courts to make a decision on the underlying merits and therefore insures that equal protection will be applied in a responsible manner. Yet the test allows the courts more freedom from the impediments of early due process decisions. The application of equal protection to pretrial hearings and post-conviction proceedings is not complicated by early decisions that due process requires neither. Due process may be limited by the Bill of Rights or by *fundamental* fairness. The unfairness resulting from some misdemeanor trials in which counsel was absent may not be protected by the Bill of Rights or fundamental fairness; but it may be significant enough to generate the application of equal protection. Equal protection can thus reach further than due process. The rationale of *Douglas* and *Griffin* offers an opportunity for the courts to demand that our system of criminal justice provide equal justice for all.

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