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Gale Reddie Lea
West Virginia University College of Law

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EXPERT WITNESSES—RIGHT TO PAY EXPERT WITNESSES ON A CONTINGENT-FEE BASIS IN CIVIL CASES

The inability of many Americans to finance the cost of necessary legal services presents an ever-growing problem.¹ Attorney fees, witness fees, filing fees, and discovery costs cut substantially into the resources of private plaintiffs. These high costs may prevent the litigation of some meritorious claims where a potential litigant decides that the possibility of a successful complaint or defense on the merits is outweighed by the price of a lawsuit.² This financial impediment to the pursuit of a legal remedy, however, is only burdensome for those unable to bear the high costs.

Although the client must generally finance the cost of the litigation regardless of the outcome,³ the legislatures, the courts, and the legal profession have responded to the challenge of unequal access to the judicial process and have established exceptions to the general rule. In criminal cases, the duty to finance legal services for indigent defendants is imposed upon the states,⁴ and in civil cases, where damages often take the form of money, the courts avoid the issue of right to counsel by condoning the retention of attorneys on a contingent-fee basis.⁵ In some instances, Congress has shifted attorney fees⁶ and witness fees⁷ to the losing party. State legislatures have provided for proceedings *in forma pauperis*,⁸ and where such statutes have been held to be inapplica-

¹ McCourt, *Professional Responsibility—Cost Barriers to the Delivery of Legal Services*, 1974-75 ANN. SURVEY AM. L. 531 (1975).

² Cf. 6 MOORE'S FEDERAL PRACTICE ¶ 54.71[3] (2d ed. 1976) (employment of expert witnesses in antitrust actions).

³ Tunney, *Foreward Financing the Cost of Enforcing Legal Rights*, 122 U. PA. L. REV. 632, 637 (1974).

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 451 (1967) [hereinafter cited as 81 HARV. L. REV. 435].

⁶ See, e.g., Clayton Act, § 4, 15 U.S.C. § 15 (1970); Truth in Lending Act, § 130(a)(2), 15 U.S.C. § 1640(a)(2) (1970); Fair Labor Standards Act, § 16(b), 29 U.S.C. § 216(b) (1970). For a more extensive listing, see 6 MOORE'S FEDERAL PRACTICE ¶ 54.71[2] (2d ed. 1976).

⁷ See, e.g., Clean Air Amendments of 1970, § 304(d), 42 U.S.C.A. § 1857h-2(d) (Supp. 1977); Noise Control Act, § 12(d), 42 U.S.C. § 4911(d) (Supp. V 1975). Under present case law, however, judicial interpretation of the Clayton Act does not award expert witness' fees to a successful plaintiff. 6 MOORE'S FEDERAL PRACTICE ¶ 54.71[3], at 1386 (2d ed. 1976).

⁸ See, e.g., N.Y. CIV. PRAC. LAW § 1101 (McKinney 1976); W. VA. CODE § 59-1-36 (1966).

ble to review proceedings, the United States Supreme Court has waived filing fees, although nominal, for indigent parties.⁹ Even discovery costs are sometimes shifted to the other party.¹⁰

With respect to witness fees, however, the American Bar Association's Code of Professional Responsibility increases the cost barriers between litigants and courts by forbidding attorneys to "offer to pay, or acquiesce in the payment of compensation to a witness contingent upon . . . the outcome of the case."¹¹ This is especially important in cases where expert witnesses are employed because they may be and usually are paid an amount in excess of the nominal statutory allowance paid to ordinary witnesses.¹² The prohibition on paying expert witnesses a contingent fee has been criticized as a denial of equal access to the courts.¹³

Modern courtroom practice relies on qualified¹⁴ expert witnesses to establish facts beyond the knowledge of the ordinary layman¹⁵ where the testimony "might aid the jury."¹⁶ In criminal

⁹ See, e.g., *Smith v. Bennett*, 365 U.S. 708 (1961) (petition for writ of habeas corpus denied without payment of \$4 filing fee); *Burns v. Ohio*, 360 U.S. 252 (1959) (motion for leave to appeal denied without payment of \$20 filing fee).

¹⁰ Where the party giving notice of the taking of a deposition fails to attend or fails to subpoena the witness, he must pay the reasonable expenses, including attorney's fees, incurred by the attending party. FED. R. CIV. P. 30(g). Where the court grants a motion for an order compelling discovery, the nonmoving party pays the reasonable expenses, including attorney's fees, incurred by the moving party, but where the court denies the motion, the moving party pays the nonmoving party. FED. R. CIV. P. 37(a)(4). Where a party refuses to admit the truth of any matter as requested, and the requesting party proves the truth of the matter, the refusing party pays the reasonable expenses, including attorney's fees, incurred by the requesting party. FED. R. CIV. P. 37(c). Where a party fails to attend at his own deposition, to serve answers to interrogatories or to respond to requests for inspection, he pays the reasonable expenses, including attorney's fees. FED. R. CIV. P. 37(d).

¹¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(c).

¹² 50 Op. Att'y. Gen. 72 (1962). Ordinary witnesses are allowed not less than ten nor more than twenty dollars per day, W. VA. CODE § 59-1-16 (Cum. Supp. 1977), but expert witnesses are sometimes paid enormous sums of money, *Trans World Airlines v. Hughes*, 449 F.2d 51 (2d Cir. 1971) (expert witness fees totaled \$1,642,677.71). It is important to note that expert witnesses are paid for their services in preparation of trial and not for their testimony.

¹³ *Person v. Association of the Bar of New York*, 414 F. Supp. 144 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (Nov. 1, 1977).

¹⁴ *Lester v. Rose*, 147 W. Va. 575, 595, 130 S.E.2d 80, 94 (1963).

¹⁵ *Compare Ames & Webb, Inc. v. Commercial Laundry Co.*, 204 Va. 616, 133 S.E.2d 547 (1963) (expert allowed where question of excavation requirements in

cases, the government "spend[s] vast sums of money to establish machinery in order to try defendants."¹⁷ Both prosecution and defense attorneys bolster their arguments with the testimony of doctors, fingerprint experts, narcotics experts, handwriting experts, ballistic experts, and psychiatrists.¹⁸ In civil cases, the successful litigation of antitrust, malpractice, products liability, patent, copyright, personal injury, desegregation, and obscenity claims, for example, requires the use of expert witnesses.¹⁹ Corporate defendants in civil cases have an arsenal of experts in their own employees. The federal courts' and legislatures' sanction of the use of expert testimony²⁰ further reflects the widespread belief in the necessity of expert witnesses.

Although few would contest the necessity of expert witnesses in a highly specialized society, opinion differs on whether a partisan or an impartial expert witness system would best cope with this need. In the former, each party pays his expert,²¹ but in the latter, the Federal Rules of Evidence provide that the parties shall share the expert's fees.²² Criticism of the present partisan expert system focuses on two aspects. First, experience shows that parties search until they find the "best witness" who supports their position.²³ Master of the Rolls Jessel wrote,

[T]he mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes to half-a-dozen experts He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, Will you be kind

sandy soil) *with* Collins v. Zedeker, 421 Pa. 52, 218 A.2d 776 (1966) (expert not allowed where question is how a person walks).

¹⁶ Currier v. Grossman's, Inc., 107 N.H. 159, 161, 219 A.2d 273, 275 (1966).

¹⁷ Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

¹⁸ C. McCORMICK, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 206 (2d ed. 1972) [hereinafter cited as McCORMICK].

¹⁹ Person v. Association of the Bar of New York, 414 F. Supp. 144, 146 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (Nov. 1, 1977).

²⁰ The Federal Rules of Criminal Procedure allow the court to call expert witnesses, and in the case of indigent defendants, the government must finance the cost. FED. R. CRIM. P. 17(b), 28. For application of Rule 17, see *Bandy v. United States*, 296 F.2d 882 (8th Cir. 1961) (government will provide handwriting expert for indigent defendant if defendant complies with rule). For discovery rules sanctioning the use of expert witnesses, see note 10 *supra*.

²¹ See note 3 *supra*.

²² FED. R. EVID. 706(b).

²³ McCORMICK, *supra* note 16, § 17, at 38.

enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.²⁴

Only the well-to-do can afford to hire the ideal witness whose background, experience, demeanor, ability to communicate, and testimony will most impress a jury.²⁵ Second, cross-examination does not always adequately present expert testimony to a jury.²⁶ To remedy the first criticism, judges may, in their inherent power²⁷ or rule-given power,²⁸ call expert witnesses. In cases involving medical testimony, more and more courts call experts from impartial panels.²⁹ In response to the second criticism regarding the best manner in which to elicit expert testimony, France has adopted a system in which the expert, rather than testifying, prepares a report in answer to a court order.³⁰ If the court exercises its discretion and calls the witness, then the judge, not the attorney, questions the expert.³¹ These two criticisms of the partisan expert system, however, would only be magnified by endorsement of the right to retain expert witnesses on a contingent-fee basis because such endorsement would make it economically feasible for more parties to retain expert witnesses. The partisan expert system also imposes a greater financial burden on each party than does the impartial expert system.

The latter system would eliminate the problem of forum shopping and would provide neutral experts to testify before the jury. An impartial expert witness system, of course, is not wholly free

²⁴ *Plimpton v. Spiller*, 6 Ch. D. 412, 415 n.2 (1877).

²⁵ 2 AM. JUR. TRIALS *Selecting and Preparing Expert Witnesses* §§ 19-24 (1964).

²⁶ MCCORMICK, *supra* note 16, § 17, at 38. For difficulties encountered in explaining medical testimony, see Guttmacher, *Problems Faced By the Impartial Expert Witness in Court: The American View*, 34 TEMP. L.Q. 369, 369-70 (1961).

²⁷ 31 AM. JUR.2d *Expert and Opinion Evidence* § 8 (1967).

²⁸ FED. R. EVID. 706.

²⁹ For a discussion of the pros and cons of impartial panels of medical experts, see Guttmacher, *Problems Faced By the Impartial Expert Witness in Court: The American View*, 34 TEMP. L.Q. 369 (1961); Polsky, *Expert Testimony: Problems in Jurisprudence*, 34 TEMP. L.Q. 357 (1961); Schroeder, *Problems Faced by the Impartial Expert Witness in Court: The Continental View*, 34 TEMP. L.Q. 378 (1961); Van Dusen, *The Impartial Medical Expert System: The Judicial Point of View*, 34 TEMP. L.Q. 386 (1961).

³⁰ Travis, *Impartial Expert Testimony Under the Federal Rules of Evidence: A French Perspective*, 8 INT'L L. 492, 503-04 (1974).

³¹ *Id.*

from problems either. There, one confronts the question of what weight to give to the impartial expert's testimony in relation to that given the partisan expert.³² Beyond the commentators' written protestations and the rule allowing, but not mandating, the judge to call expert witnesses, no marked trend away from the partisan witness system has materialized.

Because a need for expert witnesses exists and the system of partisan witnesses remains a significant part of American trial practice, fairness demands that the opposing party, who also bears part of the responsibility of finding and presenting evidence, have the opportunity to rebut the "hired gun's" testimony with other expert testimony. In order to discover the truth in every lawsuit by way of the adversary system, the parties must have relatively equal resources.³³ The contingent-fee arrangement would provide a practical means by which the poor and persons of moderate means could pay for expert witness' services in the same manner as they presently may pay for attorneys' services.³⁴ The judgment award provides a *res* out of which to pay expert witnesses.³⁵ Also, witnesses, who are required to be away from their homes and their occupations, require compensation in order to meet the cost of living.³⁶ Perhaps the best reason for allowing the contingent-fee contract is that, while witnesses are now paid a fixed fee in theory, they are paid on a contingent-fee basis in reality because the expert often goes unpaid when the employing party loses.³⁷ Even if the expert successfully sues the losing party to recover his fee, there is little or no *res* from which he could collect.

In contrast to the reasons offered for allowing the retention of expert witnesses on a contingent-fee basis, there are reasons for prohibiting it. Since the expert witness receives compensation only if his party wins, he has a more obvious financial interest in the lawsuit. Perhaps he will compromise his public duty by lying or by

³² Travis, *Impartial Expert Testimony Under the Federal Rules of Evidence: A French Perspective*, 8 Int'l L. 492, 519 (1974).

³³ Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1062-63 (1962).

³⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20.

³⁵ *Id.*

³⁶ Cf. Arlidge, *Contingent Fees*, 6 OTTAWA L. REV. 374, 394 (1974) (arguments in favor of allowing contingent fees for lawyers).

³⁷ *Person v. Association of the Bar of New York*, 414 F. Supp. 144, 146 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534, 539 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (Nov. 1, 1977).

exaggerating the facts.³⁸ But at the same time *any* payment provides such incentive.³⁹ Any financial interest, however nominal, makes a witness susceptible to impeachment, but a contingent fee is usually larger than a fixed fee⁴⁰ and would expose the witness' credibility to a more devastating impeachment on grounds of bias by the cross-examiner.⁴¹ Perhaps, if the party paying the contingent fee were to testify that he was unable to hire the expert on a fixed fee, his testimony would alleviate the impact of impeachment. The client would have to choose whether to forego the expert's testimony and possibly even the lawsuit or whether to assume this risk.

Even if the law allowed retention of expert witnesses on a contingent-fee basis in civil cases, the problems inherent in such an arrangement necessitate safeguards. These could be similar to the safeguards now imposed upon the contingent-fee payment of lawyers. First, the courts could hold the attorney responsible for arranging the terms of the contingent fee between his client and the expert in order to avoid subsequent misunderstandings and to promote good relations among attorney, client, and expert.⁴² Second, the contingent fee could not be illegal or clearly excessive,⁴³ and the reasonableness of the fee would be subject to judicial and professional scrutiny.⁴⁴ And finally, the contingent fee would not be applicable in criminal cases because the proceedings "do not produce a *res* with which to pay the fee."⁴⁵

A stronger argument for allowing expert witnesses to be paid on a contingent-fee basis would be possible if the right to have an expert witness testify were constitutionally based. This issue has been presented to the United States Supreme Court in two criminal cases. In *United States ex rel Smith v. Baldi*,⁴⁶ the Court affirmed a lower court decision which held that where the *court* has

³⁸ Cf. Arlidge, *Contingent Fees*, 6 OTTAWA L. REV. 374, 394 (1974) (arguments against allowing contingent fees for lawyers).

³⁹ *Person v. Association of Bar of City of New York*, 414 F. Supp. 144, 146 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (Nov. 1, 1977).

⁴⁰ *Campbell Co. v. Howard*, 133 Va. 19, 112 S.E. 876, 885 (1922).

⁴¹ *McCORMICK*, *supra* note 16, § 40 n.9.

⁴² Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (attorney's agreement with his client as to the basis of the fee charges to be made).

⁴³ *Id.* DR 2-106(A).

⁴⁴ Arlidge, *Contingent Fees*, 6 OTTAWA L. REV. 374, 396 (1974).

⁴⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20.

⁴⁶ 192 F.2d 540 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953).

called an expert witness the defendant has no constitutional right to his expert at state expense because his rights have been protected. The Court next faced the issue of the right to retain expert witnesses ten years later (the same year it upheld the absolute right to counsel in *Gideon v. Wainwright*⁴⁷) and this time avoided the issue by remanding *Bush v. Texas*⁴⁸ to the highest state court for decision. The problem falls, then, on lower federal and state courts to reconcile the *Baldi* decision with the more recent holding of a right to counsel in *Gideon v. Wainwright*. In grappling with this problem, the courts have reached different results in deciding whether there is a constitutional right to expert witnesses.⁴⁹ Where the court itself has called an expert, some courts have held that there is no constitutional right to expert witnesses. They reason that the state has no duty to promote the battle of experts by financing expert witnesses for indigent defendants and that to hold otherwise either would constitute judicial legislation⁵⁰ or would go beyond the minimum requirements of due process.⁵¹ Where the court has not called any expert witnesses,⁵² some courts have not recognized a constitutional right and some have. Those that have recognized such a right have based it on the constitutional guarantees of due process,⁵³ equal protection,⁵⁴ right to counsel,⁵⁵ and right to compulsory process.⁵⁶

Although the sixth amendment offers textual support for providing aid in addition to counsel, its application is limited to criminal cases.⁵⁷ The equal-protection clause and the due-process clause

⁴⁷ 372 U.S. 335 (1963).

⁴⁸ 372 U.S. 586 (1963).

⁴⁹ Annot., 34 A.L.R.3d 1256 (1970).

⁵⁰ *State v. Bowen*, 104 Ariz. 138, 449 P.2d 603, cert. denied, 396 U.S. 912 (1969).

⁵¹ *State v. Chapman*, 365 S.W.2d 551 (Mo. 1963).

⁵² See, e.g., *State v. Superior Court*, 2 Ariz. App. 458, 409 P.2d 742 (1966); *Houghtaling v. Commonwealth*, 209 Va. 309, 163 S.E.2d 560, cert. denied, 394 U.S. 1021 (1968).

⁵³ See, e.g., *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966); *State v. Taylor*, 202 Kan. 202, 447 P.2d 806 (1968) (dicta).

⁵⁴ *United States ex rel Robinson v. Pate*, 345 F.2d 691 (7th Cir. 1965), aff'd in part and remanded in part on other grounds, 383 U.S. 375 (1966).

⁵⁵ *Ex parte Ochse*, 38 Cal.2d 230, 231, 238 P.2d 561 (1951).

⁵⁶ *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967).

⁵⁷ U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

suggest other constitutional sources for the right to expert witnesses in civil cases. The Court has relied on the equal-protection clause in developing a firm commitment to equalizing access to criminal courts.⁵⁸ For indigent defendants, the Court has granted free transcripts,⁵⁹ waived access fees,⁶⁰ and even imposed on the states the financial burden created by the right to counsel.⁶¹ Moreover, the Court has apparently not been concerned with labels of criminal and civil.⁶² In habeas corpus proceedings the Court has waived access fees,⁶³ and in juvenile proceedings the Court has upheld the right to court-appointed counsel.⁶⁴ Civil cases recognizing the constitutional right to counsel, however, occur infrequently because plaintiffs usually seek money damages in which case they may hire an attorney on a contingent-fee basis.⁶⁵

Majority opinions seem to suggest that the appropriate inquiry under the equal-protection clause is merely whether the state has made a distinction between rich and poor.⁶⁶ If so, then precluding expert testimony because of a party's inability to pay would seem to constitute a violation of equal protection since the state, although not denying the right to expert testimony, has in effect barred the exercise of that right where a plaintiff cannot afford to pay an expert a reasonable fee. But the facts of the equal access cases decided under this rationale indicate that the holdings go beyond finding a rich-poor distinction. These cases must also involve a fundamental right, such as the right to counsel or the writ of habeas corpus.⁶⁷

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have Assistance of Counsel for his defense.

⁵⁸ See, e.g., *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵⁹ See, e.g., *Britt v. North Carolina*, 404 U.S. 226 (1971); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court*, 385 U.S. 192 (1966); *Lane v. Brown* 372 U.S. 477 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁶⁰ See, e.g., *Smith v. Bennett*, 365 U.S. 708 (1961); *Douglas v. Green*, 363 U.S. 192 (1960); *Burns v. Ohio*, 360 U.S. 252 (1959).

⁶¹ See, e.g., *Douglas v. California*, 372 U.S. 353 (1963). *Contra*, *Ross v. Moffit*, 417 U.S. 600 (1974) (indigent criminal defendant denied court-appointed counsel on discretionary review).

⁶² *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

⁶³ See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Long v. District Court*, 385 U.S. 192 (1966); *Smith v. Bennett*, 365 U.S. 708 (1961).

⁶⁴ *In re Gault*, 387 U.S. 1 (1967).

⁶⁵ 81 HARV. L. REV. 435, *supra* note 5, at 451.

⁶⁶ *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁶⁷ 81 HARV. L. REV. 435, *supra* note 5, at 437-38.

In order to restrict the scope of constitutional protection,⁶⁸ Justice Harlan⁶⁹ proposed using the due-process clause rather than the equal-protection clause so as to emphasize fundamental rights and not differences in treatment between individuals.⁷⁰ His argument prevailed in *Boddie v. Connecticut*⁷¹ where the Court adopted a two-part test to explain its waiver of access fees. First, the judicial process must offer the exclusive remedy.⁷² This part of the test is easily met because the government does have an effective monopoly over the redress of grievances in an orderly fashion.⁷³ Second, the right involved must qualify as fundamental.⁷⁴ "[S]ince *Boddie* held that the right to a divorce was 'fundamental.' . . . almost every other kind of legally enforceable right is also fundamental to our society."⁷⁵ The Court could read *Boddie* as representing the doctrine of equal access to civil courts,⁷⁶ but subsequent decisions, although not overruling *Boddie*, restricted *Boddie* to its facts.⁷⁷

Whether the court selects an equal-protection or a due-process analysis with regard to equal-access cases,⁷⁸ the basic issue remains one of determining whether the right in question is fundamental. In the past, economic rights such as discharge in bankruptcy,⁷⁹

⁶⁸ 16 AM. JUR.2d *Constitutional Law* 490 (1964).

⁶⁹ See, e.g., *Williams v. Illinois*, 399 U.S. 235, 259-66 (1970) (Harlan, J., concurring in result); *Griffin v. Illinois*, 351 U.S. 12, 33-39 (1956) (Harlan, J., dissenting).

⁷⁰ 81 HARV. L. REV. 435, *supra* note 5, at 439.

⁷¹ 401 U.S. 371 (1971).

⁷² *Id.* at 374.

⁷³ *Meltzer v. LeCraw*, 402 U.S. 954, 956 (1971) (denial of *certiorari*) (Black, J., dissenting).

⁷⁴ *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

⁷⁵ *Meltzer v. LeCraw*, 402 U.S. 954, 957-58 (1971).

⁷⁶ *Id.* at 958.

⁷⁷ See, e.g., *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Meltzer v. LeCraw*, 402 U.S. 954 (1971). Although the *Boddie* Court's approach to the problem of equal access to civil courts has not been followed in subsequent decisions, Justice Douglas' penumbra analysis might allow the Court to reach the same result as in *Boddie* but in contexts other than divorce. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the right of privacy was found to be within the penumbras of the first, third, fourth, fifth, and ninth amendments. The right of access to the courts might be found within the penumbra of the first amendment right "to petition the Government for a redress of grievances." See generally *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

⁷⁸ Note, *Access to the Courts in Civil Cases: Extension of Boddie Refused*, 3 CAP. U.L. REV. 115, 132-33 (1974).

⁷⁹ *United States v. Kras*, 409 U.S. 434 (1973).

welfare payments,⁸⁰ and housing⁸¹ have been held not to be fundamental, whereas many of the guarantees of the federal Bill of Rights,⁸² the writ of habeas corpus,⁸³ right to notice and hearing, right to interstate travel,⁸⁴ right to vote,⁸⁵ right to privacy,⁸⁶ right to terminate pregnancy,⁸⁷ and right to a divorce⁸⁸ have been held to be fundamental rights.⁸⁹ That the Court proceeds with caution in this area is best illustrated by the rare occasions on which it has held a right to be fundamental:⁹⁰ in order to gain that status, the right to expert witnesses must be "implicit in the concept of ordered liberty."⁹¹ Stated in those terms, the denial of expert witnesses makes the fundamental right to a hearing a meaningless ritual.⁹²

One court, however, has rejected the argument that there is a constitutional right to retain expert witnesses on a contingent-fee basis. In *Person v. Association of the Bar of New York*,⁹³ the plaintiffs sought treble damages in an antitrust action and had only small individual stakes in the outcome of the litigation. The court found this to be more analogous to prior Supreme Court cases involving economic rights than to cases involving fundamental rights.⁹⁴ Although the court refused to elevate the right to retain

⁸⁰ *Dandridge v. Williams*, 397 U.S. 471 (1970).

⁸¹ *Lindsey v. Normet*, 405 U.S. 56 (1972).

⁸² See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (guarantee against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

⁸³ *Johnson v. Avery*, 393 U.S. 483 (1969); *Long v. District Court*, 385 U.S. at 193.

⁸⁴ *Shapiro v. Thompson*, 394 U.S. 618 (1968).

⁸⁵ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

⁸⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁸ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁸⁹ Although these rights have been termed fundamental, some rights are more fundamental than others when balanced against one another. For example, first amendment interests weigh more heavily in the balance than does the right to privacy. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

⁹⁰ See text accompanying notes 75-79 *supra*.

⁹¹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁹² *Contra*, *State v. Superior Court*, 2 Ariz. App. 458, 409 P.2d 742, 749 (1966); but cf. *Ross v. Moffit*, 417 U.S. 600, 615 (1974) (defendant had meaningful access to courts although denied right to counsel on discretionary review).

⁹³ 554 F.2d 534 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3293 (Nov. 1, 1977).

⁹⁴ See text accompanying notes 79-91 *supra*.

expert witnesses on a contingent-fee basis to a constitutional level, it indicated some sympathy for the arguments: that such a right would aid and encourage less affluent plaintiffs to bring meritorious claims; that cross examination would reveal an expert witness' financial arrangement with his party; and that many expert witnesses would have an indirect stake in the outcome of the litigation either because they had an ongoing business relationship with the plaintiffs or because they would not receive payment unless the plaintiffs were successful. The United States Court of Appeals for the Second Circuit, however, was not persuaded to invalidate the disciplinary rule forbidding attorneys to "offer to pay, or to acquiesce in the payment of compensation to a witness contingent upon . . . the outcome of the case."⁹⁵ The court also stated that whether these arguments are sufficient to overcome the fear that experts paid on a contingent-fee basis will perjure themselves is a legislative decision.⁹⁶

If there is a valid constitutional right to retain expert witnesses, recognition of that right would create financial implications for the courts, especially in the criminal area, where imposition of a duty on the states to appoint experts for indigent defendants would constitute judicial legislation;⁹⁷ yet this did not prevent the Court from imposing on the states a duty to appoint counsel in criminal cases for indigent defendants.⁹⁸ In the civil area, the contingent-fee arrangement with expert witnesses would allow the courts to reach the desired result without judicial legislation. It is not the role of the judiciary to redistribute wealth.⁹⁹ Although achieving economic equality in the courtroom is a laudable goal, it is an inachievable one in light of our system of private enterprise.¹⁰⁰ The wealthy defendant can hire the best attorney, but the Court will not impose a duty on the states to finance this service for indigents. Yet the Court could reconcile the theory of private enterprise with the appointment of experts in criminal cases by allowing the states to recoup¹⁰¹ the fees as they do in cases

⁹⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(c).

⁹⁶ *Person v. Association of the Bar of New York*, 554 F.2d 534, 539 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3293 (Nov. 1, 1977).

⁹⁷ Cf. 81 HARV. L. REV. 435, *supra* note 5, at 451 (appointment of attorney and waiver of court fees).

⁹⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹⁹ See Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

¹⁰⁰ *State v. Superior Court*, 2 Ariz. App. 458, 409 P.2d 742, 746-49 (1966).

¹⁰¹ See, e.g., ORE. REV. STAT. § 161.665(1) (Supp. 1977) (the court may require

where access fees have been waived¹⁰² and counsel has been appointed.¹⁰³

The contingent-fee arrangement in civil cases has provided a solution to the problem of the high cost of legal services and might possibly meet with the same success if extended to cover expert witness' fees. Although the right to counsel has been unequivocally established, the constitutional right to expert witnesses remains arguable until finally decided by the United States Supreme Court. The prevalent belief in the necessity of expert witnesses, in the absence of any constitutional right, however, should be sufficient reason to endorse the contingent-fee contract.

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a convicted defendant to pay costs). W. VA. CODE § 62-3-1 (Cum. Supp. 1977) provides:

A court of record may appoint counsel to assist an accused in criminal cases at any time upon request In every case where the court appoints counsel for the accused and the accused presents an affidavit showing that he cannot pay therefor, the attorney shall be paid for his services and expenses The amount so paid, in the event the accused shall not prevail, shall be and constitute a judgment of said court against the accused to be recovered as any other judgment for costs.

¹⁰² *Britt v. North Carolina*, 404 U.S. 226 (1971); *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

¹⁰³ *Fuller v. Oregon*, 417 U.S. 40 (1974).