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Right to Aid in Addition to Counsel for Indigent Criminal Defendants

Economic obstacles often prevent indigent defendants from securing adequate investigatory services, from obtaining those witnesses who might be needed for an effective defense, and from utilizing other assistance beyond an attorney that is used by more affluent defendants in criminal cases. After describing the severity of this problem, the author of this Note evaluates the arguments for and against the establishment of a constitutional right to aid in addition to counsel. He concludes that such a right is inapplicable from either the due process clause, the equal protection clause, or the guarantees of counsel. The establishment of this right, however, would present significant problems in determining those forms of aid most useful to the defendant and within the economic ability of the states to furnish.

INTRODUCTION

For the past decade, the problem of defining the scope of the indigent's right to counsel¹ has engaged the attention and challenged the wisdom of legal scholars.² With the recent overruling of Betts v. Brady—³—which had declared that whether a state was required to furnish counsel depended upon an evaluation of the "totality of facts"—and the establishment of a seemingly unqualified right to counsel,⁴ an end to this long controversy may appear to some to be in sight.⁵ Yet a few, perhaps farseeing jurists

¹. The landmarks in the development of the right to counsel are Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in capital cases); Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel in all federal felony cases); Betts v. Brady, 316 U.S. 455 (1942) (whether failure to appoint counsel violates fourteenth amendment due process depends on an appraisal of the "totality of facts"); Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling Betts v. Brady and holding that representation of counsel is essential to a fair trial).


³. 316 U.S. 455 (1942).


⁵. The Court's overruling of Betts does not resolve the entire question,
see the problem of providing aid to the indigent defendant as involving more than a right to the assistance of counsel, they argue that the due process clause, the equal protection clause, or the guarantee of counsel itself may entitle an indigent defendant to various forms of aid other than counsel in investigating, preparing, and presenting his defense. Such assistance might include, for example, payment of fees to secure the assistance of expert witnesses in preparing the defense or payment of investigatory costs to locate important missing witnesses. Frequently, such assistance may be more important than counsel. An accountant may be more helpful than an attorney to a person accused of tax fraud, while a handwriting expert could be more essential than a criminal lawyer to a person charged with forgery.

for the Court has not fully defined the scope of the accused’s right to counsel. It has said only that “any person . . . cannot be assured a fair trial unless counsel is provided for him.” Gideon v. Wainwright, 372 U.S. 335, 344 (1963). A vast problem in “drawing the line” remains unresolved. There are at least two dimensions to this problem. The first involves a determination of the kinds of cases—juvenile proceedings, petty offenses, misdemeanors, felonies—to which the right to counsel extends. See Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 MICH. L. REV. 219, 260–72 (1962). The second is to determine at what stages in the legal process counsel is required. See Beaney, Right to Counsel Before Arraignment, 45 MINN. L. REV. 771 (1961); Boskey, The Right to Counsel in Appellate Proceedings, id. at 783; Kadish, The Advocate and the Expert-Counsel in the Peno-Correctional Process, id. at 803. An independent problem is whether an expansion of the right to counsel is to be retroactively applied. See Kamisar, supra at 272–81. Evaluation of these problems is beyond the scope of this Note except as such evaluation is relevant to determining the existence of a constitutional right to aid other than counsel.


7. One of the most forceful statements in support of this position is that of the late Judge Frank:

Furnishing . . . [the defendant] with a lawyer is not enough: The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e. g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist. It might, indeed, reasonably be argued that for the government to defray such expenses, which the indigent accused cannot meet, is essential to that assistance by counsel which the Sixth Amendment guarantees. Legal aid has no money available for that purpose, nor, in most jurisdictions, does the Public Defender (if there is one). In such circumstances, if the government does not supply the funds, justice is denied the poor—and represents but an upper-bracket privilege.

United States v. Johnson, 238 F.2d 565, 572 (2d Cir. 1956) (dissenting opinion).
Twelve years ago, in *United States ex rel. Smith v. Baldi*, a majority of the Third Circuit could see little merit in the contention that an indigent defendant had a constitutional right to the assistance of a psychiatrist, paid for by the state, in preparing his defense.

We have great difficulty in accepting as a proposition of constitutional law that one accused of crime is entitled to receive at public expense all the collateral assistance needed to make his defense . . . . The same argument . . . would entitle [the accused] to consultation with ballistic experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant. We do not think the requirements of due process go so far.

Today the claim that the indigent accused is constitutionally entitled to aid other than counsel appears much less bizarre. Only this term, the Supreme Court of the United States heard argument that the petitioner had a constitutional right to the services of an independent psychiatrist, to be provided by the state. Because defendant might have been insane at the time of the crime, the state agreed to a retrial and the Court postponed evaluation of the constitutional argument.

Recent developments in the field of criminal procedure make the establishment of a right to aid other than counsel distinctly possible. In the last decade, the establishment and advancement of legal aid systems has resulted in substantial improvements in

9. Id. at 547.
10. The Eighth Circuit in 1961 indicated that the Government will provide handwriting experts for a defendant if he complies with FED. R. CRIM. P. 17(b). Bandy v. United States, 296 F.2d 882, 888 (8th Cir. 1961).

providing assistance to indigent defendants. In Congress, legislation intended to provide more adequate assistance to the accused has been repeatedly introduced. In 1963, the attorneys general of 22 states joined in asking the Supreme Court to expand the right to counsel in state criminal cases. Within the past 12 years, a constitutionally based right to aid in addition to counsel was unsuccessfully asserted in three federal court cases with sufficient persuasiveness to secure the support of six judges. In 1956, the Supreme Court, in Griffin v. Illinois, discussed the due process and equal protection clauses in language broad enough to support, perhaps unintentionally, a constitutional right to aid in addition to counsel when it said: "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Again in 1963, the Court, in Douglas v. California, the bills introduced in Congress during the current session are: S. 1057, H.R. 4461, H.R. 4816, H.R. 5330, H.R. 5545, 88th Cong., 1st Sess. (1963). For a description and evaluation of recent proposed legislation, see Celler, Federal Legislative Proposals To Supply Paid Counsel to Indigent Persons Accused of Crime, 45 MINN. L. REV. 697 (1961).

The report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice calls for federal legislation authorizing "the utilization of services essential to the proper conduct of the defense, including investigatory services, the assistance of experts, transcripts of the proceedings, and the like." ATTORNEY GENERAL'S COMMITTEE, REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 40 (1963) (hereinafter cited as COMMITTEE ON POVERTY).

In some nations, very liberal assistance is granted the accused, whether indigent or not. In Scandinavian countries, for example:

1. not only is every accused in a criminal case entitled to counsel of his own choosing at government expense, but counsel for every defendant can call on government officials, at government expense, to make all necessary investigations . . . and to supply analyses of handwriting as well as expert testimony on behalf of the defendant.

FRANK, NOT GUILTY 87 (1957), see COMMITTEE ON POVERTY 31–33.


peared to read the equal protection clause as casting upon the states some duty to minimize the disadvantages resulting from the defendant's poverty:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments in his behalf, while the indigent . . . is forced to shift for himself.18

The Douglas case appears to be substantial support for a constitutional right to aid other than counsel. The Court there held that the state must furnish counsel to an indigent defendant on his first appeal. Although the Constitution does not guarantee the right to appeal and although the defendant was not precluded, by lack of counsel, from prosecuting his appeal, the Court argued that counsel on appeal is necessary to achieve some degree of equality between indigent defendants and defendants of means. The same reasoning is equally persuasive as support for a constitutional right to aid other than counsel at the trial level.

The purpose of this Note is to determine whether, in the light of those developments in criminal procedure, an indigent defendant may now assert a constitutional right to aid in addition to counsel. The Note will attempt, first, to establish that there is a substantial need for aid other than counsel; second, to demonstrate that several clauses of the constitution could support the indigent defendant's right to such aid; and, third, to consider the difficulties inherent in an attempt to provide this aid.

I. THE NEED FOR AID IN ADDITION TO COUNSEL

The question of whether a constitutional right to aid other than counsel exists certainly cannot be resolved merely by demonstrating the need for such aid and the inadequacy of present methods of assisting indigent defendants. Such a background is useful, however, both to illustrate the significance of the problem and to provide a basis for determining the scope of the right, assuming it is found to be constitutionally based.

Several factors are responsible for the growing need of the accused for aid in addition to counsel. The most obvious is that a high percentage of criminal defendants are indigent. A survey in Utah, for example, disclosed that one-half of all defendants in that state were unable even to afford counsel.19 A more ex-

18. Id. at 357-58.
tensive study estimated that in 1947, sixty percent of all defendants in the United States lacked the funds to employ counsel. In that year, 97,000 defendants in serious criminal cases could not pay for counsel; 58,000 of these were assisted by volunteer or public defender organizations, but the remaining 39,000 went without any aid. While substantial progress has been made in the past 15 years in the number of legal aid and public defender organizations, the percentage of people in the United States for whom no legal aid exists has risen from 21.8 percent to 34.4 percent.

Although indigent defendants may not always need aid in addition to counsel, a defendant who is unable to afford counsel will probably be unable to finance any other aid he does need for his defense. Even the defendant of modest means may be forced to choose between employing counsel and financing other aid that may be essential in the trial to his case.

A second factor contributing to the need for aid is the increasing costliness of the legal process itself. Both counsel fees and out-of-pocket expenses for discovery and for securing witnesses have greatly increased. Indeed, one commentator suggests that in all but the simplest cases the costs of preparation and counsel

the seriousness of the indigency problem in rural areas, see Wilcox & Bloustein, Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime, 59 COLUM. L. REV. 551, 567 (1959).

20. BROWNELL, LEGAL AID IN THE UNITED STATES 83–84 (1951); see FELLMAN, op. cit. supra note 2, at 125; N.Y. BAR ASS'N, SPECIAL COMM. TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED 80, 134–35 (1959) [hereinafter cited as N.Y. BAR COMM. STUDY]; Kennedy, Judicial Administration: Fair and Equal Treatment to All Before the Law, 28 VITAL SPEECHES 706 (1962); Pollock, supra note 12, at 738–39. The Attorney General's Committee has concluded that at the present time, over one-third of federal defendants are financially unable to obtain competent counsel. COMMITTEE ON POVERTY 16–17.


22. The bail problem is an example of the adverse consequences of relative indigency. See generally Ares & Sturz, Bail and the Indigent Accused, 8 CRIME & DELINQUENCY 12, 14–15 (1962); Foote, Comment on the New York Bail Study, 106 U. PA. L. REV. 685, 689–92 (1958); Maas, Robert Kennedy Speaks Out, Look, March 28, 1961, p. 24; Samuels, Bail: Justice for Far From All, New York Times, Aug. 19, 1962, § 6 (Magazine), p. 13. If the defendant is unable to provide bail or if he chooses to use his limited resources for counsel rather than for bail, he must remain incarcerated at the time that it is most vital for him to be free to secure witnesses or to assist his attorney in gathering information for his defense. See COMMITTEE ON POVERTY 70–72; Note, 106 U. PA. L. REV. 693, 725 (1958). In addition, if the defendant is employed, his financial support will be cut off, leaving him with no means to finance assistance that his case may require.

"will ruin the ordinary man." Likewise, the burdens on legal aid organizations and private volunteer counsels are increasing. Perhaps more significantly, the number of defendants who may be considered "indigent" is also rising; a defendant who has sufficient funds to secure aid in a relatively simple, brief trial may become indigent in the process of defending himself in a more complicated proceeding. The result of the rising cost of litigation is not only that an indigent defendant cannot afford a proper defense, but also that the defendant of modest means may secure representation that is casual, at best.

The criminal defendant may require aid in paying witness fees, printing expenses, and discovery costs. Inability to finance these expenses has led, with some frequency, to convictions later found to be erroneous. A vivid example is *Bush v. Texas*, where the state repeatedly rejected the defendant's plea for the services of a psychiatrist. Not until the defendant had been convicted and his appeal had been carried to the United States Supreme Court did the state recognize that the defendant may have been prejudiced by its refusal to furnish a psychiatrist. Perhaps even more serious than the need for witnesses is the problem of securing information on which to construct a defense. Defense counsel contend that this is their chief problem.

26. See Cross, supra note 24, at 996.
28. See FRANK, NOT GUILTY 88-89 (1957). For example, the assigned counsel system may tend to encourage guilty pleas because the unpaid attorney has an interest in avoiding the further expense of a trial. Note, 76 HARV. L. REV. 579, 597-98 (1963).
30. See BORCHARD, CONVICTING THE INNOCENT 28, 50, 190, 197, 342 (1932); FRANK, NOT GUILTY 75, 84, 196 (1957).
33. See the comments of Harris B. Steinberg of the New York Bar and Si Weisman of the Minnesota Bar in ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUCATION, THE PROBLEM OF A CRIMINAL DEFENSE 3-5, 35-37.
and that "money is the chief obstacle to getting at information." Moreover, the limited discovery procedures available to a criminal defendant are not very helpful in securing this information.

The need for aid in addition to counsel is heightened by the inadequacy of present systems of aiding indigent defendants. Legal assistance for indigents in the United States has long been inadequate. Both private voluntary organizations and assigned counsel systems lack adequate funds to compensate the lawyers who participate and to finance the investigatory or preparatory services that may be required. In addition, many lawyers defending indigents under these systems are totally inexperienced in


35. Federal Rule 16 provides for discovery only by the defendant and only against the Government. Material to be thus obtained is limited to documents or other objects “obtained from or belonging to the defendant or obtained from others by seizure or by process.” FED. R. CRIM. P. 16.


The substantial problems facing the indigent defendant in securing information to prepare his defense caused a special committee of the New York Bar Association to include as one of the six standards of primary significance in an adequate defender system a provision for the “investigatory and other facilities necessary for a complete defense.” N.Y. BAR COMM. STUDY 26.

[The innocent defendant suffers most from [the lack of discovery] procedure. The guilty defendant may not need liberal discovery procedures. He usually knows the identity of the witnesses, . . . what they have told the grand jury and what they will tell the trial jury. . . . An innocent defendant, on the other hand, may well be unaware of the identity of the witnesses against him. He has no way of knowing what false or misleading testimony has produced the unfounded charge against him.


38. N.Y. BAR COMM. STUDY 62–72; Follock, supra note 12, at 741–48. According to Mr. Justice Clark, the problems facing assigned coun-
handling criminal cases. While public defender systems may be the solution to the problem of inexperienced counsel, they are also plagued by a scarcity of funds. Since the present systems are inadequate, they will be able to provide indigents with little aid in addition to counsel.

Federal courts have, at present, no provision even for payment of court-appointed counsel for indigents, although such legislation has been introduced in Congress. Some assistance in securing witnesses is given by the Federal Rules of Criminal Procedure. Rule 17(b) instructs the court, upon a showing of poverty and that the expected testimony is material, to subpoena witnesses for the defendant and to direct the Government to pay the costs and the witness fee. The availability of this assistance is within the discretion of the trial court and is not reviewable. Both the showing required to invoke the rule and the discretion of the trial court in granting the assistance, however, limit the value of this rule to the defendant. Rule 28 provides for the appointment, at the discretion of the court, of an impartial expert witness. This rule has been unsuccessfully attacked as unconstitutional because it requires the expert to "advise the parties of his findings," subjecting the defendant to discovery proceedings on behalf of the Government and in effect compelling him to testify against himself. Neither of these rules provides financial assistance for investigation or preparation of the defense.

In state and local jurisdictions, the amount of assistance varies with the type of legal aid offered. In states having only as-

40. N.Y. BAR COMM. STUDY 73-74; Pollock, supra note 12, at 749-52.
42. Goldsby v. United States, 160 U.S. 70 (1895); Gibson v. United States, 53 F.2d 721 (8th Cir. 1931); see COMMITTEE ON POVERTY 27.
signed counsel systems of representation, the accused is entirely dependent on the willingness and ability of the assigned counsel to engage in investigation and to secure experts to assist in preparation or presentation of the defense.\footnote{44} While those jurisdictions with voluntary defender organizations may theoretically finance all aid necessary to the defense from whatever donated funds are available, in practice there are likely to be few funds available for such services.\footnote{45} Public defender systems vary widely in the amount of funds each has available, but they generally fail to provide sufficient funds to conduct adequate investigation, preparation, and presentation of the accused's case.\footnote{46} The only other means of assistance available to the accused is the prosecutor, and he is unlikely to be a fruitful source.\footnote{47}

II. CONSTITUTIONAL AUTHORITY FOR A RIGHT TO AID IN ADDITION TO COUNSEL

A. THE SUPREME COURT AND POVERTY

The Supreme Court has spoken only rarely of the significance of poverty in the judicial process, stating that poverty is "constitutionally an irrelevance"—that is, indigence is a basis

\footnote{44}{\text{The failure of the practices prevailing in all the district courts outside the District of Columbia to provide assigned counsel with resources to contest the guilt of defendant or violations of his constitutional rights is, in the judgment of the Committee, a fundamental deficiency of the present system. We believe that the consequences are serious and unfortunate. First, in some cases assigned counsel is induced to advise a plea of guilty because he is aware that resources adequate to challenge abuse of authority or the government's accusation are lacking. Second, when a decision is made to go to trial, the absence of such resources handicaps conduct of the defense and places the accused at a disadvantage not shared by the defendant in possession of adequate means. It is not possible to determine the percentage of cases in which these deficiencies reach serious proportions. It is clear, however, that the impact on the individual defendant is devastating when it does occur and that no system of representation worthy of the name can complacently tolerate such consequences.}}

\footnote{45}{\text{Committee on Poverty 26. For appraisals of the burden on assigned counsels, see N.Y. Bar Comm. Study 66; Committee on Poverty 29–30.}}

\footnote{46}{\text{Id. at 70–71.}}

\footnote{47}{\text{See note 37 supra.}}

\footnote{48}{\text{Without a discovery process, without investigatory facilities, the assigned counsel must take crumbs of information from the prosecution's table. It goes without saying that the "crumbs" usually doled out by the prosecution are those which give the defendant's case a guilty and hopeless flavor.}}

\footnote{Trebach, supra note 25, at 303. See also Frank, Not Guilty 154–55 (1957).}

\footnote{Edwards v. California, 314 U.S. 160, 185 (1941).}
neither for asserting rights nor for denying them. This pronouncement, however, is not very helpful. Certainly it cannot mean that the Court will ignore the fact of the defendant's indigence and the resulting problems he faces in securing aid at trial and on appeal. For these purposes, his poverty is indeed relevant; it casts upon the state some affirmative duty to ensure the defendant the aid he needs in conducting his defense.

Whether a constitutional right to aid in addition to counsel may be premised upon the poverty of the defendant is a question that is largely unexplored. The Supreme Court in United States ex rel. Smith v. Baldi had occasion to consider this question, but gave it only perfunctory attention. The defendant in Smith had been convicted of murder by a Pennsylvania court. The trial court had appointed a psychiatrist to examine the defendant and to testify as an impartial witness. The defendant alleged, however, that the state was required to appoint a psychiatrist to make a pretrial examination to determine his sanity. The Court, three justices dissenting, concluded that it could not "say that the State has that duty by constitutional mandate . . . . Psychiatrists testified. That suffices."

In reaching this result, the Court relied on McGarty v. O'Brien, decided in 1951 by the First Circuit. In McGarty, the defendant argued that the refusal of the trial court to appoint a psychiatrist to examine him and to testify as a defense witness violated due process. While the court in a unanimous decision rejected this contention, it based its decision on the narrow ground that the state had in fact provided two impartial psychiatrists whose reports had been made available to the defense. This court did not decide the broader constitutional question; it pointed out that "how far the state . . . is required under the due process clause to minimize this disadvantage [of poverty] is a matter which, in other contexts, may deserve serious examination."

The defendant in both Smith and McGarty did have the assistance of state-appointed psychiatrists. Whether either court

52. 344 U.S. 561 (1953).
53. Id. at 568.
54. 188 F.2d 151 (1st Cir.), cert. denied, 341 U.S. 928 (1951).
55. The defendant did not utilize the doctors' report at the trial because they had concluded that he was "neither feeble minded nor insane, and that he does know the difference between right and wrong." 188 F.2d at 152.
56. Id. at 155.
would have reached the same result had no psychiatrists been available is unclear. Thus, neither case forecloses the question of whether an indigent defendant is entitled to aid in addition to counsel. Moreover, the Supreme Court's decision in *Bush v. Texas* suggests that the Court is not committed to *Smith* as foreclosing the question of the indigent defendant's right to aid in addition to counsel.

B. **ESTABLISHING A RIGHT TO AID IN ADDITION TO COUNSEL**

Several reasonable arguments can be advanced in support of an indigent defendant's constitutional right to the assistance of the state in preparing and presenting his defense.

1. **Aid and the Adversary Process**

   Such aid would often seem to be necessary for the proper functioning of the adversary process. Although it may occasionally be forgotten in the heat of trial, the adversary process is employed because it is deemed the most effective method of discovering truth. The theory underlying the adversary system is that truth is most likely to be disclosed when each litigant has freedom to discover and present those materials that will support his case and undermine his adversary's. But the adversary system also presupposes that truth will emerge only if the "parties are roughly comparable in legal, investigative, and expert resources. The system will not function well if they are not. . . . Substantial equality is certainly a minimal condition in a procedural system oriented towards a fair trial."

57. 372 U.S. 586 (1963). In *Bush*, the defendant claimed a constitutional right to the assistance of a state-appointed psychiatrist, but the Court "declined to anticipate a question of constitutional law," and disposed of the case on other grounds. Id. at 590.

58. Counsel for petitioner in *Bush* argued persuasively that *Smith* and *McGarty* actually support the right of an indigent defendant to the assistance of a psychiatrist, for in both cases the courts rejected the defendants' appeals solely because psychiatrists had examined the defendants.

   The *Smith* and *McGarty* cases suggest, as a minimum compulsion of due process under the Fourteenth Amendment, that in a case where insanity is seriously in issue, the state must make available testimony by competent psychiatrists . . . .


60. Goldstein & Fine, supra note 32, at 1062–63. "[I]f society desires that courts engage in a search for truth, before punishing, then I would avoid 'being stingy with defense materials.' United States v. Brodson, 241 F.2d 107, 115 (7th Cir. 1957) (Finnegan, J., dissenting); see ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUCATION, THE PROBLEM OF A CRIMINAL DEFENSE 2, 33–35 (1961); Cuff, supra note 12, at 720–22.
Recently, the Court has expressed similar concern with the consequences of poverty in the adversary process. In *Griffin v. Illinois*, for example, the Court stated that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has". In *Douglas v. California*, the Court deplored the "discrimination . . . between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot."

2. A Peculiar Scale of Priorities

If the indigent defendant needs aid in addition to counsel to conduct an adequate defense under the adversary system, then such aid ought to be considered more important than many other defendant's rights guaranteed by the Constitution. This is not the case. For example, defendants are shielded from convictions obtained through illegally-secured evidence, not because of the occasional untrustworthiness of that evidence, but because of a desire to curb improper police methods of obtaining evidence. In contrast, when the accused is refused the aid that he may require to prepare or present a defense, the trustworthiness of the guilt-determining process is impaired. It is a somewhat peculiar scale of values that protects a defendant when the evidence used to convict him is trustworthy, and yet does not attempt to prevent a conviction that may be untrustworthy because of the accused's inability to afford the costs of a proper defense.

*Griffin v. Illinois* and *Douglas v. California* furnish a second example of this peculiar scale of priorities. In *Griffin*, the Court held that a state could not deny an indigent defendant the right to obtain appellate review of alleged trial errors solely because of his inability to pay the cost of the required trial transcript. Thus, the state is required to furnish the indigent at least this one "tool" essential for a meaningful appeal. *Douglas* placed a second "tool" at the disposal of the indigent defendant in making

62. Id. at 19.
64. Id. at 357.
his appeal effective by requiring that the state provide counsel on at least the first appeal when the state makes such appeal a matter of right. That such aids are guaranteed on appeal while there is no constitutional right to appeal and while no similar provision for aid exists at the trial level is somewhat anomalous. Certainly enabling the accused to present his defense effectively at the trial level should be more important than granting him various forms of aid on appeal.

3. The Equal Protection Clause

Griffin v. Illinois and its progeny furnish some support for a constitutional right based on the equal protection clause to aid other than counsel. Some scholars have contended that the significance of Griffin is that for the first time the Court "addressed itself squarely to the impact of poverty on constitutional rights under the due process and equal protection clauses . . . ." But Griffin can be, and has been, read much more narrowly—it is a denial of equal protection for a state to condition availability of appellate review of alleged trial errors solely on the defendant's ability to furnish a transcript. Under this reading, the equal protection clause is the proper basis for Griffin; the holding is limited to the narrow problem of denial of access to the court solely because of economic disability.

Until Douglas v. California was decided this term, the cases following Griffin could be harmonized with this interpretation. In Eskridge v. Washington Prison Bd., the Court held that a state could not make the availability of a free transcript for an indigent defendant's appeal dependent upon the trial judge's determination of whether there was reversible error. Such a method of aiding indigents would not provide them with a right of appellate review equivalent to the right of review enjoyed by a defendant who can pay for his own transcript. The Court in Burns v. Ohio further held that a state may not require an indigent defendant to pay a

68. See Brief of the American Civil Liberties Union and the Florida Civil Liberties Union as Amici Curiae, Gideon v. Wainwright, 372 U.S. 335 (1963); Willcox & Bloustein, supra note 51, at 24.
70. Willcox & Bloustein, supra note 51, at 1-2.
73. 357 U.S. 214 (1958).
74. Id. at 216.
75. 360 U.S. 252 (1959).
filing fee before allowing him to file a motion for leave to appeal; in Smith v. Bennett, the Court decided that a state may not condition the docketing of a petition for a writ of habeas corpus on the payment of a filing fee. In each case, the defendant, because of poverty, was unable to fulfill the requirement demanded as a condition to meaningful review. These decisions thus appeared to establish that a state, having provided a "road," appellate review, could not deny access to that road solely because of poverty.77

This interpretation of Griffin, however, is no longer satisfactory, for in Douglas, the Court read Griffin as more than an access case. The defendant in Douglas had access to the appellate court; he was simply required to present his appeal personally. The Court required that counsel be appointed for the defendant, reasoning that when a state allowed appeals as of right, "the type of appeal a person is afforded" cannot "hinge upon whether or not he can pay for the assistance of counsel."78 As in Griffin, the Court in Douglas appeared to rely on both due process and equal protection in reaching this result.79 The Griffin-Douglas doctrine, therefore, appears to demand more than that the state simply place the defendant upon the "road"; it must see that he has some vehicle—counsel—to use in traveling the "road."

In rejecting the "access" interpretation of Griffin, the Court has selected a difficult course, for if Griffin had been limited to "access," a clear line would exist by which states and the Court could determine what aid was due an indigent defendant on appeal. Nonetheless, the Court's holding is logically sound; the contrary result—that aid must be given to a convicted appellant to gain meaningful access, and yet aid need not be granted to the same defendant who, having gained access, lacks the resources to present an effective appeal—would have been anomalous.

In other respects, however, the Griffin-Douglas doctrine of aid on appeal can be questioned. In Griffin, the Court had indicated sympathy with the administrative and financial problems facing states in aiding the indigent defendant on appeal, and had expressed a willingness to allow the states considerable discretion in adopting "corrective rules to meet the problem."80 Douglas

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77. See Comment, 1959 DUKE L.J. 484, 486.
79. In dissenting to Douglas, Mr. Justice Harlan criticized the majority's reliance on both the equal protection and due process clauses. Id. at 360–367.
80. 351 U.S. at 20.
would appear to allow the states less leeway, however, for California had created such a rule—the appellate court should examine the record "and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed."

A more puzzling aspect of the *Douglas* extension of *Griffin* is that the Court, on the same day that it decided *Douglas*, overruled the *Betts v. Brady* "special circumstances" limitation on the indigent accused's right to counsel in state cases. In overruling *Betts*, the Court proceeded from the premise that counsel was essential to a fair trial; in *Douglas*, the Court relied on an entirely different ground—an indigent defendant should get whatever aid the affluent man could have obtained to make his appeal meaningful. To the extent that *Douglas* is based on equal protection and the equal protection clause demands the representation of counsel at appellate level, that clause would seem to require such representation at trial level also. *Douglas* would then be an *a fortiori* basis for overruling *Betts*.

If *Griffin* and *Douglas* do indeed represent such an extension of the equal protection clause, then no logical barrier would appear to prevent the use of that clause either as a basis for representation of counsel at stages other than trial and first appeal or as a basis for aid in addition to counsel. At least the *Griffin-Douglas* doctrine would require a state to provide assistance at trial level if that assistance were a *sine qua non* to presenting a defense. If, for example, a statute required testimony of a psychiatrist to sustain an insanity plea, the state would be compelled to pay the expense of obtaining such a witness.

The most troublesome problem flowing from the *Griffin-Douglas* doctrine is in determining where to "draw the line," and

81. Chief Justice Knutson of the Minnesota Supreme Court has drawn a similar conclusion:
[A]s far as the appointment of counsel is concerned the court has gone all the way and . . . it is now necessary to appoint counsel for every indigent defendant convicted of a crime who wishes to perfect an appeal. There is only one step left, and that is to hold that counsel must also be appointed in all post-conviction applications . . . .

83. 316 U.S. 455 (1942).
87. See id. at 260.
it is here that this doctrine breaks down. If the standard is that
the state must "furnish [the indigent defendant] with legal ser-
vices ... equivalent to those that the affluent defendant can ob-
tain," then no logical limitation exists short of substantial equal-
ity. There is no apparent distinction between providing witnesses
and paying for investigation and preparation, or between pro-
viding counsel at trial, on first appeal, on discretionary appeal,
and on petition for certiorari. This extension is far from the
traditional purpose of the equal protection clause, which histori-
cally has served to prevent discrimination in statutes that were
primarily intended to be discriminatory, or that created classifi-
cations with no legitimate purpose. The Griffin-Douglas stand-
ard under an equal protection reading, however, appears to re-
quire a state to alleviate inequities even when they are not caused
discriminatory policies, and it offers no ascertainable, logical
basis for limiting the duty of the state to minimize inequities.

4. The Due Process Clause

The due process clauses of the fifth and fourteenth amendments
are perhaps more reasonable grounds on which to interpret
Griffin and its progeny, and on which to base a constitutional
right to aid in addition to counsel. The due process clause, accord-
ing to Mr. Justice Frankfurter, is "the least frozen concept of
our law—the least confined to history and the most absorptive of
powerful social standards of a progressive society." As our
civilization advances, our notions of due process and funda-
mental fairness may be enlarged or altered. Police methods that
were considered fair in one era begin to pain the conscience of an
advancing society; the fairness of guilt-determining procedures,
which may be maintained easily in a relatively uncomplicated le-

88. See Douglas v. California, 372 U.S. 353, 363 (1963) (Harlan, J.,
dissenting).
89. The Second Circuit has recently ruled that a state is not required
to furnish counsel to an indigent defendant in preparing an application
for writ of certiorari to the Supreme Court. United States ex rel. Coleman
v. Denno, 313 F.2d 457 (2d Cir. 1963). The defendant had been provided
counsel in carrying his appeal through the New York appellate system;
the court regarded the furnishing of counsel at all such stages as
sufficient to satisfy the Griffin-Douglas requirement.
90. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954); Truax
v. Raech, 239 U.S. 33, 41 (1915).
91. See, e.g., Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535
(1942). See generally Frank & Munro, The Original Understanding of
"Equal Protection of the Laws," 50 COLUM. L. REV. 131 (1950); Tussman
& tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341
(1949).
gal process, may be impaired as the process becomes more complex. Thus, due process expands to include "those procedures that are fair and feasible in the light of then existing values and capabilities."\(^{93}\)

The "fundamental fairness" standard of due process\(^ 94\) would seem to be readily adaptable to at least some situations in which the indigent accused needs aid in addition to counsel. Due process protection was, in fact, sought in the three recent federal cases in which this constitutional right was asserted. In *McGarty v. O'Brien*,\(^ 95\) the First Circuit avoided the constitutional issue although it admitted that the due process contention was not untenable.\(^ 96\) In *United States ex rel. Smith v. Baldi*,\(^ 97\) four judges of the Third Circuit rejected the due process argument, while the three dissenters contended that the aid of a psychiatrist was demanded by due process.\(^ 98\) In *United States v. Brodson*,\(^ 99\) the trial court held that the guarantees of due process and right to counsel required that the defendant have the assistance of an accountant in preparing his defense. Because the defendant's assets had been impounded and subjected to tax liens, he was unable to pay for such assistance, and the trial court dismissed the action in the belief that the defendant would be deprived of a fair trial. A majority of the Seventh Circuit reversed without considering the constitutional issue. Two dissenters, however, agreed with the trial court that due process demanded the furnishing of an accountant in this situation.\(^ {100}\) Thus, five of the nine judges on the federal courts of appeal who have considered this due process question on the merits (and the district court judge in *Brodson*) were prepared to hold that aid in addition to counsel is constitutionally required at the trial level.\(^ 101\)

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\(^{93}\) Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956).

\(^{94}\) Rochin v. California, 342 U.S. 165 (1952).

\(^{95}\) 188 F.2d 151 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951).

\(^{96}\) See text accompanying notes 54–56 supra.

\(^{97}\) 192 F.2d 540 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953).

\(^{98}\) The Supreme Court, however, appeared to leave open this constitutional question. See notes 52–58 supra and accompanying text.


\(^{100}\) 241 F.2d at 111, 112.

\(^{101}\) The nine judges who considered the question on the merits were the two dissenters in *Brodson*, the three dissenters in *Smith* (all five of whom favored the due process argument), and the four judges in the majority in *Smith*. Neither the unanimous court in *McGarty* nor the majority in *Brodson* reached the constitutional issue.

In dissenting in *Smith*, Mr. Justice Frankfurter appeared to agree with these five judges.

A denial of adequate opportunity to sustain the plea of insanity is a
Griffin and succeeding cases can perhaps best be understood by reference to the principles of due process, for all of these cases involve the "fundamental fairness" value with which due process is concerned. They are most reasonably read to establish that when a state provides for appeals, it is unfair to deny the indigent defendant some aids—those aids without which his appeal has little chance of being meaningful. Some discriminations based on wealth produce such great disparity in effectiveness that they are fundamentally unfair, thus violating due process. Only if it is said that it is unfair to deny the indigent any form of assistance that a rich man may obtain is the equal protection concept introduced. In the Griffin-Douglas line of cases, the extent of inequality between indigent defendants and defendants of means was so vast and so significant in the appellate process as to be unfair. The significance of the Griffin-Douglas doctrine, therefore, is that it incorporates within the due process standard some element of equality, but this is not to say that every inequality violates due process. Through the use of the due process standard, distinctions that are both fair to the defendant and feasible with respect to the abilities of the states may be made to determine what aid is required, and at what stages in the legal process it is required.

5. The Right to Counsel Guarantee

Aid for indigents in addition to counsel may also be premised on the guarantee of the sixth amendment that "in all criminal prosecutions the accused shall enjoy . . . the Assistance of Counsel for his defence." The Court has held that this right guarantees the effective assistance of counsel. If the word "assistance" in the sixth amendment is stressed, then the amendment could be construed to guarantee more than the representation of counsel. In support of such a construction, some have contended that aid in investigation or in procuring witnesses may be more denial of the safeguard of due process in its historical procedural sense which is in the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment.

102. See notes 73–79 supra and accompanying text.
103. See Schaefer, supra note 93 at 6.
104. See United States v. Brodson, 241 F.2d 107, 115 (7th Cir. 1957);
United States v. Johnson, 238 F.2d 565, 572 (2d Cir. 1956).
important than the aid of counsel.\textsuperscript{107} Use of this standard, of course, involves the same problems in determining the scope of the right as do the use of the due process and equal protection clauses.\textsuperscript{108} The determination of what "assistance" is essential to make counsel effective depends on whether the standard is one of "fundamental fairness" or of achieving substantial equality between indigent and affluent defendants.\textsuperscript{109}

In summary, while no attempt to establish a constitutional right to aid other than counsel has secured majority acceptance in any court that has considered the issue, there is substantial judicial opinion favoring the recognition of such a right. Moreover, those courts that have refused to import such a right into the Constitution made their decisions on narrow grounds in factual situations that did not present the constitutional question squarely on the merits. Finally, in light of the Court's decisions in the \textit{Griffin-Douglas} line of cases, a constitutional right to aid in addition to counsel appears readily inferrable from either the equal protection clause or the due process clause although either basis offers obstacles in determining the scope of the right.

III. DIFFICULTIES INHERENT IN PROVIDING AID IN ADDITION TO COUNSEL

A. DETERMINING INDIGENCY

The threshold problem of how indigency is to be determined has been the subject of much comment.\textsuperscript{110} False indigency

\begin{itemize}
\item \textsuperscript{107} Cross, "The Assistance of Counsel for His Defence": Is This Becoming a Meaningless Guarantee?, 38 A.B.A.J. 995, 996 (1952).
\item \textsuperscript{109} Historically, of course, the guarantee of counsel meant only that the state could not prevent the accused from using counsel in his defense if he chose to employ one. See generally \textit{Beane}, \textit{Right to Counsel in American Courts} 8–33 (1955). However, since the Court has, for the past 30 years, consistently interpreted the amendment as requiring the representation of counsel, at least in some cases the original intent would not appear to be a significant barrier to construing the amendment to include that aid necessary to make counsel effective. See, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).
\end{itemize}
claims are difficult to discover without investigation, yet any substantial investigation is likely to be more costly than simply allowing the claim. In jurisdictions without public defender systems, no person, including the judge, is sufficiently informed of the defendant's financial status to make the determination. Even if the defendant's financial condition could be easily discovered, the question of whether he is "indigent" remains. This term defies precise definition. Certainly it cannot be based on a stated minimum dollar amount of assets. "Medical indigency" exists when a patient is without sufficient funds to pay the expenses incident to his particular illness. By analogy, indigency for legal purposes should not depend on a fixed standard, such as whether the defendant has been able to provide bail, but should be determined on the basis of the adequacy of the defendant's resources when measured against the complexity of the issues and the necessity for investigation and expert assistance.

B. FORMS OF AID

The kinds of aid to which an indigent defendant may be entitled depends on whether the constitutional basis is the equal protection clause or the due process clause. Equal protection, as applied in Douglas, would seem to guarantee all aid necessary to place the indigent defendant in substantial equality with the defendant of means. If, on the other hand, equality is deemed to be an ingredient of due process, it is possible to distinguish between those forms of aid that are more essential and those that are less essential to "fundamental fairness." The state would be required to the extent of its existing capabilities, to minimize inequities in forms of aid that are more essential than others in achieving "fundamental fairness." Applying such a standard, the assistance of counsel on first appeal, in which the incidence of reversal is from 12 percent to 30 percent, would be more essential to achieving fairness than would the same assistance on the second appeal or on a petition for certiorari, beyond the first appeal.

117. See note 89 supra.
counsel would appear less vital both because the incidence of reversal is presumably less and because the courts to which such later appeals are addressed are probably already aware of the broad policy questions that the cases usually pose. By the same reasoning, counsel on appeal may be less important than such other forms of aid as investigatory services and witnesses at the trial level. Distinctions may even be drawn among the types of aid other than counsel at the trial level. Arguably, aid in investigation is more useful than is assistance in securing witnesses. Among witnesses, aid in securing key missing witnesses might be considered more important than providing expert witnesses; among expert witnesses, the need for psychiatrists may be most pressing because of complexity of the insanity issue and the frequency with which it arises.

Under this analysis, both the type of aid typically secured by defendants of means in similar cases and the amount being expended on the case by the prosecution might be viewed as evidentiary facts to be weighed in determining whether the proceeding is likely to fulfill the due process requirement of “fairness.” Equality between indigents and defendants of means would not then be the sole factor in determining what aid must be given; inequality is not relevant unless it is likely to make a significant difference in the reliability of the legal process. To the extent of its capabilities, a state would be required to minimize those inequities that may significantly affect reliability. Because the limited resources of the states will make them unable to eliminate inequality, some scale of priorities between the forms of assistance may be necessary.

C. Cases in Which Aid May Be Required

Several choices are possible in identifying the kinds of cases to which the right to aid extends. One alternative is to make the availability of aid co-extensive with the right to counsel; whenever the indigent may demand the assistance of counsel, he must also be furnished with other aid. Use of this standard, however, would

118. See note 33 supra and accompanying text.
119. For an exhaustively documented and persuasive discussion of the complexity of the insanity issue and the resulting need for a psychiatrist, see Brief for Petitioner, pp. 8–17, Bush v. Texas, 372 U.S. 586 (1963).
120. Some states appear to recognize that the amount being expended on the case by the prosecution is a relevant criterion for determining what aid ought to be furnished the defendant. In New York, for example, the court may direct the employment of as many expert witnesses for the indigent defendant as the prosecution employs. N.Y. CODE CRIM. PROC. § 308.
create a dilemma. The greater the number of cases to which the right to counsel is extended, the greater will be the financial burden on the state if it is also forced to provide other aid. Thus, to the extent that aid other than counsel is constitutionally guaranteed, the expansion of right to counsel may be impeded. If, on the other hand, the right to counsel is further broadened both in the kinds of cases and in the stages in the judicial process to which it extends, then aid other than counsel may be narrowly restricted because of the financial limitations of the states.121

A second alternative is to make the availability of aid in addition to counsel depend on the seriousness of the charge or on the severity of the possible punishment. Such a limitation may be a practical one, but there is no logical relationship between the severity of the offense or the punishment and the need for this aid. The issues in a tax case122 may be more complex and may require more assistance than a murder case. Perhaps a more reasonable alternative is to condition the right to aid on the complexity of the case and the peculiar circumstances of the defendant.123

D. DETERMINING THE NEED FOR AID

Also of importance in the application of the right to aid other

121. What the cost of providing this aid to indigent defendants would be is a matter of almost pure speculation. The cost would depend on the kind and number of cases to which the right would extend and on the amount of aid found to be necessary. This, in turn, would depend on whether the constitutional standard is one of "fundamental fairness" or of "providing the defendant with the kind of trial that would be available to the man of means"; the latter standard would appear to place a considerable financial burden on the state. The present cost per case of providing counsel in public defender systems is relatively low—less than $100 per case. INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDERS 39, chart 2 (1956).

The problem of financing aid to indigents can perhaps best be solved by use of public defender systems. It has been estimated that an annual expenditure of $225,000 would be necessary to finance a model defender system in the District of Columbia. BAR ASS'N OF D.C., REPORT OF THE COMMISSION ON LEGAL AID 179–87 (1958). An expenditure of $180,000 would be required for a comparable system in New Jersey. Trebach, supra note 25, at 309. Some argue that such expenditures are not unreasonable in a society that appropriates much greater amounts for other types of public assistance. See Prettyman, supra note 110, at 207–08. The problem of cost may itself encourage the expansion of public defender systems since these systems are more efficient and less costly than assigned counsel systems. Goldstein, Book Review, 28 U. CHI. L. REV. 772–73 (1961).


123. "The appointment of counsel for a deaf mute would not constitute due process of law unless an interpreter also was available." United States ex rel. Smith v. Baldi, 192 F.2d 540, 559 (3d Cir. 1951) (dissenting opinion), aff'd, 344 U.S. 561 (1953).
than counsel is the identification of who is to decide whether, and how much, aid must be furnished. Obviously, this decision is not one that the accused himself can properly make. Indeed, the requirement of counsel is predicated upon the assumption that an accused does not have the knowledge necessary to analyze his own defense.\textsuperscript{124}

Public defender organizations, where they exist, would appear to be competent bodies to make this decision because their staffs are presumably experienced in conducting criminal defenses and because they are aware of the practical limits on the resources available to them. For this reason, the decision of the public defender, both on the merits of the request for aid and of the capacity of the state to provide aid, should probably be subject to review only for abuse of discretion.\textsuperscript{125} Establishment of a right to aid other than counsel would thus militate in favor of the further development of public defender systems as offering the most efficient method by which a state could administer such a right.

In jurisdictions having assigned counsel or private defender systems, the decision of whether aid in addition to counsel is necessary might be made by the trial judge or, more reasonably, by the defense attorney. The desire of the attorney to maintain his rapport with the court should prevent excessive demands for aid.

CONCLUSION

The factual premise of this Note has been that various forms of aid are often as important to an indigent defendant as the representation of counsel, and that these aids are too frequently unavailable to the indigent. If aid other than counsel is essential to secure reliability in the guilt-determining process, one or more clauses of the Constitution would seem to require that such aid be guaranteed. A logical extension of the Court's position in Griffin and Douglas would seem to indicate that the equal protection clause may demand the granting of aid other than counsel at trial level. Alternatively, either the due process clause or the guarantee of counsel can reasonably be read to require that such aid be furnished to indigents.


\textsuperscript{125} But cf. Lane v. Brown, 372 U.S. 477 (1963), where the Supreme Court held that the requirements of the fourteenth amendment were not satisfied by a procedure that allowed the public defender to decide whether a transcript to be used on appeal should be furnished to an indigent defendant. Such a procedure might be satisfactory, however, if the discretion of the public defender were reviewable. See \textit{id.} at 485 (Harlan, J., concurring).
The difficult task is in "drawing the line," a task of at least three-dimensional proportion. The scope of the right to aid other than counsel involves determinations of (1) the cases in which aid must be granted; (2) the kinds of aid that must be furnished; and (3) the stages at which aid is required. If a due process standard is adopted, the kinds of cases in which aid is required and the kinds of aid to be granted should be determined by analysis of the complexity of the particular case and by a judgment as to whether the defendant is likely to be able to present a meaningful defense without the aid requested. Awareness of what the prosecution is expending on the case and what defendants of means typically spend in like cases would be useful in weighing the reasonableness of the defendant's request for aid.

Establishing a limitation on the stages in the legal process to which the right to aid other than counsel extends should be resolved by considering the extent to which inequities between indigents and defendants of means need to be minimized to achieve reliability in the guilt-determining process; presumably the inequities would need to be minimized only at those stages in which they make a significant difference in the disposition of the case. Because of the limited capabilities of the states to furnish assistance to indigents, a problem intensified by the expansion of the right to counsel itself, a choice will have to be made as to which inequities it is most important to minimize.