1970

Assistance in Addition to Counsel for Indigent Defendants: The Need for, The Lack of, The Right To

Dennis W. Alexander

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Comparative and Foreign Law Commons, Conflict of Laws Commons, Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation


Available at: https://digitalcommons.law.villanova.edu/vlr/vol16/iss2/3

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
ASSISTANCE IN ADDITION TO COUNSEL FOR INDIGENT DEFENDANTS: THE NEED FOR; THE LACK OF; THE RIGHT TO

I. INTRODUCTION

[T]o a serious extent, the scales of justice in this country are weighted against the poor. Each year thousands are confronted with obstacles to obtaining justice because they are financially unable to obtain adequate defense.\(^1\)

The existence of a high number of these "obstacles" is attributable to the accused's financial inability to procure those defense services without which his attorney is unable to fashion an adequate defense. In a contemporary adversarial confrontation the contribution of an expert witness or a private investigator may very well be crucial to the accused's defense. Notwithstanding this fact, each year a large portion of those brought to trial must forego such assistance because they lack the resources to pay for it.

The opening quotation is taken from the statement made by former Attorney General Robert F. Kennedy in 1963 when he appeared before the Senate Judiciary Committee to testify in favor of a federal bill which would provide indigent defendants with the means of establishing an adequate defense in criminal proceedings. Congress responded with the Criminal Justice Act of 1964\(^2\) which effectively eliminated these "obstacles" in the federal courts. It is tragic, however, that in most of our states those "obstacles" to an adequate defense still plague the impoverished defendant.

The purpose of this comment is threefold. First, it will attempt to demonstrate the need for assistance in addition to counsel in establishing an effective defense. Second, it will attempt to review the legislative action which has been taken by both the federal government and the states to provide indigent defendants with such aid in addition to counsel as is necessary to their defense. Third, it will attempt to present alternative theories upon which judicial action in this area, absent the enactment of statutes, might be predicated. In so doing, a prima facie case for the establishment of the right to aid in addition to counsel for indigent defendants will be developed on the bases of: (1) the due process clauses of the fifth and fourteenth amendments; (2) the equal protection clause of the fourteenth amendment; (3) the right to the assistance of counsel guaranty of the sixth amendment; and (4) the very nature of our judicial process.

---

The question whether an indigent accused of a crime has a right to ancillary assistance, furnished at government expense, evolved from the question whether an accused was entitled to an attorney at government expense if he could not afford one. Due to this interrelationship, a brief review of the recognition and development of an indigent's right to state provided counsel is necessary.

The first judicial recognition of this right occurred in 1932 when the Supreme Court, in the landmark case of Powell v. Alabama, ruled that, under certain circumstances, the fourteenth amendment commanded that an accused must be provided with counsel "as a necessary requisite of due process of law." The Court so ruled because it realized that some defendants, due to physical impairments, ignorance, or lack of understanding of the judicial procedure, would not receive their constitutionally required opportunity to prove their innocence absent the aid of counsel. Thus, when such individuals were unable to obtain counsel the Court deemed it the state's duty to provide such assistance for them. Subsequently, the Supreme Court, under the right to assistance of counsel provision of the sixth amendment, extended the right to counsel beyond capital offenses to apply to any person accused of a felony by the federal government. This rule was later modified to encompass all persons accused of a serious crime in either a state or federal court, and finally, in Gideon v. Wainwright, to arguably anyone charged with the commission of a crime. The uncertainty of the scope of Gideon is due to the vague language of the Court. The difficulty concerns the phrases "any person haled into court..." and "the right of one charged with a crime..." which the Court used in Gideon in describing those entitled to counsel at state expense if they could not afford it. In

3. 287 U.S. 45 (1932).
4. Id. at 71. The Court ruled that:
   "In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy or the like...
5. Id.
6. Id. Powell required the state to provide counsel in all cases in which the defendant was accused of a capital offense.
7. Johnson v. Zerbst, 304 U.S. 458 (1938), was the case in which this rule was initially proclaimed. The Court reasserted the proposition again in Avery v. Alabama, 308 U.S. 444 (1940), and Walker v. Johnson, 312 U.S. 275 (1941).
8. Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). The Supreme Court reversed the conviction of the seventeen year old on the grounds that he had been deprived of due process of law. The opinion stated that while the respective justices held differing views on the right to counsel question, all conceded that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial.
9. 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1942), and the "totality of the circumstances doctrine."
Douglas v. California\textsuperscript{11} the Court held that the Constitution requires that counsel be provided for an indigent convict when he appeals his case. The right to aid of counsel, qualified by the Supreme Court to mean "effective counsel",\textsuperscript{12} now extends from the earliest moments of the proceedings against the accused,\textsuperscript{13} through the trial, \textsuperscript{14} and on appeal.\textsuperscript{15} The substantive right to counsel has expanded greatly since Powell and has yet to reach its full potential. The courts have acknowledged the great need of indigent defendants for appointed counsel and readily supply the same at government cost. In some cases however, even with counsel the indigent may nonetheless go to trial with an inadequate defense because, the exigencies of a particular case may demand assistance other than that of an attorney for the development of an effective defense.

II. NEED FOR ASSISTANCE IN ADDITION TO AN ATTORNEY

While the issue of the right to counsel was being decided by the courts, a second issue was evolving, clearly aligned with the initial one and likely to be equally significant. The question was raised whether the right to counsel meant more than providing just an attorney. This question was presented to the courts in 1951 in U.S. ex rel. Smith v. Baldi.\textsuperscript{16} In a four-three decision the Third Circuit took the position that the indigent defendant had no constitutional right to the aid of a state provided psychiatrist in preparing his defense.\textsuperscript{17} Three dissenting judges argued that a constitutional right to such aid in addition to an attorney existed\textsuperscript{18} and since the petitioner had been unjustly denied that right his conviction should be reversed. On appeal, the Supreme Court ignored this issue and affirmed the circuit court’s ruling,\textsuperscript{20} but a determined dissent by Justice Frankfurter hinted that a constitutional right to such

\begin{itemize}
\item \textsuperscript{11} 372 U.S. 353 (1963).
\item \textsuperscript{12} Walker v. Johnson, 312 U.S. 275 (1941); Powell v. Alabama, 287 U.S. 45 (1932).
\item \textsuperscript{14} Gideon v. Wainwright, 372 U.S. 335 (1963).
\item \textsuperscript{16} 192 F.2d 540 (3d Cir. 1951), aff’d, 344 U.S. 561 (1951).
\item \textsuperscript{17} 192 F.2d at 547.
\item \textsuperscript{18} Biggs, C.J., noted in his dissenting opinion:
But if as here, assuming the allegation of the petition to be true, there are grave indica of mental disease, and it appears as well that counsel can not prepare his client’s case properly without the aid of a psychiatrist, one must be appointed by the court if due process is to be had.
192 F.2d at 559. (Biggs, C.J., McLaughlin & Stanley, J.J., dissenting).
\item \textsuperscript{19} Chief Judge Biggs having noted that defendant had a right to the assistance of a psychiatrist stated:
To deprive relator’s counsel of psychiatric assistance was in fact to deprive the relator of the benefit of counsel.
\item \textsuperscript{20} U.S. ex rel. Smith v. Baldi, 344 U.S. 561 (1951).
\end{itemize}
assistance did exist by virtue of the due process clause of the fourteenth amendment.\textsuperscript{21} The proposition put forth by the Smith dissent was reasserted by Judge Jerome N. Frank in his forceful and often quoted dissent in \textit{U.S. v. Johnson},\textsuperscript{22} wherein he stated:

We still have a long way to go to fulfill what Chief Justice Warren has called our "mission" to achieve "equal justice under the law," in respect to those afflicted with poverty. In our federal courts, and in most state courts, there is no provision by which a poor man can get funds to pay for a pre-trial search for evidence which may be vital to his defense and without which he may be deprived of a truly fair trial. Furnishing him with a lawyer is not enough: The best lawyer in the world can not competently defend an accused person if the lawyer can not 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 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 . . . . In such circumstances, if the government does not supply the funds, justice is denied the poor — and represents but an upper-bracket privilege.\textsuperscript{23}

The nature of our contemporary judicial proceedings makes extensive pre-trial investigation and access to experts in fields outside the law as important, indeed more important in some cases, to an adequate defense as the appointment of an attorney.\textsuperscript{24} That these services are essential to the preparation and presentation of an effective defense has been acknowledged by both federal and state courts.\textsuperscript{25} For example, the

\begin{itemize}
\item \textsuperscript{21} Justice Frankfurter, in his dissenting opinion in \textit{Smith}, boldly proclaimed: A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the uncontroversial scope of the Due Process Clause of the 14th Amendment. \textit{Id.} at 571. (Black & Douglas, J.J., concurring in dissent).
\item \textsuperscript{22} 238 F.2d 565 (2d Cir. 1956).
\item \textsuperscript{23} \textit{Id.} at 572 (footnotes omitted).
\item \textsuperscript{24} The importance of such assistance was attested to by former Attorney General Robert F. Kennedy. He stated that: [T]he phrase "adequate defense" means more than counsel. Equally important to a defense are defense services. For example, the poor man cannot hire an investigator to find witnesses and evidence which may be indispensable to his case. He cannot retain a physician, psychiatrist, or handwriting expert. Statement of Robert F. Kennedy, \textit{Hearings, supra} note 1, at 10.
\item \textsuperscript{25} Similarly, Francis A. Allen, a widely acclaimed expert in criminal law and Dean of the University of Michigan Law School, has said: [A]dequate defense requires provision of services in addition to those of counsel. . . . In many cases the lawyer, however competent, cannot supply adequate representation without a pretrial investigation of his case to locate and interview witnesses, secure evidence, and inform himself as to matters essential to proper cross-examination. In some cases a full and proper defense will require access to experts, such as psychiatrists, accountants, other specialists. Statement of Francis A. Allen, in \textit{Hearings, supra} note 1, at 146. \textit{See also Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 MINN. L. Rev. 1054, 1055 (1963); Comment, Reimbursement of Expenses of Appointed Counsel, 26 LA. L. Rev. 695, 696 (1966).}
\item \textsuperscript{25} Watson v. Patterson, 358 F.2d 297 (10th Cir. 1966) (ballistics expert); United States v. Brodson, 241 F.2d 107 (7th Cir. 1957) (accountant); Bush v.
services of an accountant may be of far greater value to one accused of
tax fraud than those of his attorney.26 The crucial role that a handwriting
expert plays in the defense of one accused of forgery was emphasized
by the Supreme Court of Illinois in People v. Watson.27 Similarly, there
can be little question of the significance of a blood group test in the de-
fense of the accused in a bastardy proceeding, when we consider that
the result of such a test could conclusively prove his innocence.28 That
an indigent can be assigned counsel and still lack any meaningful defense
is most evident in situations where the defendant pleads the defense of
insanity or mental defect and, due to financial insolvency, is forced to
go to trial without the critical aid of experts in the field. In just such a
case the Supreme Court reversed an indigent's felony conviction and
remanded the case for retrial, directing the state to provide the defense
counsel with the needed experts to plead the defense effectively.29

Court assigned defense counsel often cite as their largest problem
the securing of information upon which to construct their defense,30
thereby making investigation the most important area in which outside
assistance is needed.31. The practical necessity of such pre-trial investi-

---

26. United States v. Brodson, 241 F.2d 107 (7th Cir. 1957). The defendant was
being tried on an evasion of income tax charge and, considering the confusing
accounting principles involved in the government's case, the court realized that the
services of an accountant would be at least as valuable as that of accused's counsel.

27. 36 Ill. 2d 228, 230, 221 N.E.2d 645, 648 (1966). The Supreme Court of
Illinois ruled that the defendant's conviction for attempting to commit forgery by
delivery of a forged check had to be reversed because he had been denied the funds
to hire a handwriting expert to aid in his defense. In remanding for retrial the court
directed that such aid was to be made available to Watson. See also Note, Illinois
Supreme Court Announces Right of Indigent Defendant To Reasonable Fee To Hire
A Questioned Document Examiner In Attempted Forgery Case, 18 SYRACUSE L. REV.
880, 881 (1967).

Supreme Court of Massachusetts ordered the lower court to pay the cost of such a test
for impoverished defendants.

tutional argument raised by the petitioner, that he had a right to be furnished the
services of an independent psychiatrist, because the state agreed to a retrial as a result
of a post-conviction psychiatric examination that indicated the defendant may have
been insane for some time. This question has not been considered by the Court since
that time but it is of interest to note that in remanding the Court instructed the Texas
court to supply defense counsel with the services of a psychiatrist.

30. H.B. Steinberg and S. Weisman in ABA-ALI JOINT COMM. ON CONTINUING
also NEW YORK BAR COMMISSION STUDY 58-60; INSTITUTE OF JUDICIAL ADMINIS-

31. One of the many reasons why such pre-trial investigation is best done by
someone other than the attorney is that the investigator may have to take the
witness stand — an action shunned by all attorneys — in order to impeach the
testimony of an enemy witness. In an attorney does the investigating and a witness
of the state makes a statement at the trial inconsistent with one told to the attorney
earlier, the only way to impeach that witness' credibility is for the attorney to take
the stand and testify. Such action by an attorney not only runs counter to basic trial
igation is demonstrated by the jocular but poignant statement of one attorney: “I am especially convinced that adequate investigation is the key to proper defense and even ‘Perry Mason’ would lose once or twice, in the absence of his ‘Paul Drake’.”

While we know for certain that at least some men have been adjudged guilty solely because they lacked the funds needed to establish their innocence, the precise number of defendants who have been convicted of crime because they were poor — not because they were guilty — is open to speculation. It has been estimated that thirty percent of those indicted in federal courts and over fifty percent of those charged with crimes in state courts are financially unable to hire counsel, let alone pay for any services ancillary to their defense. While the Criminal Justice Act of 1964 provides indigent defendants with such assistance in the federal courts, only a few states have made such provisions. Since the vast majority of indictments are brought in state courts many of

strategy but also is inconsistent with Canon 5, §§ 9, 10, of the Code of Professional Responsibility of the A.B.A., which states:

§ 9 — Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he may become more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

§ 10 — Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

32. The statement was part of a letter, from Mr. Keller, as president of the Clay County Bar Association, to Sen. John Eastland, voicing support for the proposed Criminal Justice Act. Hearings, supra note 1, at 65.
33. For actual cases in which innocence was the fact, but guilty was the verdict, see J. Frank & B. Frank, Not Guilty (1957); E. Borchard, Convicting the Innocent (1932).
34. Hearings, supra note 1, at 8.
36. 18 U.S.C. § 3006A(e) (1964). This section of the Code will be dealt with at length in a further portion of the article. See p. 332 infra.
37. In 1969, some 2,402,979 persons were officially charged by the police in the United States and held over to be indicted. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES, Table 15 (1970). In a similar twelve month period, 33,585 criminal cases were filed with the United States District Courts. 1969 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE
the persons charged with the commission of criminal acts each year may, it appears, be financially unable to present an adequate defense.

Recognition of the need for other forms of assistance in addition to an attorney has not been limited to the judiciary but has been acknowledged by other sectors of the legal community. One select group of attorneys has stated that one of the requisites of a public defender system should be that "[t]he system should provide the investigatory and other facilities necessary for a complete defense." The Special Committee report concluded that thorough investigation is essential to adequate preparation of a defense and that indigents' counsel is often too busy to perform such a time-consuming search for evidence. The growing consensus among attorneys that such ancillary assistance should be provided for indigents was likewise reflected in the enumeration of standards for the public defender systems adopted by both the American Bar Association and the National Legal Aid and Defenders Association.

In April of 1961 the Attorney General of the United States, Robert F. Kennedy, appointed a committee headed by Francis A. Allen and comprised of highly acclaimed members of the legal profession whose task was to consider the impact of poverty on the administration of federal criminal justice. The report of the Allen Committee portrays in depth the handicaps of the poor when they are accused of crime and was perhaps the single most important factor in precipitating federal legislation to remedy these inequities. The extreme importance of aid in addition to counsel is demonstrated by the observation of the Allen Committee that:

In an indeterminate number of cases in the federal courts, the provision of adequate representation requires that a range of services, in addition to the appointment of counsel, be made available to the defense. These services include those of pre-trial investigation and those of experts such as psychiatrists, accountants, and other spe-

United States Courts 130. The 33,585 prosecuted in federal courts for the 12 month period is only 1.5% of the total of 2,402,979 persons indicted in all courts in the nation in a 12 month period. Thus, approximately 98.5% of those brought to court would be in non-federal jurisdictions.

38. Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defenders Association, Equal Justice for the Accused 58 (1959) [hereinafter referred to as the Special Committee].
39. Id. at 58-59; citing for support Institute of Judicial Administration (New York), Public Defenders 21-22 (May 18, 1956).
40. The third provision of that set of standards was that every state should "[p]rovide the investigatory and other facilities necessary for a complete defense." A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, Appendix A, 67 (1967).
41. These standards for defenders systems were adopted by the National Legal Aid and Defenders Association in October, 1959, and by the House of Delegates of the A.B.A. in February, 1960. Id.
42. Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) [hereinafter referred to as the Allen Committee].
cialists. . . . Until the present practices are rectified and such services are made available, the procedures in the federal courts cannot fairly be characterized as a system of adequate representation.45

The Allen Committee thereby indicated that the then existing federal criminal procedure denied adequate representation to the poor because it failed to provide for such assistance. That such auxiliary aid should be provided to the impoverished accused as a matter of fundamental justice had become obvious; and the pressing need for reform in the system was equally clear. In 1963 this awareness was manifested in action taken by both the Supreme Court and the Congress.

The more prominent criminal law decisions of the Court in that year; Gideon v. Wainwright,46 Douglas v. California,47 and Draper v. Washington,48 along with several other decisions of somewhat lesser impact,49 had the cumulative effect of drastically altering the plight of the indigent accused. These decisions can be credited with removing many of the barriers that previously had precluded the poor man from equal justice under the law.

On March 8, 1963, President John F. Kennedy transmitted to the Speaker of the House, Hon. John McCormack, a letter that called for the passage of legislation "[t]o diminish the role which poverty plays in our Federal system of criminal justice . . . ."50 The President further stated that the injustices that existed had survived too long

45. ALLEN COMm. REPORT, supra note 43, at 39.

46. 372 U.S. 335 (1963). Gideon required the states, under a constitutional mandate, to provide counsel for anyone charged with a felony. The decision may even extend the requirement to misdemeanors. See p. 324 supra.

47. 372 U.S. 353 (1963). Douglas required the states to provide counsel for every indigent appealing his conviction. This, in conjunction with the appellate right to a free transcript as established in Griffin, made his appeal meaningful. For the first time in our history an indigent was guaranteed the assistance and resources necessary to give him the same chance of success on appeal that a man of financial means always enjoyed.

48. 372 U.S. 487 (1963). The states were required by the Draper case to apply the same appellate procedures to indigents and non-indigents and were thereby precluded from imposing additional procedural burdens on indigents because of their financial status. The particular procedure prohibited by Draper dealt with the indigent defendant's obtaining a transcript of the trial proceedings. Procedure in the state of Washington called for the defendant to request such a transcript from the trial judge, who would provide it only after reviewing the petitioner's alleged grounds for appeal and finding merit in them. Thus, a judge who had already ruled on these points at trial would most likely not be inclined to find them meritorious. The Court found such procedure unacceptable and required its abolition.

49. Bush v. Texas, 372 U.S. 586 (1963). In Bush, the Court reversed a conviction because the state had failed to provide the indigent the means with which to plead effectively the defense of insanity. Lane v. Brown, 372 U.S. 477 (1963). In Lane, the Court held that the state must grant the convicted indigent an appeal on the merits from the denial of the writ of error coram nobis. White v. Maryland, 373 U.S. 59 (1963). In White, the Court reversed the petitioner's conviction for murder because the accused was not provided with an attorney at the time of his preliminary hearing, where he pleaded guilty. The Court ruled that the hearing was a "critical stage" of the proceedings and therefore he should have had counsel under the rule handed down in Hamilton v. Alabama, 368 U.S. 52 (1961).

and must be removed without further delay.\textsuperscript{51} In the First Session of the Eighty-eighth Congress both the House and the Senate\textsuperscript{52} took up the matter of reforming the federal provisions for aiding the indigent accused of criminal offenses. In his appearances before the respective committees of the House and Senate which were drafting legislation on this matter, Attorney General Kennedy presented strong arguments\textsuperscript{53} favoring the inclusion of a clause which would provide a means for the impoverished defendant to acquire the additional assistance he might require to establish his defense adequately. The action of Congress took the form of the Criminal Justice Act of 1964\textsuperscript{54} which contained, in part, the clause for which the Attorney General had campaigned.

III. Statutes Providing for Aid in Addition to Counsel — Federal and State

A. Federal Level

1. The Criminal Justice Act of 1964

"Insuring the poor man of a proper defense will not give him anything to relieve him of his poverty. It will simply recognize his right to equal justice."\textsuperscript{55} Passage of the Criminal Justice Act of 1964 did more than merely recognize the indigent's right to "equal justice"; it established the means necessary to insure that "equal justice" could at last be a reality for those to whom the words had previously been mean-

\textsuperscript{51} President John F. Kennedy stated that:
In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator, or technical expert an unjust conviction may follow.

The Attorney General's accompanying letter describes the deficiencies in the present system. These defects [referring to the defects cited in the Attorney General's letter which accompanied his own] have prevailed for many years despite persistent pleas for legislation by the judicial and executive branches and the organized bar. Fairness dictates that we delay no longer.

\textit{Id.} at 2993.


\textsuperscript{53} The tenor of Attorney General Kennedy's statement made clear the importance he ascribed to providing such collateral assistance to the impoverished.

Equally important to a defense are the expert fact finding services. For example, an innocent man may be unable to hire an investigator to find the witnesses and evidence indispensable to his acquittal. Counsel may be unable to retain a handwriting expert to show that a forgery was not committed by his client.

The importance of skilled investigation is underscored in police work everyday. The prosecuting attorney can not function without the facts. The same is true of the defense.

\textit{Hearings on H.R. 1027 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 32} (1963). \textit{See also Hearings, supra note 1, at 10, for the testimony before the Senate Committee in which the same arguments were asserted.}


\textsuperscript{55} Statement of Attorney General Robert F. Kennedy, in \textit{Hearings, supra note 1}, at 12.
ingless rhetoric. The Act codifies the right to be represented by government appointed counsel in both felony and misdemeanor cases arising under federal law, upon a showing of financial inability to hire counsel.\textsuperscript{56} Appointed counsel who represent the defendant at each stage of the proceedings from his initial appearance before the federal magistrate up to and through appeal\textsuperscript{57} are compensated for their services so as to assure effective representation.\textsuperscript{58} Subsection (e) of the Act, which provides for services other than counsel is the focal point of this Comment and will be analyzed in some detail in the following paragraphs. Subsection (e) states:

Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after an appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interest of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant and the compensation received in the same case or for the same services from any other source. The compensation to be paid to a person for such service rendered by him to a defendant under this subsection, or to be paid to an organization for such services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred.\textsuperscript{59}

This subsection removes many of the injustices that were once visited upon the impoverished defendant in the federal courts. The use of the words "investigative, expert or other services" makes the statute broad enough to include any type of non-legal assistance a defendant may require that is "necessary to an adequate defense". To have the request for such services heard, the defendant must be merely "financially

\textsuperscript{56} 18 U.S.C. § 3006A(b) (1964) provides:
In every criminal case in which the defendant is charged with a felony or misdemeanor, other than a petty offense, and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel.
\textsuperscript{57} 18 U.S.C. § 3006A(c) (1964) provides:
A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or court through appeal.
unable to obtain them". Moreover, the use of this phrase and not the word “indigent” is significant for it can encompass those who have their own attorneys but insufficient funds to fully pay for the services needed. Thus, the financially marginal defendant may also be eligible for assistance under this statute. The statutory criterion of “necessary to an adequate defense” has thus far been construed very liberally by the courts. Furthermore, while prior authorization is the general procedure, an exception exists in the event that “timely procurement of necessary services could not await prior authorization” whereby the court is able to ratify the action at a later time. Another important feature of the provision is the relative ease with which persons rendering such aid are able to receive their remuneration. All they need to do is submit an affidavit “specifying the time expended, services rendered, and expenses incurred. . . and the compensation received in the same case or for the same services from any other source.” While such affidavit requirements are absolutely necessary to protect the court from paying fraudulent claims, they are simple enough to be performed with minimal inconvenience to the filing party. The maximum amount of compensation for any one person rendering service under the bill — “$300, exclusive of reimbursement for expenses reasonably incurred” — appears to be a realistic limit. Rarely do the fees of such experts exceed the statutory limit and in some cases where the cost of required services would exceed the statutory limit if performed by one person, they can nonetheless be obtained at government expense by merely employing a number of people, each of whom does a portion of the work. That this section of the Act is contributing significantly to the establishment of “equal justice for all” in the federal courts is apparent from the fact that in the fiscal year of 1967, 333 defendants went to trial with the resources needed to fashion adequate defenses largely because of the “investigative, expert or other services” provided by the government under subsection (e).

2. Judicial Construction of Subsection (e) of the Act

As with all statutes it is the judicial interpretation and implementation of the act that determines its true worth to those for whose benefit

60. See, e.g., United States v. Pope, 251 F. Supp. 234, 241 (D. Neb. 1966). In Pope the court stated that:
[1]The rule in allowing defense services is that the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation, not that the defense would be defective without such testimony (emphasis added).
61. It is important that persons rendering service under this arrangement be able to collect with relative ease, for if they had to meet burdensome requirements the result would be an unwillingness to work under the statute and the defendant would suffer.
64. SUBCOMM. ON CONSTITUTIONAL RIGHTS, supra note 62, at 208.
it was passed. For this reason it is of considerable importance that inquiry be directed toward the fashion in which the Criminal Justice Act in general, and subsection (e) in particular, have been received by the federal courts. From the very beginning of the Act's effective existence (August 20, 1965) the federal courts have interpreted the Act as intended to provide all services that an indigent defendant would find valuable in the preparation of his defense and which he would, no doubt, acquire if he had the funds. A good example of this judicial liberality can be found in *United States v. Pope*\(^6\) in which the District Court of Nebraska approved requests for payment of over twelve thousand dollars for the costs of an indigent defendant's counsel, witnesses, and expenses. The defendant was on trial for bank robbery during the commission of which three persons were killed. The court directed the payment of the cost of retaining two psychiatrists and a psychologist, all of which received the statutory maximum of $300, who administered tests to the defendant and testified at trial in his behalf. Also permitted was the expense of having a special court reporter transcribe a separate court record so that the defendant could have a copy of the proceedings at the end of each day. The cost of this service, which included three recorders and two typists, each of whom were treated as separate entities for purposes of payment, totaled $1,178.50. The remainder of the costs were attorneys' fees, investigation costs, and miscellaneous expenses. In allowing all of these expenses at government cost the court commented that "[t]he rule in allowing defense services is that the judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation, not that the defense would be defective without such testimony."\(^6\) The liberal interpretation of *Pope* appears to be the rule rather than the exception in treating requests for subsection (e) aid. In the case of *United States v. Albright*\(^7\) the appellate court noted that the district court had provided the defendant with the services of a handwriting expert, a fingerprint expert and a psychiatrist. The offense which he was charged with was forgery and issuing forged United States postal money orders with the intent to defraud. It can readily be seen from the charges lodged against the indigent that the court provided him with all of the services he might have needed in preparing his defense.

A firm resolve to effectuate the intention of the Congress in passing the Act appears to exist in the circuit courts as well as in the district courts. In the recent case of *United States v. Tate*\(^8\) the United States Court of Appeals for the Sixth Circuit vacated the petitioner's conviction for unlawful escape from federal custody and remanded the case for a new trial. The sole ground for vacation of the judgment was the


\(^{66}\) Id. at 241.

\(^{67}\) 388 F.2d 719 (4th Cir. 1968).

\(^{68}\) 419 F.2d 131 (6th Cir. 1969).
failure of the district court to grant defendant's motion for a psychiatric examination at government expense. The court of appeals stated that such a refusal in light of the defendant's contention of insanity and the existence of subsection (e) of the Act was intolerable. In ratifying the acquisition of certain services by an indigent's counsel, the District Court for the Eastern District of Tennessee in United States v. Sisk summarized the view that the federal courts have adopted in reference to the Act:

It is contemplated by the [Criminal Justice] Act that counsel should be afforded the fullest opportunity to prepare their case. The rule in allowing defense services is that the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation...

Not only have the federal courts been liberal in providing indigent defendants with the types of non-counsel assistance referred to in the Act, but they have also allowed the retention of some unusual forms of aid pursuant to the “other services” provision of subsection (e). The case of United States v. Baker is illustrative of this type of assistance. The witness who identified defendant Baker at the trial as being the gunman in the hijacking had stated prior to trial that he could not be certain of the defendant's identity until he saw him face to face and felt that he could not readily differentiate one negro from another. With the normal pre-trial lineup for identification having been cancelled, the witness' first confrontation with the defendant was at the trial. Since the defendant was the only nonjuror negro in the courtroom the judge suggested that counsel might mitigate this disadvantage by retaining other negroes to sit in the courtroom and, seating the defendant among them, request that the witness be asked to pick him out of the group. The judge further suggested that the cost of these stand-ins could be obtained from the government under the authorization of subsection (e) that “other services” may be provided to indigent defendants.

From the cases noted it is apparent that the courts of the federal judicial system are willing to provide an indigent defendant with practically anything provided there exists some minimal nexus between the request and the adequate preparation of his defense. That in fiscal 1969 the Administrative Office of the United States Courts disbursed $423,441 in payment for “investigative, expert or other services” rendered to indigent defendants is clear proof that the intention of Congress in including subsection (e) in the Criminal Justice Act of 1964 is being fostered on the federal level.

70. Id.
71. 419 F.2d 83 (2d Cir. 1969).
B. State Level

While the problem of providing indigent defendants with the means to fashion a defense has, for the most part, been resolved in the federal system by statutory enactment, it still exists on the state level. Consequently, the vast majority of impoverished defendants may still be subjected to the injustices discussed earlier since most of the criminally accused are tried in state tribunals.\(^\text{7}\)

Eight states; notably Pennsylvania, New York, and Vermont, have recognized the shortcomings of their criminal justice systems and have adopted statutes which in part resemble subsection (e) of the Criminal Justice Act.\(^\text{74}\) These states are clearly forerunners among non-federal jurisdictions in affording the poor an equal chance to contend with their accuser. A number of other states, including Illinois, have authorized public defender systems, most of whose enabling statutes contain clauses such as “and shall pay out of the county treasury for necessary office, travel and other expenses incurred in the defense of cases.”\(^\text{76}\) This statutory language is broad enough to be interpreted as a grant to the public defender systems to employ experts at state expense. However, other state statutes creating defender systems make no provision for “expenses”\(^\text{78}\) and thereby on their face preclude the retaining of ancillary services. Notwithstanding this shortcoming, these organized defender systems do have the ability to carry out limited pre-trial investigation.\(^\text{77}\) A fourth category is comprised of states that have statutes providing solely for the appointment of counsel from the rolls of the various bar organizations within the state. Of these states, five have statutes providing compensation for the attorney’s services and reimbursement for the expenses incurred;\(^\text{78}\) nine others provide compensation only for the services of the advocate;\(^\text{79}\) while a few still request gratuitous legal service.\(^\text{80}\)

It is apparent that a large number of our states have no specific statutory provisions making these ancillary services available to the indigent.

---

\(^{73}\) See note 36 supra.

\(^{74}\) See, e.g., ILL. ANN. STAT. ch. 34, § 5607 (Smith-Hurd Supp. 1970).

\(^{76}\) See, e.g., ARIZ. REV. STAT. ANN. § 1-581-6 (Supp. 1969).

\(^{77}\) The defenders do as much pre-trial investigation as their busy schedule will allow and are sometimes aided in their efforts by the prosecuting attorney who may give the defenders some information they obtained in their preparations.

\(^{78}\) See note 36 supra.

\(^{79}\) See, e.g., ARIZ. REV. STAT. ANN. § 1-581-6 (Supp. 1969).

While rules of court do not have the pervasive effect of statutes, they can accomplish similar results within their applicable jurisdiction. For this reason the rules of court pertinent to the rights of indigents would be rather significant. Unfortunately, the extreme difficulty attached to gaining access to the rules of court in the hundreds of jurisdictions in the United States effectively precludes determination of how many jurisdictions, if any, have procedural rules which call for non-counsel assistance for indigent defendants.81

C. Prospects for Future Development—Legislative and Judicial

The lack of any provision in most states to either furnish such non-legal assistance to indigent defendants or reimburse counsel for expenses incurred in obtaining such aid is a serious problem. In considering this situation Judge Jerome N. Frank argues:

This is not democratic justice. It makes a farce of "equality before the law", one of the first principles of a democracy. Unless we can solve the problem, we must acknowledge that, in denying justice to under-incomed persons, we are "selling justice."82

Court-appointed counsel that serve without compensation pursuant to state law,83 must retain any non-legal aid they deem necessary for the preparation of the defense at their own expense, a sacrifice some are unwilling to make.84 Nor are the attorneys from the public defender offices much better off; underbudgeted from the start, these organizations have little money available for "extras."85 There is a very real possibility that any accused being defended under these conditions could be seriously prejudiced.86 The diversity of the states' positions on this important issue of whether or not a defendant is to be provided the means of conducting an adequate defense is disturbing. If indeed the indigent has an inadequate defense without such aid, the procedures for providing aid to indigents in most states would represent a grave travesty of justice.

81. There is no compilation of the rules of court for the thousands of city, county, and state judiciaries. This fact in conjunction with the general lack of availability of these rules outside of their respective jurisdictions prohibits any investigation on this plane.
83. See note 80 & p. 336 supra.
85. Silverstein, supra note 35, at 45.
86. In considering this point the Allen Committee declared:
This failure [to provide for aid in addition to counsel] may adversely affect the quality of the defense made or force a decision to plead guilty to a criminal charge in situations in which the charge might otherwise be properly contested. Allen Comm. Report, supra note 43, at 39.
The fact that a defendant's lack of money could result in his inability to produce a defense sufficient to counteract the state's charge of guilt, taken in conjunction with the position of the Supreme Court in Griffin v. Illinois,\(^8\) that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has" raises the question whether there is any basis for judicial action on this problem. The Supreme Court of New Jersey has ruled that there exists a constitutional right to aid in addition to counsel and ordered that it be provided\(^8\) at state expense if necessary. Unfortunately, New Jersey stands alone in its judicial determination that the right to counsel guaranteed by the Constitution means the right to more than just an attorney. The nonexistence of any trend among the state legislatures or judiciaries to remove this inequality makes judicial action, on the federal level, the most probable vehicle of reform.

IV. ALTERNATIVE THEORIES UPON WHICH JUDICIAL ACTION MIGHT BE PREDICATED

There are several sound arguments, based upon both the constitution and the nature of the judicial process, which lend support to the proposition that in some cases viz, those in which aid in addition to counsel is necessary to an adequate defense, the indigent defendant has a right to such aid. The constitutional protections of due process, equal protection, and right to counsel as well as the very core of American justice — the adversary system — can be interpreted as requiring assistance above and beyond counsel. It should be noted, however, that the passage of the Criminal Justice Act renders these points largely moot as applied to the federal system. Nonetheless, the significance of these arguments should not be minimized since the states are the primary dispensers of criminal justice.

A. Due Process

The due process clauses of the Constitution of the United States, binding upon the federal government by the 5th Amendment and the state governments by the 14th Amendment, may provide the means whereby courts could remedy the infirmities of the present system. Both of these amendments state that government may not deprive any person "of life, liberty or property, without due process of law."

There is no concise definition, of "due process of law." Rather, it is a phrase which embodies an obligation of fairness or equity in the manner in which government conducts its affairs. The essence of due process

\(^{87}\) 351 U.S. 12, 19 (1956).

\(^{88}\) In State v. Horton, 34 N.J. 518, 170 A.2d 1 (1961), the Supreme Court of New Jersey ruled that "the constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to proper defense in addition to the time and professional efforts of an attorney. . . ." Id. at 526, 170 A.2d at 9.
lies, therefore, in the requirements and prohibitions placed on judicial action via the implementation of the concept which the phrase "due process of law" embodies. For example, the Court in *Betts v. Brady*, took the position that "the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right" was prohibited by due process. It is well to note the words of Justice Frankfurter who, in considering the due process issue in the case of *Rochin v. California*, stated:

Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

Though there be no concrete definition of due process, reflections upon the question of what it represents seem to polarize around notions of what is "fair" and "unfair."

Most of the cases defining the constitutional rights of criminal defendants have been decided under the due process clauses. The first such case was *Powell v. Alabama* in which the court ruled that due process under the 14th Amendment required the state to provide counsel for the accused in every capital case where the defendant was unable to hire counsel. There followed from *Powell* a number of cases which broadened the category of offenses for which the court was required to provide counsel in order to meet the due process test. The requisite of due process has been applied in the area of investigation as well as in the elicitation of confessions. In *Rochin* the Court reversed the defendant's conviction because it was obtained by methods that offended due process of law. Similarly, the due process clause has been invoked to bar the use of evidence secured in an illegal search. Confessions which have been coerced from the accused are precluded from use as evidence under the same principles. The Supreme Court in each of

---

89. 316 U.S. 455 (1942).
90. *Id.* at 473.
91. 342 U.S. 165 (1952).
92. *Id.* at 173.
94. 287 U.S. 45 (1932).
96. The defendant was handcuffed and taken to a hospital where an emetic solution was forced into his stomach and caused him to vomit. The vomited matter contained two capsules of morphine which were used as evidence at the trial. *Rochin v. California*, 342 U.S. 165 (1952).
97. This rule was first promulgated in the federal courts in the case of *Weeks v. United States*, 232 U.S. 383 (1914), and later made binding upon state courts in the case of *Mapp v. Ohio*, 367 U.S. 643 (1961).
these instances felt that the minimal standards which are of the very essence of a scheme of ordered liberty had been transgressed.

Mr. Justice Burton speaking in *Joint Anti-Fascist Committee v. McGrath* expressed the idea that:

> Due Process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

In the past fifteen years the exercise of judgment by the Supreme Court has led to considerable “adjustment” in the concepts of what is “fair” and “reasonable” in the conducting of criminal proceedings.

A trend toward the granting of tools in addition to counsel for the presentation of an adequate defense, might well be said to have begun with the case of *Griffin v. Illinois,* in which the Court ruled that on appeal the state must furnish all indigent defendants with a transcript of the lower court proceedings free of charge. In so ruling the Court announced that both the due process and equal protection clauses of the fourteenth amendment precluded the state from granting appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. Under Illinois law, at that time, in order to get a full direct appellate review of alleged errors it was necessary for the defendant to furnish the appellate court with a bill of exception or report of proceedings at the trial certified by the trial judge. The state had conceded that at times it was impossible to prepare such documents without a transcript of the trial proceedings. There was no provision, however, to provide indigent defendants, other than those convicted of murder, with such transcripts in the event they could not afford to purchase them. Thus, the Supreme Court found, that while the state had provided all convicted defendants an appeal as of right in some cases. In the Court’s view this constituted invidious discrimination.

---

100. *Id.* at 163 (emphasis added).
102. *Id.* at 17. See also *Draper v. Washington,* 372 U.S. 487 (1963), in which the Supreme Court held Washington’s procedure of review was violative of the fourteenth amendment, because it required the indigent defendant to go through a preliminary examination of the merits of his appeal in order to obtain a free transcript.
103. Illinois law at that time stated that “a writ of error in all criminal cases are [sic] writs of right and shall be issued of course.” *Ill. Ann. Stat.* ch. 38, § 769.1 (1955) (repealed 1963). Thus, the appeal via writ of error was an appeal as of right, guaranteed to all convicted of criminal activity.
104. The trial court denied petitioner’s motion requesting the court to provide him with a transcript of the proceedings below. In so doing they rejected petitioner’s argument that a denial of the transcript would be invidious discrimination, based on poverty, in the administration of the right of appeal. *Griffin* then filed a petition for post-conviction relief, pursuant to the Illinois Post-Conviction Hearing Act No. 630 [1949] Laws of Ill. 722 (repealed 1963). He claimed that there were nonconstitutional errors at trial which entitled him to have his conviction set aside on appeal. Petitioner stated that his lack of a transcript impeded appellate review of his case and the state’s refusal to provide it was a violation of the due process and equal protection clauses of the fourteenth amendment.
discrimination in violation of both the due process and equal protection clauses of the fourteenth amendment. Later, the Court in *Douglas v. California*,\(^{105}\) again looking to both the due process and equal protection clauses of the fourteenth amendment, ruled that the state must provide the convicted indigent with counsel in his first appeal of right. The California procedure required the indigent defendant to apply to the District Court of Appeals of California for the assignment of counsel to assist him in his appeal as of right. That court would make an independent investigation of the record and decide whether it would be advantageous to the defendant or helpful to the appellate court to have counsel appointed. Thus the question of whether or not the defendant was to be assisted by counsel on appeal was decided in an *ex parte* proceeding, on the basis of the court's opinion as to the value of such assistance.

Justice Douglas, writing for the majority stated that "where the merits of the one and only appeal an indigent has as of right are decided without the benefit of counsel . . . an unconstitutional line has been drawn between rich and poor."\(^{106}\) The gravity of this unconstitutional disparity in treatment was noted by Justice Douglas as follows:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination of the record, research of the law, and marshalling arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.\(^{107}\)

Read together, *Griffin* and *Douglas* indicate that the Supreme Court is cognizant of the direct effect poverty has on the fairness and reasonableness of criminal procedure.

The decisions of the Supreme Court in *Powell, Johnson, Griffin, Gideon*, and *Douglas* all have the result of recognizing that an indigent must not be prejudiced by his poverty. Former Attorney General Rogers distilled the essence of the Court's thinking in these decisions when he stated:

> We are at a stage in our history, and in the development of our concept of justice, when we must assure an adequate defense for every person accused of crime regardless of his financial means. In our legal system . . . poverty must never be allowed to prevent justice.\(^{108}\)

\(^{105}\) *372 U.S. 353* (1963). The Court based its ruling on both the equal protection and due process clauses of the fourteenth amendment.

\(^{106}\) *372 U.S. at 357.

\(^{107}\) *Id. at 357–58.

\(^{108}\) Statement of Former Attorney General Rogers, in *Hearings, supra* note 1, at 31.
Considering this attitude of the Court and the essential role of expert witnesses and pre-trial investigations in developing an adequate defense,\textsuperscript{109} it is conceivable that the Court may require that such services be provided the indigent defendant.

It is submitted that the failure to provide an indigent defendant with the non-legal assistance essential to an adequate defense while guaranteeing him an attorney to present an inadequate defense coupled with the guarantee of an adequate appeal is illogical, "offends a sense of justice"\textsuperscript{110} and is "offensive to the common and fundamental ideas of fairness and right."\textsuperscript{111} In short, this deprivation constitutes a violation of due process.

\textbf{B. Equal Protection}

The equal protection clause of the fourteenth amendment declares that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause, like the due process clauses, eludes definition.\textsuperscript{112} It is a protection that represents an amorphous concept of governmental responsibility. The goal of equal protection is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents.\textsuperscript{113} It matters not whether the offensive situation is imposed as a result of statutory enactment or administrative procedure for the injustices wrought are indistinguishable in their impact.

The substantive embodiment of the concept of equal protection or equality of protection is contingent upon which of the two basic notions of equality, numerical or proportional, is brought to bear on the issue. "The principle of distribution according to a numerical equality concedes that human beings are diverse and unequal in most respects; it nevertheless concludes that all such differences are irrelevant for purposes of distributing benefits and burdens among members of society."\textsuperscript{114} For example, the right to vote in an election extends equally to all who meet the established requirements without any concern for other personal differences such as income, health, or stature. Conversely, "[t]he principle of proportional . . . equality does take cognizance of differences

---

\textsuperscript{109} See pp. 325-31 \textit{supra}.
\textsuperscript{110} See p. 339 \textit{supra}.
\textsuperscript{111} See p. 339 \textit{supra}.
\textsuperscript{112} "Equal protection" is a term as undefinable as "due process"; but statements of what it encompasses seem to center on the theme of like treatment for all, e.g., "equal protection of the laws" simply means that all persons similarly situated should be treated alike. Derman v. Ingraham, 47 Misc. 2d 346, 262 N.Y.S.2d 533, 536 (1956). "Equal protection of the laws" in the sense used in the fourteenth amendment implies that all litigants similarly situated may appeal to courts for relief under like conditions and without discrimination. Communist Party of the United States v. Moysey, 141 F. Supp. 332, 340 (S.D.N.Y. 1956).
\textsuperscript{113} Sunday Lake Iron Co. v. Wakefield Twp, 247 U.S. 350, 352 (1918).
among men and may require numerically different treatment because of those differences."\textsuperscript{115} An example of proportional equality can be found in the income tax which is levied on all but the personal differences among men including: income, health, age, number of persons being supported, etc., which are taken into account in assigning each person's share of the burden.

Traditionally, equal protection has been a matter of numerical equality, requiring that each person within a particular classification be treated the same. Aside from that consideration the only other factor which the Court has inquired into is the validity of the legislative scheme's defining the designated group. The Court has not, traditionally, concerned itself with whether certain members of a group, due to particular personal circumstances, should have been treated differently.\textsuperscript{116} Recent decisions, however, have seen the Court transcend the traditional standard and instruct states that certain differences among men must be taken into account when the legislature or judiciary act in a fashion that affect individual's rights. One such area is criminal procedure. In effect, the Supreme Court has directed that proportional equality is required and that financial inequality must be compensated for by the system. Both \textit{Douglas} and \textit{Griffin} exemplify this position and while the Court did not use the label of proportional equality it is evident that this is the standard they required in appellate review.\textsuperscript{117}

It was primarily upon the constitutional mandate of "equal protection" that the Supreme Court based its decision in \textit{Griffin}. Writing for the majority, Mr. Justice Black stated that "in criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."\textsuperscript{118} He contended that, by analogy, any appellate procedure that permitted access to the court only after the payment of fees would likewise be an invidious discrimination against the poor and a contravention of the Constitution.\textsuperscript{119} The language of the Court in this decision clearly lends itself to the proposition that poverty must not be permitted to preclude the exercise of the accused's rights\textsuperscript{120} and that all must "stand on an equality before the bar of justice in every American court."\textsuperscript{121} The \textit{Douglas} Court manifested the same awareness that poverty may have the deleterious effect of precluding the afflicted party from exercising his rights in any meaningful fashion. In \textit{Douglas} the Court proclaimed that an indigent defendant must be provided with the assistance of counsel in his first appeal as of right. The Court

\begin{footnotes}
\footnote[115]{Id. at 1166.}
\footnote[116]{Id. at 1171.}
\footnote[117]{Id. at 1179–80.}
\footnote[118]{351 U.S. at 17.}
\footnote[119]{Id. at 18.}
\footnote[120]{No other meaning could be attached to the Court's statement that: There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.}
\footnote[121]{Id. at 19.}
\end{footnotes}
equated the situation in *Griffin* to that in *Douglas* and found that "[i]n either case the evil is the same: Discrimination against the indigent."122 This discrimination was branded as being a violation of the fourteenth amendment’s equal protection clause. While both of these cases factually dealt with appellate review, the rationale employed by the Court in deciding them is equally applicable to the trial level. It has been suggested by some commentators that *Griffin–Douglas* provide a sound basis from which other benefits could be granted the indigent defendant.123 In light of this proposition it is relevant to note that proportional equality has also been established by the courts as the standard in the areas of political rights124 and education.125

These decisions indicate the growing concern of the courts over the unequal protection now afforded to some because of the states’ lack of consideration of the personal differences of their citizens. It has finally become apparent that certain characteristics and differences among the people constituting the group to which a law or right is applicable will drastically affect the degree or manner in which some of the group are able to avail themselves of the said law or right. In some cases these differences may result in a denial of the benefit or privilege of the law or rule. The indigent defendant can be considered such a person who, belonging to the group comprised of the criminally accused, has certain rights and privileges but because of his personal difference — indigency — may in reality be denied the exercise of these rights or privileges. For example, all persons accused of criminal activity have the right to present witnesses in their favor, as well as to bring forth all evidence in their favor, yet the indigent’s lack of money may well prevent him from uncovering such evidence of summoning witnesses to his aid. Application of the proportional theory of equality would achieve a result in which each person accused of a crime would have the same real or actual as opposed to theoretical rights and privileges.

122. 372 U.S. at 355.
124. See, e.g., Harper v. Virginia Bd. of Education, 383 U.S. 663 (1966). In this case the Court struck down a poll tax of $1.50/person which had been levied indiscriminately on all voters. The Court declared it unconstitutional as a violation of the equal protection clause, because the tax had no relation to standards designed to promote intelligent use of the ballot and was in fact an invidious discrimination against the poor. Thus the Court outlawed a statute because of the varying effect it had on people of different income levels.
125. See, e.g., Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass.), vacated on other grounds, 348 F.2d 261 (1st Cir. 1965). The district court found that a racial imbalance, resulting from a non-discriminatory districting plan in the schools led to lower achievement levels by minorities. The court ruled that the equal protection clause was violated by this failure to provide equal educational opportunity. *Hobson v. Hanson*, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom., *Smuck v. Hanson*, No. 21,167 (D.C. Cir., Jan. 21, 1969). This court ordered the local school district to initiate compensatory programs for the disadvantaged minorities and to take positive steps to eliminate racial imbalance. The court so moved because the current policies, while not shown to be discriminatory, affected the educational opportunities of minorities in an adverse fashion.
The Court in *Griffin* and *Douglas* required that once a state, has decided to allow an appeal, it must do so in a manner that will not prejudice those without funds. Based upon the same reasoning, it seems that once a state initiates prosecution of a person this same equal protection guarantee should require that every person have an equal opportunity to maintain their innocence regardless of their financial resources. It is submitted that this argument must be answered in the affirmative.

The Allen Committee\(^\text{126}\) in their consideration of the obligation of the government to provide "equal justice" addressed itself to the same inquiry:

Duties arise from action. When a course of conduct, however legitimate, entails the possibility of serious injuries to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to the just administration of the law but which, nevertheless may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.\(^\text{127}\)

It would seem as though the Supreme Court fulfilled just such a "requirement to minimize the influence of poverty" in deciding *Griffin* and *Douglas*. Given this recent history of the Court in the criminal procedure area\(^\text{128}\) and the "requirement" to eradicate the effect of poverty in our criminal proceedings, it is submitted that the recognition of a right to aid in addition to counsel, pursuant to the demands of the equal protection clause of the fourteenth amendment, is imminent.

**C. Right To Counsel**

One of the more persuasive arguments in support of the position that an indigent accused has a right to such ancillary aid is grounded upon the provision of the sixth amendment which states that "in all criminal prosecutions the accused shall enjoy . . . the Assistance of Counsel for his defense." The Supreme Court held in *Gideon* that recog-

\(^{126}\) See note 42 supra.

\(^{127}\) ALLEN COMM. REPORT, supra note 43, at 9.

\(^{128}\) In its per curiam opinion in *Roberts v. LaVallee*, the Court reviewed its decisions in the area over the past 10 years.

Our decisions for more than a decade now have made clear that differences in the access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, e.g., *Draper v. Washington*, 372 U.S. 487 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). To interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.

tion of this right was obligatory on the states vis-a-vis the fourteenth amendment.

The assistance of counsel clause has been interpreted in both federal and state courts to mean "effective" assistance of counsel. Initially many courts narrowly interpreted this right as meaning a right to assistance by competent counsel. Subsequent decisions, however, indicate that the courts now recognize effective assistance of counsel to require more than just a competent attorney. One such case, *In re Branch*, took the position that the constitutional right to counsel contemplated effective aid in preparation and trial of the case. Similarly, in *United States v. Germany*, the court ruled that the constitutional mandate of effective assistance of counsel required that counsel be given an "opportunity" to prepare the case and that this opportunity meant more than just time. Furthermore, this court considered the funds to prepare a defense as "[a]n essential ingredient to an attorney effectively representing a defendant in a criminal case."

The critical part that pre-trial investigation plays in meeting the standard of "effective assistance" of counsel is indicated by the action of the court in *Cross v. United States*. When it came to the court's attention that the indigent defendant's attorney had neglected pre-trial investigation, the case was remanded for a hearing on the question of the effectiveness of the assistance of counsel. The belief that effective assistance of counsel requires more than just the appointment of an attorney is becoming more prevalent.

---


132. 449 P.2d 174, 74 Cal. Rptr. 238 (1969). The court stated that the attorney owes his client the duty of investigating carefully crucial defenses of fact that may be available.

133. 32 F.R.D. 343 (M.D. Ala. 1963).

134. *Id.* at 344. The court also stated that "the effective assistance of counsel" mandate required that funds for reasonably necessary travel and subsistence in preparation for trial be made available to defense counsel by the government. *Id.*


136. The attorney stated that his failure to investigate was due to the fact he had not been paid. On remand, the court was also to determine if the attorney should be dropped from the roles.

137. See, e.g., *NEDRUD, THE CRIMINAL LAW* 1968, Commentary 53 (1968), where the author pointed out that "[p]reparation and investigation aids serve to make counsel effective. Denial of effective counsel may result from counsel's lack of expert assistance. . . ." Former Attorney General Robert F. Kennedy in discussing the Criminal Justice Act of 1964 stated that the defense standard of the Act recognized that adequate representation in a criminal case involves more than an attorney alone.
The Supreme Court of New Jersey recognized the existence of a constitutional right to aid in addition to an attorney in *State v. Horton*.138 This court took the position that "[t]he Constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to a proper defense in addition to the time and professional efforts of an attorney..."139 Similarly, the State of Illinois in *People v. Watson*140 acknowledged the constitutional right of one accused of attempted forgery to be provided with a reasonable fee to hire an expert document examiner to aid in his defense.141 Furthermore, there are several other cases in which this right, though not openly declared to exist, has been nonetheless recognized by the courts’ conduct in providing auxiliary aid.142 It has been suggested that by following the rationale of the court in *Watson*, a right to funds for retaining non-legal assistance in state courts could be based upon the sixth amendment.143 The creation of such a right would not be an illogical or strained extension of *Gideon* since the existence of such aid is often essential to make the “assistance of counsel” effective.144

The constitutional right to aid in addition to counsel came one step closer to fruition with the decision of the Fifth Circuit in *Greer v. Beto*.145 The court remanded the case for further proceedings to determine if Greer had been accorded the “effective assistance of counsel” guaranteed him by the sixth amendment. Of prime consideration in the court’s eyes was the fact that Greer’s appointed counsel had failed to present any medical testimony, at his trial for burglary, on the critical issue of sanity. The court noted that this vacuum may have been caused by the fact that “Texas authorities seem to hold that an indigent defendant is not entitled to psychiatric examination at the expense of the state.”146 The court went on from there to state that “[s]uch Texas

139. Id. at 527, 170 A.2d at 9 (emphasis added).
140. 36 Ill. 2d 228, 221 N.E.2d 645 (1966).
141. This ruling seemed to be based on Article 2, Section 9, of the Illinois Constitution which states “accused shall have the right to appear and defend in person and by counsel,” but may have been based on that court’s interpretation of the federal constitution’s sixth amendment right of “assistance of counsel.” See Note, Illinois Supreme Court Announces Right of Indigent Defendant to Reasonable Fee to Hire a Questioned Document Examiner in Attempted Forgery Case, 18 Syracuse L. Rev. 880, 881 (1967).
142. See note 25 supra.
143. Note, supra note 141, at 882.
144. That such assistance is necessary to make counsel “effective” has been asserted by commentators such as Francis A. Allen who noted that:
[A]dequate defense requires provision of services in addition to those of counsel. . . . In many cases, the lawyer, however competent, cannot supply adequate representation without a pretrial investigation of his case to locate and interview witnesses, secure relevant evidence, and inform himself as to matters essential to proper cross examination. In some cases a full and proper defense will require access to experts such as psychiatrists, accountants, or other specialists.
Statement of Francis A. Allen, in Hearings, supra note 1, at 146.
145. 379 F.2d 923 (5th Cir. 1967).
146. Id. at 925. The court was referring to whether this rule had a bearing on the defense counsel’s failure to introduce any medical evidence to support the plea of
policy may not, however, avoid the federal constitutional right to the effective assistance of counsel."\textsuperscript{147} It is thus evident that this court considered the assistance of a psychiatrist as being essential to "effective assistance of counsel", in some cases, and that state policy denying such assistance would not be tolerated.

It is submitted that a fair distillation of the above cases yields the conclusion that effective assistance of counsel requires more than mere appointment of an attorney and that the trend seems to be in the direction of insuring that the indigent receives an adequate defense.\textsuperscript{148}

There has arisen within the area of constitutional law a doctrine known as the "same standards" rule. Its genesis can be traced back to \textit{Gideon}, where the Supreme Court stated:

We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.\textsuperscript{149}

That the right to assistance of counsel is of a fundamental nature and was a continuous thread running through the opinion. Less than two years later, the Court in \textit{Pointer v. Texas},\textsuperscript{150} ruled that the sixth amendment's right to confront witnesses was a "fundamental right" and obligatory on the states through the fourteenth amendment. The \textit{Pointer} Court concluded that this "right" must be "enforced against the states under the fourteenth amendment according to the \textit{same standards} that protect those personal rights against federal encroachment."\textsuperscript{151} In the recent case of \textit{Duncan v. Louisiana},\textsuperscript{152} Justice White in delivering the opinion of the Court stated:

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment’s guarantee.\textsuperscript{153}

In \textit{Duncan} the Court held that the petitioner had a right to a jury trial since he was being prosecuted for a crime which was punishable by fine and up to two years in prison. This right to jury trial in all serious

\textsuperscript{147} Id.
\textsuperscript{148} See note 137 \textit{supra}.
\textsuperscript{150} 380 U.S. 400, 403 (1965). The Court in \textit{Pointer} was very definitive in its statement of the holding:

\textit{We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.}

\textsuperscript{151} Id. at 406, citing Malloy v. Hogan, 378 U.S. 1, 10 (1964) (emphasis added).
\textsuperscript{152} 391 U.S. 145 (1968).
\textsuperscript{153} Id. at 149.
crimes was held to be a part of the sixth amendment’s guarantees and made binding on the states through the fourteenth amendment. The Court noted “that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right. . . .”\textsuperscript{154} It is important to note that the Supreme Court once again seized upon a “fundamental right” and then determined that the state courts are to apply the “same standards” for its implementation as those applied in the federal courts.

If the state courts are to be held to the “same standards” as the federal courts with respect to the “fundamental rights” of confronting the witnesses against an accused, as well as a jury trial, it seems justifiable to conclude that the “same standards” rule should likewise apply to other “fundamental rights” made obligatory on the states by the fourteenth amendment. Under this proposition the fundamental right to “assistance of counsel” in a state court should convey the same meaning it does in a federal court. The current standard for implementing the fundamental right to “assistance of counsel” in the federal jurisdictions is set forth in the Criminal Justice Act of 1964 and encompasses the collateral right to aid in addition to an attorney.\textsuperscript{155} In establishing this operating procedure for the federal courts Congress had no intention of affecting state procedures. Notwithstanding this fact, however, the Supreme Court could conceivably declare that the “same standards” rule required the states to follow the federal standard for implementing the “fundamental right” of “assistance of counsel” in state courts. In so doing, the Court might take the position that a Constitutional right to aid in addition to appointed counsel exists and that part of the federal standard is sub-section (e) of the Act which provides for such assistance.

A valid objection to this line of reasoning lies in the fact that the standard for the “assistance of counsel” in the federal courts is of legislative origin. In all of the cases to date in which the Supreme Court has applied the rule the standard imposed upon the states had earlier been proclaimed by the Court to be Constitutionally required in the federal courts. Thus the Court was merely extending an already existing constitutional requirement to the state courts to insure uniform observance of “fundamental rights”. The Court had never dealt directly with the issue of a constitutional right to aid in addition to counsel prior to the enactment of the statutory standard and the existence of said statute made the issue a moot one in federal jurisdictions. This being

\textsuperscript{154} Id. at 157.  
\textsuperscript{155} In an article in the Journal of the American Judicature Society, Robert F. Kennedy reported that:  

\textbf{[T]he bill establishes an adequate defense standard under which representation in a criminal case is recognized as involving more than a lawyer alone. It requires making available to counsel those auxiliary investigative, expert and other services frequently essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant’s case.}  
Kennedy, \textit{supra} note 137, at 182–83.
the case it is arguable that the standard, as set out by sections (b) & (e)
of the Criminal Justice Act,\textsuperscript{156} is not a true standard for the purposes
of the “same standards” rule because the Court has never proclaimed
it to be constitutionally required. Neither logic nor precedent, however,
preclude the Court from ruling that the standard set forth by the statute
is in fact what the Constitution would require the federal courts to do
in the Act’s absence. Such a determination would only come to pass in
deciding a case on appeal from a state court, the issue being moot in
federal jurisdictions, and once made the Court could employ the “same
standards” rule to require the states to abide by the constitutionally
required and statutorily promulgated federal standard in treating the
“fundamental right” of “assistance of counsel”.

D. The Nature Of The Adversary System

The judicial process itself generates one final argument in support
of the right to ancillary assistance for the accused. This country long
ago made the fundamental decision to employ the adversary process in
the adjudication of disputes because it was deemed the most effective
way of arriving at the proper decision. In order for this process to
operate effectively, \textit{i.e.}, to bring out all of the true facts and resolve the
issue based on those findings of fact, the parties must be nearly equal
in legal, investigative and expert resources.\textsuperscript{167} This equality of contending
forces is essential because the decision of the court is based solely
upon the evidence presented at the trial. Clearly, if one party is able
to thoroughly investigate the issue, employ experts to testify, and hire
an attorney; while the opposition’s poverty precludes him from all aid
except the assistance of appointed counsel, the outcome could be de-
determined, at least indirectly by the financial status of the litigants.

Today, in large measure, just such a gross inequality of parties
exists when the state prosecutes an indigent defendant.\textsuperscript{158} Furthermore,
this inequality between the prosecution and the defense tends to impair
the integrity as well as the effectiveness of the adversary system.\textsuperscript{159} It
is well recognized that in the operation of our system of criminal justice
the defense function is equally as essential as the prosecution.\textsuperscript{160} Counsel
for the impoverished must be supplied with resources comparable to
those employed by the prosecution if he is to have a chance at winning.\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{156} These sections of § 3006A provide the indigent defendant with both counsel
and other forms of aid necessary to prepare an adequate defense.
\item \textsuperscript{157} Goldstein & Fine, \textit{The Indigent Accused, The Psychiatrist, and the Insanity
Defense}, 110 U. Pa. L. Rev. 1061 (1962); Note, \textit{Right to Aid in Addition to Counsel
\item \textsuperscript{158} Trebach, \textit{New England Defender Systems: Basic Problems and Questions,
\item \textsuperscript{159} Steinberg & Paulsen, \textit{A Conversation with Defense Counsel on Problems of a
\item \textsuperscript{160} Statement of Francis A. Allen, in \textit{Hearings, supra} note 1, at 142.
\item \textsuperscript{161} \textit{Id.}.
\end{itemize}
Former Attorney General Kennedy stated "this responsibility [for the administration of justice in our courts] is not to see that the prosecution prevails, but that justice does. In the words of the epigram on a wall of my office: 'The United States wins its point whenever justice is done its citizens in its courts.'" For the poor citizens to receive justice in the courts, the mechanics of the system require that he go to court roughly comparable to the prosecution. Thus for the system to function as desired it must police itself and see that the indigent is supplied with the necessary assistance to make him a worthy opponent before the bench.

V. Conclusion

From what has been presented in this comment several fundamental conclusions can be drawn. First, an impoverished defendant, unless he is provided with assistance in addition to his attorney, is very likely to be "guilty" before he enters the courtroom. Second, most of our states do not at this time provide such aid and there is no indication they will, of their own volition, do so in the near future. Third, the Supreme Court in recent years has gone far to insure the viability of our judicial system by dictating reform in criminal procedure. Finally, the question that arises is whether such reform by the Court will continue to develop and declare a "right to aid in addition to counsel" for the impoverished defendant.

Dennis W. Alexander

162. Statement of Robert F. Kennedy, in Hearings, supra note 1, at 11.