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Indigent's Right to an Adequate Defense Expert and Investigational Assistance in Criminal Proceedings

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THE INDIGENT'S RIGHT TO AN ADEQUATE DEFENSE: EXPERT AND INVESTIGATIONAL ASSISTANCE IN CRIMINAL PROCEEDINGS

Many criminal cases find the prosecution and indigent defendant mismatched, with the indigent distinctly disadvantaged.[1] An indigent[2] charged with a serious crime is guaranteed court-appointed counsel to aid in his defense, and at one time this may have been sufficient to ensure the indigent's protection. Today, however, science, technology, and criminological specialization pervade the criminal process.[3] The state has an extensive arsenal of investigators and experts at its disposal, but the indigent defendant lacks similar resources. Without these additional services, the indigent is ill-equipped to meet the state's contentions.[4]

The inability of the indigent defendant to adequately develop a defense without expert and investigative aid is inconsistent with the espoused American fundamental of "equality before the law."[5] The government need not alleviate the accused's poverty, but neither should it allow poverty to create an imbalance in the administration

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1 Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149-50 (1960).

2 Depending on the jurisdiction, an estimated 30% to 60% of all those charged with crime are classified as indigents. *See, e.g.*, SPECIAL COMM'N TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED 80, 134-35 (1959); E. BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951); Kennedy, *Judicial Administration: Fair and Equal Treatment to All Before the Law*, 28 VITAL SPEECHES 706 (1962).

3 *See* J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, CASES ON EVIDENCE 250-51 (5th ed. 1965); Orfield, *Expert Witnesses in Federal Criminal Procedure*, 20 F.R.D. 317, 339-40 (1958). "[I]n countless suits tried every day in courts across the country, the outcome depends largely upon the testimony of an expert witness . . . ." N.Y. Times, Oct. 27, 1969, at 41, col. 1.

4 In one case described to the author, the state presented expert witnesses employed by the FBI and the state bureau of investigation to identify blood samples, hair samples, and ballistics. Police officers from five sheriffs' offices also testified for the state, as did a pathologist and four psychiatrists. The state presented 60 witnesses in all. Since there was no preliminary hearing it was impossible for defense counsel either to interview or to investigate the background of all these witnesses; most of them were seen for the first time when they were called to testify. Letter from Jack W. Floyd to the *Cornell Law Review*, Nov. 10, 1969. The difficulty of preparing an adequate defense when expert and investigational services are unavailable is suggested by the continuing requests of Legal Aid and Defender Association offices for more such services. Letter from Lewis A. Wenzell, Assistant to the Director of Defender Services, National Legal Aid and Defender Association, Chicago, Illinois, to the *Cornell Law Review*, Nov. 25, 1969.

5 *See* Chambers v. Florida, 309 U.S. 227, 241 (1940); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

of criminal justice.[6] To reduce the influence of poverty and ensure balance, the government should provide the indigent defendant with the services of investigators and experts to develop, prepare, and present his defense.

I

PRESENT STATUTORY AIDS TO INDIGENT DEFENDANTS

A. *Federal Court Practice*

The Federal Criminal Justice Act,[7] enacted in 1964, is the first significant grant of federal aid to indigents for obtaining experts and investigation facilities.[8] Under section (e) of the Act,[9] the court may authorize counsel, upon request, to obtain necessary services on behalf of defendant at a cost not in excess of 300 dollars, exclusive of reasonable expenses, for each person rendering such services. The Criminal Justice Act has been praised for its strides in granting compensated counsel to indigent defendants[10] and has been relatively effective in this respect.[11] But the provisions of the Act dealing with additional services to indigents are relatively inadequate.[12]

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6 REPORT OF ATTORNEY GENERAL'S COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 6 (1963) [hereinafter cited as ALLEN REPORT, after the chairman of the committee, Francis A. Allen].

> It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversarial system. . . . It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity.

Id. at 11. *See* the rationale of the Federal Criminal Justice Act, in 1964 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 2996. *See also* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1068 (1963).

7 18 U.S.C. § 3006A (1964).

8 Lewin, *Indigency—Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 IOWA L. REV. 458, 464 (1966). *See* Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703, 704 (1965).

9 18 U.S.C. § 3006A(e) (1964):

> 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 . . . . [A]fter appropriate inquiry . . . the court shall authorize counsel to obtain the services on behalf of the defendant. . . . The compensation to be paid to a person for such services rendered by him to a defendant . . . shall not exceed $300, exclusive of reimbursement of expenses reasonably incurred.

10 *See, e.g.*, Kutak, *supra* note 8, at 703-04; Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

11 Since its passage in 1964, the Criminal Justice Act has provided over 300,000 indigent defendants with legal counsel. Note, *supra* note 10, at 516. *See also Editorial*, TRIAL MAGAZINE, Aug.-Sept. 1967, at 3.

12 Lewin, *supra* note 8, at 471, *citing* Letter from Daniel J. Freed, Acting Director,

The Act authorizes expenses only for services "*necessary*" to an adequate defense[13] and apparently distinguishes between services to develop and present existing defenses and services needed to ascertain whether other defenses are available.[14] The latter fall outside the statutory language. Furthermore, the federal courts have been unwilling to place aid in addition to counsel on the same constitutional plane as the right to counsel,[15] and most federal courts require that additional services be demonstrated *absolutely* necessary before they will grant a section (e) application.[16] A more definite standard should be delineated, comparable to the grant of counsel, that places the reasonably necessary services of experts and investigators within the indigent defendant's reach.

The 300-dollar limitation on the compensation available to each

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Office of Criminal Justice, to the Legislative Research Center, Univ. of Michigan School of Law, March 28, 1966:

> The Department of Justice advised that in the entire country there were only 53 section (e) authorizations in the first eight months after the Act went into effect, with a total estimated cost of 13,000 dollars. Most of these authorizations were principally for factual investigations . . . .

13 Note 9 *supra*.

14 The court-appointed attorney for the accused must often go into the field to question and examine individuals possibly familiar with defendant's conduct and the crime committed, in order to learn what defenses, if any, are available. Not only is the attorney unskilled in investigative methods, but he lacks the time to expend in thorough investigation. For the problems that may arise when counsel attempts to act as his own investigator, see People v. Kennedy, 20 N.Y.2d 912, 233 N.E.2d 126, 286 N.Y.S.2d 32 (1967); Fish v. Commonwealth, 208 Va. 761, 160 S.E.2d 576 (1968).

15 In Christian v. United States, 398 F.2d 517 (10th Cir. 1968), the court declared that, although every criminal defendant financially unable to obtain counsel is entitled to the appointment of counsel at government expense, not every similarly situated defendant is entitled to appointment of an investigator or other expert services. *See also* United States v. Bowe, 360 F.2d 1 (2d Cir. 1966), in which the court held that no provision of the Criminal Justice Act authorizes a federal court to reimburse an indigent defendant's attorney for expenses incurred in preparing litigation.

Some commentators have suggested that in many cases the assistance of an expert is more important to effective representation than the assistance of counsel. *See* 1964-65 Comm. of the State Bar of Ga. on Compensated Counsel, *Assistance to the Indigent Person Charged With Crime*, 2 GA. ST. B.J. 197, 202 (1965). *See also* SPECIAL COMM'N TO STUDY DEFENDER SYSTEMS, *supra* note 2, at 58-70. For example, an indigent charged with breaking and entering may face conviction based solely on fingerprints left at the scene. In such a case, although the attorney for defendant may contest the state's allegations, only a defense fingerprint expert can establish that the prints were not defendant's.

16 *E.g.*, Bradford v. United States, 413 F.2d 467 (5th Cir. 1969). In Ray v. United States, 367 F.2d 258 (8th Cir. 1966), a forgery case, the prosecution called handwriting and fingerprint experts to testify on behalf of the state. Defendant was denied aid to obtain his own experts under § (e), on the ground that the Criminal Justice Act does not provide an indigent with any procedural rights of discovery or defenses. Since § (e) is directed toward providing procedures by which the indigent may obtain services needed for his defense, the court's interpretation appears incorrect. *See* 1964 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 2996.

expert and investigator employed by the defense[17] also impairs the Act's effectiveness. The cost of such services may exceed this figure,[18] especially in proceedings involving extensive preparation or prolonged litigation.[19] Although statutory aid to the indigent must be limited by the reasonable bounds of practicality, rigid monetary limitations may unnecessarily hamper the indigent's ability to defend. It is ironic that additional aid is not approached with the same degree of flexibility as payment of court-appointed counsel,[20] which may exceed the stated limitations if litigation is protracted. Such an adjustment to section (e), coupled with a liberal interpretation of its provisions, would do much to increase the flexibility and effectiveness of its grant.

B. *State Court Practice*

In most states the granting of aid is discretionary with the trial court.[21] Courts in some jurisdictions refuse to exercise their discretion on the ground that the payment of expert and investigative fees is a matter for legislative determination.[22] In jurisdictions in which courts exercise their discretion, additional assistance is often *seriously* considered only for capital offenses.[23] Even then, requests for assistance are not always granted;[24] some courts refuse defense requests

17 18 U.S.C. § 3006A(e) (1964).

18 The cost, exclusive of expenses, may run as high as $2,300. Letter from James Cardona, Public Defender, Providence, R.I., to the *Cornell Law Review*, Nov. 25, 1969.

19 *See, e.g.*, N.Y. Times, Oct. 27, 1969, at 41, cols. 1-4, citing fees of from $100 to $500 per day. Crowded court dockets, which often necessitate the expert's presence several times before the case is actually called, increase the fees. The expert must be reimbursed for his time even if his services are not used.

20 18 U.S.C. § 3006A(d) (1964):

> The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney . . . . [T]he compensation to be paid . . . shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, *payment in excess of the limits stated herein may be made* if the district court certifies that such payment is necessary to provide fair compensation for protracted representation . . . .

(emphasis added).

21 *E.g.*, People v. Thomas, 1 Mich. App. 118, 134 N.W.2d 352 (1965); Annot., 18 A.L.R.3d 1074, 1091-94 (1968).

22 *See, e.g.*, People *ex rel.* Connecticut v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966); People v. Thomas, 1 Mich. App. 118, 134 N.W.2d 352 (1965). "Courts have generally refused to hold, in the absence of a statute authorizing it, that defense experts should be paid by the state. The approach has been a passive one which leaves the parties as before—mismatched." Goldstein & Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1080 (1962) (footnotes omitted).

23 *See, e.g.*, State v. Horton, 34 N.J. 518, 170 A.2d 1 (1961). *But see* State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

24 *See, e.g.*, People v. Konono, 41 Misc. 2d 63, 245 N.Y.S.2d 105 (Sup. Ct. 1963) (services of a detective agency at the request of the attorney assigned to an indigent defendant charged with a capital crime are not payable from county funds). *See also* People v. Fernandez, 202 Misc. 190, 109 N.Y.S.2d 561 (Sup. Ct. 1951).

for aid unless and until the prosecution calls or indicates its intention to call experts,[25] thus precluding defendants from determining whether possible defenses are available.

At least fourteen states have legislation providing some degree of additional aid to the indigent for his defense preparation.[26] Although most of these statutes were adopted in response to the Federal Criminal Justice Act, the federal principles were often modified in the transition, making, for example, expert and other services available only in "capital cases"[27] or only to persons "accused of murder."[28] Capital cases are not the only instances in which additional aid is needed,[29] and so limiting fund allotments excludes many needy defendants.[30] The most efficient state statutes granting services other than counsel are those modeled after section (e) of the Criminal Justice Act with least modification.[31] But the limitations encountered in these statutes are similar to those in the federal statute. Rigid monetary restrictions, for example, frustrate the statutes' purpose when need exceeds the statutory limit.

To meet these objections, several states have provided that the court may fix compensation for services rendered at an amount it deems reasonable.[32] These statutes avoid the problems of a statutory

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25 *See, e.g.*, People v. Scott, 17 Misc. 2d 134, 190 N.Y.S.2d 461 (Sup. Ct. 1959).

26 CAL. EVID. CODE §§ 730-31 (West 1966); FLA. STAT. § 932.30 (Supp. 1969); ILL. REV. STAT. ch. 38, § 113-3 (1967); IOWA CODE ANN. § 775.5 (1969); MINN. STAT. ANN. § 611.21 (Supp. 1969); N.H. REV. STAT. ANN. § 604-A:6 (1965); N.Y. CODE CRIM. PROC. § 308 (McKinney Supp. 1969); N.C. GEN. STAT. § 15-5 (1966); OHIO REV. CODE ANN. § 2941.51 (Page Supp. 1968); PA. STAT. tit. 19, § 784 (1964); R.I. GEN. LAWS ANN. § 9-17-19 (1956); S.D. COMPILED LAWS ANN. § 23-2-3 (1969); TEX. CODE CRIM. PROC. art. 26.05 (1965); UTAH CODE ANN. § 77-64-1 (Supp. 1969).

Many other jurisdictions provide a court-appointed attorney with some compensation for his out-of-pocket expenses incurred in defending an indigent defendant. *See* Annot., 18 A.L.R.3d 1074, 1091 (1968).

27 *E.g.*, ILL. REV. STAT. ch. 38, § 113-3 (1967) (counsel and expert witnesses).

28 PA. STAT. tit. 19, § 784 (1964).

29 Although the defendant accused of a capital crime presents the most pressing case due to the possible punishment, there is no logic in withholding aid from persons facing lesser degrees of official sanctions. The same rationale that led to granting counsel in a broad range of cases is applicable to additional assistance. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

30 For restrictions other than the "capital" ones, see N.Y. CODE CRIM. PROC. § 308 (McKinney Supp. 1969) (funds for additional assistance available only in "relatively serious incidents"); S.D. COMPILED LAWS ANN. § 23-2-3 (1969) (additional aid restricted to post-trial proceedings).

31 *E.g.*, MINN. STAT. ANN. § 611.21 (Supp. 1969); OHIO REV. CODE ANN. § 2941.51 (Page Supp. 1968); TEX. CODE CRIM. PROC. art. 26.05 (1965).

32 CAL. EVID. CODE §§ 730-31 (West 1966); FLA. STAT. § 932.30 (Supp. 1969); N.C. GEN. STAT. § 15-5 (1966); R.I. GEN. LAWS ANN. § 9-17-19 (1956).

maximum, but they may work to deny defendant any allotment.[33] Moreover, inadequate financing may restrict the court's discretion. At present, funds are generally insufficient to finance even the cost of adequate representation programs.[34] Hence, states should move not only to enact effective additional aid legislation but should also make specific appropriations to ensure that reasonable requests for expert and investigative aid can be financed.[35]

II

CONSTITUTIONAL CONSIDERATIONS

At present the indigent defendant often lacks the tools to defend against the prosecution's contentions. When additional expert and investigative assistance are necessary to adequate representation and the opportunity to defend, such assistance may be constitutionally mandated.

A. *Due Process*

Although the Supreme Court has not addressed the issue of auxiliary assistance on due process grounds, this question has been considered by several lower federal courts. In *McGarty v. O'Brien*,[36] the court held that it is not a violation of due process to deny an indigent defendant's application for expert witnesses when reports of the state's experts are available to both prosecution and defense.[37] Since the task of experts and investigators is to procure the evidence that most strongly

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33 Letter from Jack W. Floyd, *supra* note 4.

34 *E.g.*, Letter from Edward J. Reichert, Executive Director of the Tri-County Legal Services, Berlin, N.H., to the *Cornell Law Review*, Nov. 8, 1969. Mr. Reichert noted that the funds appropriated by the New Hampshire legislature for indigent defendants generally run out half-way through the fiscal year.

35 A new provision of the New Hampshire statute adopted in 1969 states:

> Any defendant whose case is continued for sentence, or who receives a suspended sentence . . . may be ordered by the court to repay the state . . . all of the fees and expenses paid on his behalf on such terms as the court may order . . . .

N.H. REV. STAT. ANN. § 604-A:9 (1969). Such a provision may somewhat alleviate the financial burden on states that provide indigents with additional defense services.

36 188 F.2d 151 (1st Cir. 1951).

37 *See also* United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951):

> The same argument that would entitle [defendant's lawyers] to psychiatric consultation would entitle them 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.

Id. at 547.

bolsters their client's position, however, it seems that defendant should be given the opportunity to present his own evidence.[38]

Even if due process did not require that additional assistance be given an indigent in 1951 when *O'Brien* was decided, concepts of due process change.[39] "[A]s civilization progresses our ideas of fundamental fairness necessarily enlarge themselves."[40] More recent cases emphasizing the expanded notion of "fundamental fairness" in treatment of indigent defendants[41] suggest that federal courts would favor state-compensated experts and investigative services.[42] *Douglas v. California*,[43] although conceding that absolute equality was not required among all defendants, emphasized that due process demands that the concept of fair trial for indigents not be reduced to a "meaningless

38 Letter from William J. Ciolka, Public Defender of Poughkeepsie, N.Y., to the *Cornell Law Review*, Nov. 6, 1969. In a murder case in which defendant was represented by a court-appointed attorney, state police fingerprint experts testified that a latent print lifted from the crime's scene was defendant's by demonstrating 14 points of similarity. Defense was able to procure its own expert who proved three crucial points of dissimilarity. An acquittal followed. *Id.*

39 "[W]e have never . . . restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1969) (dictum).

40 United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 560 (3d Cir. 1951) (dissent of Biggs, C.J.). *See* Note, *supra* note 6, at 1070. This dissent in *Baldi* had previously pointed out that

> [t]he requirement[s] of due process . . . would not be met by the appointment of a layman as counsel. The appointment of counsel for a deaf mute would not constitute due process of law unless an interpreter also was available. Nor, in our opinion, would the appointment of counsel learned in the law fulfill the requirement of due process if that counsel required the assistance of a psychiatrist in order to prepare an insane client's defense.

192 F.2d at 559.

41 Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). For an explanation of the fundamental fairness doctrine of due process, see Rochin v. California, 342 U.S. 165, 169 (1952). Due process of law is a constitutional guarantee respecting personal notions of fairness "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1935).

42 In Bush v. Texas, 372 U.S. 586 (1963), the Supreme Court nearly had an opportunity to review the decision in *Baldi*, but the state decided to re-try the case. The Court's decision to re-examine its position after Griffin v. Illinois, 351 U.S. 12 (1956), and Gideon v. Wainwright, 372 U.S. 335 (1963), suggests that it might have granted additional services in *Bush*. For an indication of such an attitude, see United States v. Brodson, 241 F.2d 107, 111 (7th Cir. 1957) (dissent of Duffy, C.J.), in which the defense argued that expert accounting assistance was necessary for effective preparatiou. The assistance was denied, and the dissent argued that such denial "violates those canons of decency and fairness to which any defendant in a criminal case is entitled under the Fifth and Sixth Amendments of the Constitution . . . ." *Id.* at 111-12. *But see* Feguer v. United States, 302 F.2d 214 (8th Cir. 1962), in which the court stated that, although the right to call expert witnesses was fundamental, "this right does not necessarily include the payment by the government of the expenses of witnesses." *Id.* at 241.

43 372 U.S. 353 (1963).

ritual."[44] Defendant's poverty may make his attempts at defense so ineffective that to deny him necessary additional assistance is to deny him the basic foundation of a fair and equitable proceeding.[45] In addition, an opportunity to prepare a defense is no less essential to the indigent defendant in many situations than is the opportunity to prepare an appeal,[46] which has been deemed an essential element of fundamental fairness.[47]

B. *Equal Protection*

In *Griffin v. Illinois*,[48] the Supreme Court considered the impact of poverty on constitutional rights under the equal protection clause. The Court held that a state may not deprive indigent defendants of adequate review of alleged trial errors solely because of their inability to pay the cost of a necessary transcript.[49] There is no "rational relationship" between an individual's ability to pay costs and his guilt or innocence,[50] and discriminations based on poverty violate equal protection.[51]

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44 *Id.* at 357. The Court stated that

> [a]bsolute equality is not required; lines can be and are drawn and we often sustain them. . . . But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Id. (emphasis by the Court, citations omitted). *See also* Draper v. Washington, 372 U.S. 487 (1963), concerning state denial to an indigent defendant of a transcript on appeal. The Court declared that "the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." *Id.* at 496.

45 ALLEN REPORT, *supra* note 6, at 45-46. One of the assumptions of the adversary system is that defendant's attorney will have at his disposal the essential means and elements to conduct an effective defense. Failure to provide such services "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." *Id.* at 46.

46 *See* 32 MO. L. REV. 543, 549 (1967).

47 *See* Douglas v. California, 372 U.S. 353 (1963).

48 351 U.S. 12 (1956). *See* Wilcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957).

49 "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19. *See*, however, the dissent of Justices Burton and Minton: "The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws." *Id.* at 29.

50 *Id.* at 17-18. The Court in *Griffin* stressed the theory of a "rational relationship:" "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Id.*

51 *Id.* at 17. *See also* Smith v. Bennett, 365 U.S. 708, 714 (1961), where the Supreme Court indicated that the policy of the equal protection clause is such that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."

On the reasoning of *Griffin* and its progeny, for the states to disallow necessary expert and investigative services to the indigent *as such* is a prohibited discrimination between "rich" and "poor" in the application of their laws. There is a blatant disparity in the consequences of state action for rich and poor when an indigent defendant, who would have been found innocent had he had the necessary funds to procure expert witnesses or investigative assistance, is found guilty.[52] The *Griffin-Douglas* doctrine, considered with respect to preparation of an adequate defense, seems to require at least that a state provide additional assistance at the trial level if that assistance is necessary to presenting a defense.[53]

C. *Effective Assistance of Counsel*

The guarantee of additional services to indigent defendants may also be premised on the sixth amendment right to the assistance of counsel for one's defense.[54] The right to counsel requires the "effective" assistance of counsel.[55] As early as 1932 the Supreme Court asserted that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[56] The word "effective" sets forth no concrete standard but rather connotes the state of being capable of bringing about an effect; *i.e.*, equipped and ready for service.[57] The defendant's attorney is incapable of giving

52 Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 405 (1964).

53 *See* Y. KAMISAR, F. INBAU, & T. ARNOLD, CRIMINAL JUSTICE IN OUR TIME 93 (1965). Providing this minimum assistance would not elevate the indigent defendant above others in the states' system of criminal procedure, but would merely place him on the level occupied by most individuals.

54 For valuable commentary on the indigent's right to counsel, see W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1965); D. FELLMAN, THE DEFENDANT'S RIGHTS 112-17 (1958); Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1958); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962); *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961). Assistance of counsel in criminal proceedings is applicable to states under the fourteenth amendment. Gideon v. Wainright, 372 U.S. 335 (1963). *See* Note, *supra* note 6; 32 Mo. L. REV. 543 (1967).

55 "[T]he constitutional requirement of representation at trial is one of substance, not of form. . . . Due Process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render . . . reasonably effective assistance.'" Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962) (footnotes omitted), *quoting* Makenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961).

56 Powell v. Alabama, 287 U.S. 45, 71 (1932).

57 For a general notion of what is meant by "effective counsel," see Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

effective aid unless many services available to the prosecution are also at his disposal.[58] The sixth amendment does not demand a favorably conclusive defense for the indigent, but effective assistance does require that each defense in the defendant's favor should be sought out, efficiently prepared, and adequately presented. If the "assistance" of the sixth amendment guarantee is emphasized in conjunction with the necessities of *effective* representation, the concomitant services of experts and investigators must be supplied.[59]

D. *Compulsory Process*

The sixth amendment further declares that the accused shall have "compulsory process for obtaining witnesses in his favor."[60] Initially, compulsory process to obtain witnesses may have meant merely the right to call directly involved laymen to the stand to testify for the defense. But as the science of criminology has developed, the state's contentions are increasingly founded on the testimony of skilled specialists.[61] If the defense is to meet such contentions, it must frequently call its own competent expert witnesses, who often require extensive pretrial efforts in order to arrive at their conclusions. Furthermore, investigators are frequently necessary to seek out lay individuals who are competent to testify on defendant's behalf. If the defense is unable to determine who its witnesses are, the right to call such individuals becomes of little value.

The compulsory process clause does not guarantee the favorable determination of possible defense contentions. In addition, there is an admitted difference between the right to call witnesses and the right to have the government pay for them. Expert witnesses and investigators, however, cannot be compelled to serve or testify without compensation.[62] If the indigent is without funds to compensate expert witnesses, investigators needed to find lay witnesses, or experts and investigators needed to make effective use of witnesses he has, the doctrine of compulsory process may be reduced to little more than the "sterile issuance of a paper."[63] Lack of funds could in reality prevent an indigent defendant from offering a defense. Although no Supreme Court decision has yet changed the rule to require state compensation

58 *See, e.g.*, State v. Hancock, 164 N.W.2d 330 (Iowa 1969), where defendant was accused of forgery but was denied services of a handwriting expert, even though the state had given notice that its evidence consisted basically of similar expert testimony.

59 *See* Note, *supra* note 6, at 1072.

60 U.S. CONST. amend. VI.

61 *See* note 3 *supra.*

62 *See* Annot., 77 A.L.R.2d 1182 (1961).

63 32 MO. L. REV. 543, 545 (1967).

of expert testimony or investigate evidence, *People v. Watson*[64] declared that production of compensated expert witnesses for indigents was constitutionally fundamental.[65] "[A]lthough the defendant is afforded the shadow of a right to call witnesses, he is deprived of the substance."[66] It is this substance that the indigent lacks. Funds for investigation to procure witnesses, for expert preparation, and for expert testimony must be deemed as realistically coming within the confines of a substantive theory of compulsory process.

E. *Confrontation with Witnesses*

The fundamental right of the accused "to be confronted by the witnesses against him"[67] guarantees not only the right of the accused to hear witnesses testify against him but also the right *effectively* to cross-examine them.[68] Cross-examination of lay witnesses is a valuable tool to defendant and can often separate hearsay from knowledge, error from truth, opinion from fact, and inference from recollection.[69] To become sufficiently familiar with the case to prepare an effective cross-examination, defense counsel may require investigative assistance.[70] Defense counsel must also be adequately prepared to examine adverse expert witnesses. This requires some knowledge of the potential subjects of expert evidence in the case. The attorney may extensively research the specialized areas of his case, but he often needs

64 36 Ill. 2d 228, 221 N.E.2d 645 (1966).

65 *Id.* at 233, 221 N.E.2d at 648.

66 *Id.*

67 U.S. CONST. amend. VI. This right is applicable to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).

68 *See* United States v. Barracota, 45 F. Supp. 38 (S.D.N.Y. 1942).

69 Cross-examination is the tool by which the attorney can correctly ascertain the order of events, the time and place they occurred, and the attending circumstances. The Ottawa, 70 U.S.(3 Wall.) 268, 271 (1865). *See also* Alford v. United States, 282 U.S. 687 (1931):

> [Cross-examination's] permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood . . . ; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment . . . ; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.

Id. at 691-92.

70 Preparation for an effective cross-examination requires full knowledge of the case, the issues involved, and the witness's background, including his address and occupation, his interest in the case, his prejudice, if any, his relation to the parties and counsel, and, most particularly, all his prior statements and testimony concerning the case. Counsel should also know whether the witness has a criminal record, has a charge pending against him, or is involved in any pending civil litigation . . . .

L. FRIEDMAN, ESSENTIALS OF CROSS-EXAMINATION 16 (1968).

expert advice. The value of cross-examination is questionable if defense counsel is not armed with background material derived from pretrial investigations of the surrounding circumstances and expert consultation on the technical facets of these circumstances.[71] Expert assistance and investigative preparation therefore seem necessary to preserve "the defendant's . . . right to a fair trial as affected by his right *meaningfully* to cross-examine the witnesses against him."[72]

III

Adequate Defense Services for Indigents

Extending aid to indigent defendants to cover expert and investigative services is arguably required by constitutional doctrine; certainly the practical necessities of preparing an adequate defense at least justify such an extension.[73] Both the constitutional and the practical justifications for additional aid to indigents, however, may be opposed by arguments of "over-extension." But every principle of law that is carried as far as needed creates debate: "[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law."[74]

The decision to implement various forms of additional-services aid must balance the cost to the state against the significance of the inequality affecting the indigent defendant's constitutional rights.[75] As the sums requested by the indigent for procuring additional services increase, some scale of priorities will have to be established to determine how much assistance must be made available. Several considerations will be pertinent in determining the degree of aid to be granted in a particular case. The complexity of the issues in the case should be evaluated in conjunction with the severity of the possible penalty, as should the likelihood of defendant's presenting a meaningful defense without the aid. What the prosecution is expending on the case and the range of expenditures made by defendants of means

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71 Allen Report, *supra* note 6, at 12-57.

72 United States v. Wade, 388 U.S. 218, 227 (1967) (emphasis added).

73 This need was well formulated in a letter from Lewis A. Wenzell, *supra* note 4. Responses to a questionnaire sent to all Defender Association member offices indicated that defender offices would use experts slightly over three times as often as they now use them were such services "readily available."

74 Irwin v. Gavit, 268 U.S. 161, 168 (1925) (Holmes, J.).

75 *See* W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 395-96 (1914): "In the twentieth century, as in the thirteenth, justice cannot be had for nothing . . . ."

in like cases should also be relevant in determining the indigent's reasonable requirements for additional services.[76] Flexibility is an asset in a system of auxiliary services, and thus no exact line should be drawn. The most reasonable formula is to provide services and facilities at public expense to the extent that a refusal of funds in a particular case will work undue hardship on the defendant. The harm to the indigent caused by a denial of aid must outweigh the economic good to the state resulting from a refusal. If a crime is serious enough to require court appointment of an attorney, then it is serious enough to require provision that the appointment be effective.

The United States, which prides itself on notions of equality and progressiveness, lags behind other countries in providing funds for an indigent's effective defense. Great Britain provides nationwide payment of expenses for expert witnesses and investigation.[77] The Swiss mandate that "all are equal before the law" has resulted in a variety of services in addition to counsel being made available to all indigents.[78] The broadest programs of aid in criminal cases are those of the Scandinavian countries: in addition to receiving a court-appointed attorney, every criminal defendant, regardless of financial status, may make use of government laboratories, expert testimony, and investigation at government expense.[79] The Supreme Court should take note of these systems and expand its own constitutional mandate to include auxiliary aid to indigents.[80]

Even if directives are given by state or federal courts, effective assistance can be provided only by adequate state legislation. An excellent model is New Hampshire's statute, which provides that inves-

76 Note, *supra* note 52, at 414. *See also* sources cited in note 8 *supra*.

77 *See* The Euglish Legal Aid and Advice Act, 12 & 13 Geo. 6, c. 51 (1949), which makes possible state compensation for expert witnesses and investigation acquired in conjunction with an indigent defendant's trial preparation. The pauper selects counsel from a list of attorneys who have volunteered their names, and the attorney is paid 85% of the recommended fee out of a legal aid fund supported by Parliamentary appropriation. *See generally* Note, *Proceedings in Forma Pauperis*, 9 U. FLA. L. REV. 65, 73 (1956); Note, *The British Legal Aid and Advice Bill*, 59 YALE L.J. 320 (1950).

78 *See* Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940, 942-44 (1940); Note, *supra* note 52, at 413.

79 *See* United States v. Johnson, 238 F.2d 565, 573 (2d Cir. 1956). *See also* comments on the Scandinavian practice in J. FRANK & B. FRANK, NOT GUILTY 87 (1957).

80 The plan should provide for investigatory, expert, and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following conviction.

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tigators, experts, and services necessary to an adequate defense may be obtained in any criminal case in which counsel has been appointed.[81] Upon application, the court will authorize counsel to obtain necessary services, but if timely procurement of services cannot await prior authorization, they may still be approved by the court after they have been obtained.[82] Court determination of reasonable compensation protects against excessive requests for funds. The court's determination is based upon a number of objective considerations, such as time expended, the nature of the services rendered, and the standard fees for similar services. And the maximum payment figure of 300 dollars exclusive of expenses reasonably incurred for each person rendering services may be increased when necessary.

The New Hampshire statute provides the indigent defendant with the tools needed to prepare and present an adequate defense. Substantive equality is the minimal condition that must exist to maintain the notion of fair and equitable trials, and the availability of experts and investigative aid is fundamental to that substantive equality. Only through comprehensive statutes such as New Hampshire's can these premises of our adversarial system be preserved.

Craig Bowman

81 N.H. REV. STAT. ANN. § 604-A:6 (1965).

82 The difficulties that time limitations and deadlines impose can be detrimental to the indigent in need of additional trained services. *See, e.g.*, Letter from William J. Ciolka, *supra* note 38, noting that the defense has available neither government laboratories nor experts but must purchase expertise on the market place. If this must be done during the trial the defense is in difficulty, since good experts are booked well in advance. Further, the people's experts test fresh exhibits; if the defense must wait for additional services, the exhibits may be so old that it will be impossible to get sufficient reactions for a classification.