Poverty and Criminal Justice

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From the beginnings of recorded time, when tribes and kindreds of men began to strive for what they considered to be the good life, we can find evidence tracing man's quest for equality, particularly equality before the law. The demand for equal legal treatment has always been a deeply felt necessity of the Anglo-Saxon world. The noble ideal of equal justice for rich or poor is fundamental; it underlies American legal institutions, and permeates our folklore. For example, the symbol of Themis, the goddess who balances the scales of justice without regard to person, typifies the American ideal of equal justice for any accused. This ideal, however, must confront, and not blanch, at the reality implicit in the satirical words of Anatole France: "The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread—the rich as well as the poor."

A conflict of the ideal of equality with reality exists today. Although our society has been characterized as affluent, there exist many citizens for whom reasonable legal fees appear unreasonable or impos-

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1 The doctrine of legal equality germinated at least as early as the teachings of Aristotle and Confucious. See, e.g.: "... [P]olitical justice ... is found among men who share their life with a view to self-sufficiency, men who are free and either proportionately or arithmetically equal, so that between those who do not fulfill this condition there is no justice...." Aristotle, Nichomachean Ethics V, 6; McKean, Basic Works of Aristotle, 1013 (1941) and "The magistrate ... is the guardian of justice, and, if of justice, then of equality also...." Id. at 1201. And see the Works of Mencius, VI, 1, 7 quoted in McIver, Great Expressions of Human Rights 25 (1950).

2 The Magna Carta declares that "To no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta, cap. 40 (1215), and see Thompson, Magna Carta 365, 380 (1948), and McKechnie, Magna Carta 127, 395-98 (1914). By Bradton's time it was accepted that the poor should have their writs handled for nothing. Pollock & Maitland, History of English Law 195 (2nd ed. 1909), and see Smith, Justice and the Poor 3 (1919).

3 E.g., see The Declaration of Independence; "We hold these truths to be self-evident, that all men are created equal ...", or consider: "... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. However, one recent book observes that this ideal is frequently observed in the breach; see, Gershenson, The Bench Is Warped: Equal Justice Under the Law? (1963).
sible. For example, in addition to welfare recipients, almost one-fifth of the families, having nearly one-fourth of the children, have "incomes below the taxable limit under present federal income tax laws—that is, less than $1,325 for a mother and child and less than $2,675 for a married couple with two children and $4,000 for a family of six." On the other hand, the urban family "in the $10,000-plus income class consumes eight times the dollar value of all goods consumed by the under $1,000-income class, four times as much as the $2,000-$3,000 class, and twice as much as the $5,000-$6,000 class." Thus, those who live below the poverty line provide the proving ground with which to test the genuine realization of the American ideal of equal justice for every accused.

It has long been known that poverty plays an important role in the direct administration of the criminal law. It plays a role at the arrest stage, but its influence can better be seen at the bail stage. If an

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4 For December 1960, the Social Security Administration reported the following totals (rounded): old age assistance (OAA)—2,332,000 persons; aid to the blind (AB)—107,600 persons; aid to dependent children (ADC)—806,300 families (2,378,200 children); aid to permanently and totally disabled (APTD)—374,000 persons; general assistance (GA)—431,000 families. See Current Operating Statistics, 24 Social Security Bull. No. 4, Tables 21, 22, 23, 24, 25, pp. 38-40 (April 1961).

5 Epstein, Some Effects of Low Income on Children and Their Families, 24 Social Security Bull. No. 2, p. 12 (Feb. 1961). In 1947, 60% of all defendants—97,000 in serious criminal cases—were financially unable to employ counsel. Brownell, Legal Aid in the United States, 83-4 (1951) and 12-3 (Supp. 1961).


7 In 1904, Robert Hunter concluded that 10,000,000 Americans lived in poverty, and, in 1906, J. A. Ryan found that at least 60 percent of American male wage earners received less than $600 per year. For discussion see Bremner, From the Depths: The Discovery of Poverty in the United States 151-56 (1956). In 1954, about eight million families had incomes of $2,000 or less, and one family out of every eleven had an income of $1,000 or less. About 2/3 of the low income families are non-farm families with their prime source of money being wage earnings. About 4,800,000 people live alone and have incomes less than $1,000 per year. These data are taken from a Message of the Governor of the State of New York and are reported in Willcox and Blaustein, The Griffin Case, 43 Cornell L.Q. 1, 4, note 17 (1957), and see also, Harrington, The Other America: Poverty in the United States (1962) who estimates that, "The poor in America constitute about 25 percent of the total population. They number somewhere between 40,000,000 and 50,000,000, depending upon the criterion of low income that is adopted." Id. at 190. On the poverty standard see Snyder, A Method of Identifying Chronic Low Income Groups From Cross-Section Survey Data, 23 Studies in Income and Wealth 333 (1950).

8 McKay, Poverty and the Administration of Criminal Justice, 35 U. Colo. L. Rev. 323 (1963). Indeed, it seems to play a significant role in the crime of vagrancy. See Lacy, Vagrancy and Other Crimes of Personal Condition, 66 Harvard L. Rev. 1203 (1953). Poverty also plays a role in selecting those persons who will suffer capital punishment. Consider the words of Lewis E. Laws, long a warden of Sing Sing prison: "In the twelve years of my wardenship I have escorted 150 men and one woman to the death chamber and electric chair. In ages they ranged from 17 to 63. They came from all kinds of homes and environments. In one respect they were all alike. All were poor, . . ." Laws, Twenty Thousand Years in Sing Sing 302 (1932).
arrested person can produce money sufficient for bail, then he is free to continue earning funds to hire an attorney, to locate witnesses or to finance an investigation of his case. But those indigent accused, who do not possess funds sufficient to make bail,9 not only cannot undertake these steps, but additionally:

They must consult court-appointed counsel not in the privacy and convenience of an office but in jail. The defendant enters court in the company of a guard, a fact not lost to jurors. If convicted, he is unable to point to employment and good conduct while on bail as grounds for probation; if found not guilty he has needlessly suffered the degradation of jail and his family has been punished as well. There is good ground for suspecting that the outcome of his case, as to both judgment and sentence, is materially influenced by whether he is in jail or on bail.10

This situation calls for solution; it touches the very wellsprings of balance within our adversary system and questions an even-handed administration of American criminal justice.

On March 18, 1963, the United States Supreme Court dealt with several aspects of the role that poverty plays in the criminal law processes. On that day, the Court handed down six cases; they dealt with an indigent's right to counsel at trial and on appeal, an indigent's right to a transcript on direct and collateral appeal, and with the role of the United States district courts in habeas corpus proceedings. These are historic cases, and no individual can fathom all their ramifications. Yet, there can be no doubt that through these cases the United States Supreme Court has contributed mightily to our collective attempts to realize our national aspirations of democratic government under law, and to our ideal of equal justice for every accused. The common thread knitting these decisions into a coherent and consistent constitutional policy is a deep and uniform respect for human dignity which is the nourishment necessary to the true meaning of freedom.11 This latter consideration, and the extent of its social reali-

9 A comprehensive study of the New York City municipal courts showed that in 1958, 51 percent of all defendants did not post bond. Note, A Study of the Administration of Bail in New York City, 106 U. PA. L. Rev. 693, 707 (1958). A field study of the metropolitan courts of Philadelphia showed that where bail is set by the court, 75 percent of all defendants charged with serious crimes were held in jail from time of arrest until trial. Note, Compelling Appearance in Court, 102 U. PA. L. Rev. 1031, 1048 (1954), and see Note, Bail: An Ancient Practice Re-examined, 70 YALE L.J. 966, 970 (1961).

10 Ares & Sturz, Bail and the Indigent Accused, 8 CRIME AND DELINQUENCY 12, 15 (1962), and see also, The Attorney General's Committee on Poverty and the Administration of Criminal Justice, Report, Bail and Pre-Trial Release, 58-90 (1963).

11 See Kadish, Methodology and Criteria in Due Process Adjudication, 66 YALE L.J. 319 (1957).
zation, fundamentally sets us apart from all totalitarian countries. The purpose of this article is to review these six cases, to place them in a context and to comment on some of their many implications.

TRANSCRIPTS AND INDIГENT CRIMINAL APPEALS

The history of Anglo-American legal practices reveals that the right, of either defendant or prosecutor, to appeal a criminal case is a right of comparatively recent origin. This innovation is, today, so much a necessary and appropriate part of the administration of criminal justice that it has become commonplace, and its recent beginnings are occasionally forgotten. For it was only in 1879 that Congress first authorized the circuit courts of appeal to issue writs of error in criminal cases, and then solely on a discretionary basis. In 1907, Great Britain enacted the Criminal Appeal Act, and placed the English criminal appeal on its current foundations. The historical situation has varied among the several states. In Washington, the right to appeal a criminal case has been secured by the state constitution since 1889. This right can, of course, be waived. And, although the right is constitutionally guaranteed, the Washington legislature can prescribe reasonable, but mandatory, procedures for its exercise, so long as they do not infringe upon constitutional rights of the litigants.

Although the criminal appeal is a modern innovation, nevertheless, it is an integral and indispensible part of the total criminal law process. As a judicial technique it serves as the medium through which an even-handed administration of criminal justice can be assured, and, perhaps, made more humane. In addition, the criminal appeal serves as an important, albeit fallible, protection against mistakes and

12 An earlier version of this paper was presented at the Fifth Annual Pacific Northwest Seminar of Appellate and Trial Court Judges, held at the University of Washington, Seattle, Washington, July 10, 1963.
14 7 Edw. VII, c.23 (1907).
15 "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases...." Wash. Const. art. I, § 22 and Wash. Const. amendment X.
16 See State v. Eckert, 123 Wash. 403, 212 Pac. 551 (1923).
17 See In re Mason, 42 Wn.2d 610, 257 P.2d 211 (1953); State v. Gundlach, 36 Wn.2d 918, 221 P.2d 502 (1950), and State v. White, 40 Wash. 428, 82 Pac. 743 (1905).
18 Note the perceptive words of Judge Hale: "Through the centuries, it has been the goal of the courts, law teachers and lawyers to create and maintain forums where only the truth will emerge. That this goal from time to time has not been reached goes without saying. Being institutions created by and conducted by people, the courts are subject to the same imperfections which people are heir to. . . . Because witnesses, jurors, lawyers and even judges bring with them into the courtroom all of the physical, emotional and intellectual qualities—differing one from the other in a thousand ways—which go to make up the total human personality, it is likely that reactions to the
abuses in lower court proceedings which can lead to improper convictions of persons who have been charged with committing crimes. The overall significance of the criminal appeal can easily be seen from statistics. For example, in the federal system almost twenty percent of the criminal cases appealed from 1958 to 1962, to the court of appeals resulted in reversals of the lower federal court. The percentages of reversals are greater in some of the states, including Washington. Given these facts, it is obvious that ready access to appellate review by convicted defendants, whatever their financial status, is an essential ingredient in the proper administration of criminal justice.

Unquestionably, appellate review of criminal convictions is important and fundamental. However, there is no decision of the United States Supreme Court holding that a convicted defendant has a constitutional right to appeal a criminal case. To the contrary, that Court, in an early case, held that "a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law." This is a flat statement, but it should not be read as implying that the United States Constitu-

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same situations will vary in different individuals." State v. Swenson, 382 P.2d 614, 627 (Wash. 1963). For corroboration of Judge Hale's view, see FRANK & FRANK, NOT GUILTY (1957); BORCHARD, CONVICTING THE INNOCENT (1932); Pollak, The Errors of Justice, 284 ANNALS 115 (1952), and Hirschberg, Wrongful Convictions, 13 ROCKY MT. L. REV. 20 (1940).


20 From 1887 to 1922, something less than 15 percent of criminal appeals in New York were successful. Rep. N. Y. Crime Comm. 45 (1927). In California, from 1900 to 1926, the percentage ranged from 12.6 percent to 22.5 percent. See Vernier and Selig, The Reversal of Criminal Cases in the Supreme Court of California, 2 So. Cal. L. REV. 21, 26 (1928). From 1907 to 1912 the following percentages of reversals were obtained in courts of appeal in criminal cases: Wisconsin 30 percent, Michigan 31 percent, Massachusetts 23 percent, New Hampshire 22 percent, Kansas 20 percent, South Dakota 30 percent, California 20 percent, Georgia 16 percent. 3 J. CRIM. LAW & CRIMINOLOGY 569 (1913). In Ohio for the period July 1, 1930, to December 31, 1930, 22 percent of criminal cases appealed were reversed. HARRIS, APPELLATE COURTS AND APPELLATE PROCEDURE IN OHIO 86 (1933). The Librarian of the Institute of Judicial Administration, Inc., has supplied us with the following figures: In Connecticut, in 1954, 17 percent of criminal convictions appealed were reversed; in Kansas, for the years 1952-1953, 12 percent of the criminal convictions were reversed; in Kentucky, in 1954, 23 percent were reversed; in Washington, in 1952, 13 percent were reversed, and in 1953, 25 percent were reversed; in Wisconsin, in 1952 and 1953, the percentage of reversals was 49; and in New York County for the years 1946 through 1948, the percentage of reversals was 17.4. See brief for petitioners in Griffin v. Illinois, 351 U.S. 12 (1956) (No. 95, Oct. Term, 1955, Sup. Ct. of the U.S. at p. 25, footnote 6, et seq.).


22 Id. at 687. "Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments." Per Mr. Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12, 21 (1956) (concurring opinion).
tion fails to apply to state criminal appeals. Neither the fact that a state may deny the right of appeal entirely, nor the authority of a state to make appropriate classifications, enables a state to impose burdens on appellants in criminal cases which have no relation to a rational state policy governing criminal appeals. This much was made clear in 1915 when the Supreme Court held that "where... an appeal is provided... the proceedings in the appellate tribunal are to be regarded as part of the process of law under which [a defendant] is held in custody by the State...." This latter view is the traditional one and accounts for the Court's historic role of correcting certain unconstitutional dispositions made by some state appellate courts.

In recent years, significant constitutional controls over the criminal appeal processes of both state and federal systems have evolved. Nevertheless, a complete statement of the relevant constitutional criteria remains to be expressed by the United State Supreme Court. Yet, one of the more important cases, stating a dynamic constitutional principle, is *Griffin v. Illinois.* It turned on an interpretation of the fourteenth amendment, and hence, directly binds only the states. Even so, the principle there announced is so basic to the fabric of criminal law administration that *Griffin* has come to be equally relevant to the criminal law processes in the federal courts. A consideration of that case is in order.

Griffin and Crenshaw, two indigent petitioners, were convicted of armed robbery in the criminal court of Cook County, Illinois. Immediately thereafter, they moved the trial court to supply them, without cost, a certified copy of the entire trial court proceedings because they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal. . . ." They contended that failure to provide these materials would violate the due process and equal protection

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24 See, e.g., Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951) (prison rules prohibited prisoners from pursuing their appeals because they denied prisoners the right to file petitions in court), and Cole v. Arkansas, 333 U.S. 196 (1948) (state court affirmed a conviction under a statutory section different from the one charged in the information and submitted to the jury).
27 *Griffin v. Illinois,* 351 U.S. 12, 13 (1956). In oral argument, the Illinois Attorney General candidly, and appropriately, admitted that "there isn't any way that an Illinois convicted person in a non-capital case can obtain a bill of exceptions without paying for it." *Id.* at 14, note 4. Indigent defendants who had been sentenced to death were the only ones entitled to a free transcript. Ill. Rev. Stat. c. 38, § 769(a) (1955).
clauses of the fourteenth amendment. Under Illinois practice, it was a necessary condition for jurisdiction that a defendant, who sought full appellate review by writ of error, must first furnish the appellate court with a bill of exceptions or a report of proceedings at the trial which had been certified by the trial judge. Thus, the transcript of the trial court's proceedings was essential to a bill of exceptions. Otherwise, review would have been limited only to those errors appearing on the face of the "mandatory record," the latter consisted of the indictment, arraignment, plea, verdict and sentence. Such partial review would have precluded an appeal of all trial errors such as mistakes in jury instructions or mistaken admissions of evidence, etc. The trial court denied petitioners' motion for a transcript without holding a hearing.

Griffin and Crenshaw then filed a petition under the Illinois post-conviction act which restricted court consideration exclusively to constitutional questions. Arguing that they had been denied due process and equal protection of the laws, the petitioners alleged that their original trial contained reversible, but non-constitutional errors, such as erroneous admissions of evidence, and that the only impediment to full appellate review and subsequent reversal was their lack of money with which to buy a transcript. The allegations of reversible non-constitutional errors were not denied. This petition was dismissed without a hearing, and the Illinois supreme court, without formal opinion, affirmed on the sole ground that the petition presented no substantial constitutional question.

By a vote of five to four, the United States Supreme Court reversed.

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28 See Ill. Rev. Stat., c. 110, § 259.70 A (1953) (Supreme Court Rule 70 A), and Ill. Rev. Stat., c. 110, § 101.65 (1955) (Supreme Court Rule 65).
29 I use the term "transcript" throughout this article to include both the statement of facts elicited during the trial and the paper record of the filed pleadings. This usage differs from Washington practice which is unique, and not in accord with the more common usage found in other states. Washington practice refers to copies of the various documents which have been filed with the clerk of the trial court as the "transcript of the record," see Rule 44 of the Rules on Appeal, and to the court reporter's reproduction of the trial proceedings as the "statement of facts," see Rule 35 of the Rules on Appeal.
30 See Griffin v. Illinois, 351 U.S. 12, 16 (1956). "A complete bill of exceptions consists of all proceedings in the case from the time of the convening of the court until the termination. It includes all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record." People v. McKinley, 409 Ill. 120, 124-5, 98 N.E.2d 728, 730 (1951).
31 See People v. Loftus, 400 Ill. 432, 81 N.E.2d 495 (1948); Cullen v. Stevens, 389 Ill. 35, 58 N.E.2d 456 (1945), and Speck, A Study of the Illinois Supreme Court, 15 U. Chi. L. Rev. 107, 125 (1947).
34 Id. at 15.
Technically, there is no opinion of the Court. Mr. Justice Black announced the Court's judgment and filed an opinion, concurred in by three other Justices, Messrs. Clark, Douglas and Mr. Chief Justice Warren, while Mr. Justice Frankfurter wrote a special concurring opinion. Nevertheless, it seemed clear then, and subsequent events have unequivocally shown, that the Court had approved at least this simple proposition: If a state has provided a scheme for criminal appeals, then the equal protection clause, and perhaps the due process clause of the fourteenth amendment, prevent that state from denying appellate review to indigent defendants solely on the ground of their poverty, when they lack money to purchase a transcript of the trial court's record and when the filing of such a transcript is made a condition precedent to their obtaining full appellate review. Stated another way: If a state desires to follow an appellate procedure that requires a payment of money which indigents cannot pay, then it must provide an alternative procedure that affords as adequate and effective review for indigent appeals. As Mr. Justice Black put it: "There can be no equal justice where the kind of a 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." 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.

The disproportionate impact of appellate costs on the affluent and the poor has long been viewed by the law reviews as one inequitable aspect of the criminal appeal. However, Griffin is the first case to recognize squarely that a state-imposed cost requirement could work a denial of equal protection, and perhaps a deprivation of due process of law.

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35 The dissenting justices—Burton, Minton, Reed and Harlan—denied that the Constitution of the United States compels each state to supply a transcript, or other means to afford reviews, to an indigent defendant in a non-capital case. They held that a state was not bound to help redress indigency on the part of defendants: "Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?" Id. at 28-29. In addition, the dissenters, joined by Mr. Justice Frankfurter, expressed their concern over the fact that Mr. Justice Black's opinion "is not limited to the future...." Ibid. Mr. Justice Harlan, in a separate dissent, additionally took the position that the constitutional question ought not to have been decided. Id. at 33.

39 Id. at 17-18.
The principle embedded in the *Griffin* case is broad and susceptible to dynamic application. In one of its dimensions, it reinforces an evolving state action concept which holds in certain circumstances, that the fourteenth amendment places a duty on a state to take positive action to alleviate inequities, in this instance financial. This duty exists even in situations where the inequities have not been the direct consequence of state discriminatory policies, *i.e.*, a person's financial status. The implication is that a state's failure to discharge this duty and to correct these inequities amounts to state enforcement of discriminatory state policy, contrary to the fourteenth amendment.\footnote{1} This view has obvious implications for race relations,\footnote{2} and pushed to a dryly logical extreme, in other situations, it could produce curious results. Ripped from its racial or criminal law context, this aspect of the *Griffin* principle could be argued in such a way as to view tuition costs at a state university as a denial of equal protection (or, with greater plausibility and within the criminal law context, the payment of bail costs as a condition of release from custody) because such costs create inequality of access between the affluent and the poor to state provided opportunities.\footnote{3} It appears, however, that the more direct and immediate impact of the *Griffin* case has been on the processes of the criminal law.

*Griffin* involved a situation, similar to that prevailing in Washington, where a defendant's right to appeal is founded in state law and is not discretionary. Even so, it was predicted then that there could be little doubt that the dynamic *Griffin* principle encompassed


\footnote{3}{Per Mr. Justice Harlan in dissent. *Griffin v. Illinois*, 351 U.S. 12, 34-36 (1956).}
discretionary appeals and appellate fees, or other costs of appeal, as well. These predictions have proved true. In *Burns v. Ohio,* the Supreme Court held that *Griffin* applied to state collateral proceedings, even where a criminal appeal was discretionary, rather than a matter of right as it is in Illinois. This was held even though the state had already provided one appellate review on the merits. In *Smith v. Bennett,* the Supreme Court held that a state may not require a payment of statutory filing fees by an indigent before his appeal would be docketed. Not so predictable was the Court’s additional holding in *Smith* that the *Griffin* principle applied to civil cases, at least insofar as to disallow a state from collecting a filing fee before accepting a petition for a writ of habeas corpus.

Two less clear matters, left untouched in the opinion of Mr. Justice Black in *Griffin,* seemed to have been responsible for Mr. Justice Frankfurter’s separate concurrence. On the one hand, Mr. Justice Frankfurter was concerned that a state be allowed to protect itself from frivolous appeals so that public moneys need not needlessly be spent, and on the other hand, that the *Griffin* principle be given only prospective and not retroactive vitality. The latter question—retroactivity—was resolved, at least in part, in 1958 when it was presented to the United States Supreme Court in three cases, *Eskridge,* *Ross,* and *Woods,* each coming from the State of Washington. The *Ross* and *Woods* judgments were vacated and remanded in light of the Court’s disposition of *Eskridge,* hence, only the last case will be discussed here.

Eskridge, an indigent defendant, had been convicted in 1935, well prior to the *Griffin* decision. As a general rule, the supreme court of Washington will not consider an appeal unless the appellant provides the court with a transcript of that portion of the trial in which the

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47 "We hold that 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." *Id.* at 709.
48 *Griffin v. Illinois,* 351 U.S. 12, 24 (1956): A state "may protect itself [from] frivolous appeals . . . The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still may be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."
52 *Woods v. Rhay,* *Id.*
alleged errors occurred. An appeal will be dismissed by the clerk of the state supreme court upon three days’ notice if the transcript is not timely filed.\textsuperscript{53} Eskridge took a timely appeal and had also petitioned for a free transcript under a Washington statute which allowed the trial judge discretion to grant a transcript for an indigent’s appeal, “if in his opinion justice will thereby be promoted.”\textsuperscript{54} The trial judge denied Eskridge’s petition who then petitioned the Washington supreme court for a writ of mandate directing the trial court to issue him a free transcript for purposes of his appeal. The state supreme court denied Eskridge’s petition, and simultaneously granted the state’s motion to dismiss his appeal for failure to file a certified statement of facts and a transcript of the record. Eskridge went to prison without having had appellate review over the merits of his conviction. After the \textit{Griffin} decision, in 1956, Eskridge petitioned the Washington supreme court for a writ of habeas corpus, alleging that the failure, in 1935, to furnish him a free transcript had violated the due process and equal protection clauses of the fourteenth amendment. Although the reporter’s transcript from Eskridge’s trial was still available, the petition was denied without opinion, and the United States Supreme Court granted certiorari.

By a vote of six to two, the Supreme Court reversed, issuing a per curiam opinion. The Court held that the \textit{Griffin} principle would be given retroactive application:

In \textit{Griffin v. Illinois} ... we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here. The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript. We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the \textit{Griffin} case, we do hold that “destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”\textsuperscript{55}

\textsuperscript{54} RCW 2.32.240.
\textsuperscript{55} Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216 (1958). Two dissenting Justices—Harlan and Whittaker—believed that the \textit{Griffin} case should not be given retrospective application. Mr. Justice Frankfurter took no part in the consideration or disposition of the case.
Thus, it is clear that Griffin has a retroactive application. It was argued in Eskridge that to apply Griffin retrospectively meant that the courts would be inundated with petitions for release of indigent prisoners who would have to be set free and that the courts would stagger under the magnitude of this administrative burden. However, four years later, in Mapp v. Ohio, the Supreme Court, again faced with the Eskridge contentions, but in another context, was able to say that they had "later proved unfounded."

It should be recalled that Eskridge had actually taken a timely appeal and had promptly requested a transcript, thereby presenting a strong case for retroactive application of Griffin. Nevertheless, it would appear that a retroactive application will be made in all cases, except for those cases of impossibility where no transcript of the trial is available due to the death of the court reporter, so long as, at the time of trial, an indigent accused had a lawyer, who, presumably, continued his services for purposes of an appeal but failed to perfect it. The reason is that to distinguish a pre-Griffin conviction where no timely request for a transcript was made, from the Eskridge-type case would necessarily invoke the waiver doctrine. The contention would have to be that, by failing to request a transcript prior to the Griffin case, an indigent defendant, having had knowledge of his constitutional right, consciously waived it. This is a difficult position to maintain.

This latter situation should be carefully distinguished from those post-Griffin convictions where indigent defendants fail to take a timely appeal, after having been instructed on their constitutional right to a transcript, or its equivalent. In this latter situation, the waiver doctrine would operate in those cases where an indigent defendant petitions for a transcript after the time for his appeal has expired. The Supreme Court has approved reasonable, non-discriminatory state rules that require a criminal appeal to be taken within a stipulated time, and has upheld state appellate court refusals to review non-timely appeals. Hence, it would appear that states need not furnish transcripts for appeals that they are not obligated to hear, so long as an indigent defendant has been made fully aware of his rights and has, consciously, made a knowing waiver of them.

57 Id. at 659, note 9.
A second cluster of problems, stemming from the *Griffin* case, group themselves around the content of the constitutional standard there announced, *i.e.*, a state must afford destitute defendants "as adequate appellate review as defendants who have money to buy transcripts."\(^{61}\) What does the phrase "as adequate appellate review" require? Does it require counsel on appeal as well as a transcript, or its equivalent, and does it require other professional talents as well?\(^{62}\)

One aspect of this problem does appear to be clear. It is that the type of review that an indigent actually receives will be tested for its "adequacy" against that type of review that a non-indigent may receive. This comparison necessarily must take place within the boundaries of a single jurisdiction. Thus, one could reasonably expect that the type of review which will meet the requirements of the "adequacy" standard will vary from state to state, depending upon the type of appellate review that a state makes available for the non-indigent defendant who appeals.\(^{63}\) If this is true, then few generalizations can be expected to hold for all fifty states.

Nevertheless, one general point appears to be warranted. The Court did not say that an indigent's review necessarily must be identical to that of a non-indigent, but rather, it must be "as adequate and effective":\(^{64}\)

We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective review to indigent defendants. For example, it may be that bystander's bills of exceptions or other methods of reporting trial proceedings could be used in some cases.

The implication of the quote appears to be that for an indigent's review to qualify as "adequate," there need only be a substantially equivalent review to that afforded a non-indigent. Even so, in many states, such as Washington, where, as a matter of state policy, a full and complete review is afforded to non-indigents, it seems that a transcript will be

\(^{61}\) *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). This wording also appears at pages 13 (twice), 16, 18 and 20.


\(^{63}\) For example, it has been reported that Louisiana provides no court reporter to make official trial transcripts. Comment, *The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law*, 25 U. CHI. L. REV. 161, 164, note 14 (1957). Even so, it does not appear that *Griffin* would now require that Louisiana must use transcripts for criminal appeal purposes; instead, *Griffin* would require that indigent review be as "adequate" as non-indigent review, both being without a transcript. The same might be said of those states using bystander's bills.

necessary for an indigent’s review to qualify as “adequate and effective.” The reason is that the other possible means, which can supply a basis of review, other than a transcript, appear inadequate. For example, if the alleged trial error is insufficiency of the evidence for conviction, or one of improper admission of evidence, then, it is most difficult to see how “adequate and effective appellate review” can take place without a transcript of the actual proceedings. If the alleged error is an erroneous instruction, then, surely, a bystander’s bill, which would not contain the actual wording of the instruction, could not afford the basis for an “adequate and effective review.”

These, and perhaps other, thoughts appear to have played a major role in the thinking of the Illinois supreme court when Griffin was before it on remand. That court ruled that a trial judge must supply an indigent with a free transcript in all cases for purposes of a timely appeal. Thus, the Illinois court made two decisions: (1) that, when compared with the review available to affluent appellants, transcripts were required in indigent defendant cases to afford them as “adequate” a review, and (2) that a trial judge should grant the transcript without preliminarily passing on the merits of the issues which an indigent defendant proposes to argue on appeal, and hence, the trial judge was not required to pass on frivolous appeals.

The second solution of the Illinois rules—frivolous appeals—was originally resolved differently by the Washington supreme court. It will be recalled that one of the cases remanded to the Washington court in light of the Esridge decision was Woods v. Rhay. In 1959, the Washington supreme court used that case as a vehicle for the formulation of a new set of rules to govern trial judges in passing upon indigent’s requests for free stenographic transcripts. These rules contemplated a hearing before a trial judge, usually the one who tried the case. The rules empower the judge to order a transcript, or a portion thereof, or a narrative statement; or, conversely, he is allowed to deny an indigent defendant’s motion altogether, because in his opinion, the alleged errors are frivolous. Thus, Washington’s rules allowed the trial court judge to pass on the merits of the proposed appeal. The application of these rules gave rise to Draper v. Washington, decided on March 18, 1963.

On September 14, 1960, Draper and Lorentzen were convicted on two counts of robbery, and, later, their motion for a new trial was denied. On October 20, 1960, acting as counsel pro se, they filed a timely notice of appeal and a motion requesting that the trial judge order the preparation of a free transcript. They set forth twelve allegations of error in the trial proceedings. Counsel was appointed for the hearing on the petition for a transcript. He elaborated on the objections, arguing that the foundation for the introduction of certain items of evidence was inadequate, that the state had failed to prove the existence of the corporation allegedly robbed, and had failed to prove the possessory right of its agent to the money which allegedly had been taken, and finally, that petitioners' contention that the evidence was insufficient to sustain the conviction, was under the rules of Woods v. Rhay, enough, in itself, to entitle them to a transcript. The trial court denied petitioners' motion, entering an order, coupled with formal findings of fact and conclusions of law, stating:

"That the assignments of error as set out by each defendant are patently frivolous; that the guilt of each defendant... was established by overwhelming evidence, and that accordingly the furnishing of a statement of facts would result in a waste of public funds."

Draper and Lorentzen sought review of the trial court's order in the Washington supreme court. That court held that the rules formulated in Woods v. Rhay had been applied properly and that the trial court had correctly rejected each of the twelve assignments of error, finding the appeal to be frivolous.

It is important to be absolutely clear about the materials before the Washington supreme court when it made this decision. It did not have before it any portion of the stenographic transcript of the actual jury trial on the robbery charges. The only record before the state supreme court was the one made at the hearing on the motion for a free transcript. On this basis, and without looking to the record actually made at trial on the merits, the supreme court concluded that the contentions on the merits of the case, which had been raised by petitioners in their appeal, were frivolous. It is clear then, that the Washington supreme court expressly had approved a scheme whereby an indigent's appeal was preliminarily tested for its substantive merits, before a transcript would be made available. But, when testing an appeal for its frivolity, neither the trial judge nor the state supreme court could base judgment...
on a transcript; nor, under the Washington procedure, could an indigent, Draper, have recourse to a transcript to prepare for the hearing. This procedure, of course, placed counsel and the courts, in an awkward position, for, as the late Judge Jerome Frank put it: "But how can the existence of such a meritorious appeal be shown unless the defendant has access to a transcript of the events at the trial?" Furthermore, if a free transcript is denied by a trial judge because, in his opinion, the alleged errors are frivolous, it becomes a particularly difficult task for the Washington supreme court to determine, without a transcript before it, whether the trial judge was guilty of an abuse of discretion.

There is another important consideration which lay dormant in the case. It is that, although Washington's procedure tested an indigent's criminal appeal for frivolity, there is no similar provision applying to non-indigent appeals. When an appellant is financially able to buy a full transcript of the trial proceedings, the Washington supreme court grants a full appellate review of these proceedings, regardless of what the trial judge may think of the substantive merits of the appeal. In fact, the Washington rules applying to affluent appellants who appeal criminal cases, do not afford trial judges an opportunity to express their views on the merits of an appeal.

On review of the Draper case, the United States Supreme Court, by vote of five to four, reversed. Mr. Justice Goldberg delivered the opinion of the Court. The basic holding was "that the conclusion of the trial judge that an indigent's appeal is frivolous is an inadequate substitute for the full appellate review available to nonindigents in Washington, when the effect of that finding is to prevent an appellate examination based upon a sufficiently complete record of the trial proceedings themselves." In short, the Washington procedure had not produced materials which constituted a "record of sufficient completeness" for "adequate consideration of the errors assigned."

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70 United States v. Johnson, 238 F.2d 565, 569 (2d Cir. 1956) (dissenting opinion).
73 The majority consisted of Mr. Chief Justice Warren and Messrs. Justice Black, Douglas, Brennan and Goldberg.
74 Draper v. Washington, 372 U.S. 487, 499-500 (1963). "By allowing the trial court to prevent petitioners from having stenographic support or its equivalent for presentation of each of their separate contentions to the appellate tribunal, the State of Washington has denied them the rights assured them by this Court's decisions in Griffin and Eskridge." Id. at 497-98.
75 Id. at 497. The four dissenting Justices—White, Clark, Stewart and Harlan—could not "fathom why and in what respects the record placed before the Washington
It should be pointed out that the rules set forth in *Woods v. Rhay* were not held unconstitutional. The United States Supreme Court clearly indicated that a state can protect itself from frivolous appeals, and that Washington's rules could be constitutionally administered. If there had been a showing that a narrative statement, or that only a portion of the transcript, would have been adequate to consider the alleged errors, then that showing would have been constitutionally sufficient. What was impermissible was to administer the frivolous appeal rule in such a way as totally to deny indigents any means of getting adequate review on the substantive merits of their case by the state supreme court, when no such clog attended the appeals of defendants having money. Thus, it is clear that the *Griffin* principle does allow a state to sift out frivolous appeals, but it appears that the practice cannot be applied solely to indigent appeals: "if the appeals of both indigents and non-indigents are to be tested for frivolity, they [must] be tested on the same basis by the reviewing court."

In spite of the above, the Washington rules do create problems. They contemplate that indigent appeals will be sifted for their frivolity, but there is nothing in Washington's rules, governing the criminal appellate process, that allows a non-indigent's appeal to be tested for frivolity. Thus, on this basis alone, it would appear that the rules of *Woods v. Rhay* are inherently discriminatory and violative of the *Griffin* principle. Secondly, there remains a question of state constitutional law. It is doubtful whether any organ of government in Washington can constitutionally be given power to sift criminal appeals and deny any person's criminal appeal because of its frivolity. The reason is that Washington's Constitution, on its face, clearly applies to all cases, including frivolous ones: "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases. . . ." Thus, the rules of *Woods v. Rhay* raise substantial state and federal constitutional questions.

The basic division of the Supreme Court in the *Draper* case was over what properly might constitute a "record of sufficient completeness" necessary for adequate appellate review. The majority cited,
and approved, a federal case, *Coppedge v. United States,* and *Coppedge* may well come to govern frivolous appeals. That case decided what standard must be applied by lower federal courts when they pass upon an indigent defendant's petition for leave to appeal. Present federal law has made a criminal appeal, in effect, a matter of right, but indigent defendants must petition for a free transcript in order to perfect their appeal. They are entitled to a transcript if the federal district court will certify that their appeal is "taken in good faith." A defendant's good faith . . . [is] demonstrated when he seeks appellate review of any issue not frivolous. Hence, the standard governing frivolity is crucial. That standard, simply stated, is that an indigent's appeal is to be considered frivolous only if the appeal would be dismissed in the case of a non-indigent litigant. In the course of its opinion in *Coppedge,* the Court cited the *Griffin* case and explicitly stated that the *Coppedge* holding had "been impelled by considerations beyond the corners" of the federal statutes in order to assure "equal treatment for every litigant before the bar." Thus, its equation of frivolity with the test for dismissing non-indigent cases would appear to be part of the *Griffin* principle. Furthermore, the Court indicated that it "is not the burden of the petitioner to show that his appeal has merit." Rather, the burden is on the government "to show that the appeal is so lacking in merit that the court would dismiss the case . . . had the case been docketed and a record been filed by an appellant able to afford the expense of complying with those requirements."

Thus, given the *Coppedge* decision, *Draper,* and certain other considerations, set forth above, it would appear that the rules promulgated in *Woods v. Rhay* should be reconsidered.

If we recall that the *Griffin* principle requires that destitute defendants be afforded as adequate appellate review as defendants who have money to buy transcripts, and if we recall that *Eskridge* was to the effect that a trial judge's conclusion that an appeal lacks merit

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80 28 U.S.C. 1915(a). For the earlier federal practice see, e.g., Estabrook v. King, 119 F.2d 607, 610 (8th Cir. 1941) ; United States v. Fair, 235 Fed. 1015 (N.D. Cal. 1916.)
82 Id. at 447, citing Ellis v. United States, 356 U.S. 674, 675 (1958).
83 Id. at 446.
84 Id. at 448.
85 Ibid. However, counsel for an indigent need not prosecute an appeal that he honestly considers to be frivolous. See *Ellis* v. United States, 357 U.S. 374 (1958).
cannot substitute for the right to full appellate review, then *Lane v. Brown*, also decided on March 18, 1963, will fall into place. It involved the complete denial of an indigent's appeal in collateral attack proceedings by a person who was not a part of the state judiciary.

Indiana permits an appeal from a denial of a writ of error coram nobis, but it also requires that a transcript be filed in such an appeal before jurisdiction to hear the appeal is conferred upon the appellate court. Under Indiana's public defender act of 1945, only the public defender, in his discretion, could order a transcript of a coram nobis hearing for an indigent's appeal. An indigent could not obtain a transcript for himself and appeal *pro se*, nor could he obtain a transcript if a lawyer other than the public defender would agree to prosecute his appeal. The upshot of the Indiana procedure governing coram nobis appeals was that a person with sufficient funds could appeal as a matter of right from a denial of a writ of error coram nobis, but an indigent defendant could not because, in the discretion of the public defender, the indigent could be cut off entirely from a transcript, and hence from any appeal at all.

Brown was convicted of murder by an Indiana trial court and was sentenced to death. On appeal, his conviction was affirmed, and the United States Supreme Court refused to grant certiorari. Thereafter, Brown filed a petition for habeas corpus in the federal district court which dismissed the petition due to Brown's failure to exhaust state remedies. Brown then filed a petition for a writ of error coram nobis in the state trial court; it denied relief. Brown then asked that the public defender perfect an appeal to the Indiana supreme court, appealing the denial of the writ of coram nobis. This request was rejected on the sole ground that the public defender believed the appeal would be unsuccessful. Brown then moved the state trial court for a transcript of the coram nobis hearing and the appointment of counsel to perfect an appeal. This motion was denied by the trial court, and the decision was affirmed by the supreme court of Indiana. Certiorari was

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denied by the United States Supreme Court; however, it indicated that the appropriate procedure was to file a petition for habeas corpus in the federal district court. Brown then instituted habeas corpus proceedings in the district court, which were reviewed by the United States Supreme Court. The Court was unanimous in its judgment that Indiana's procedure violated the fourteenth amendment; however, the vote split seven to two on whether the due process or the equal protection clause had been violated. In delivering the opinion of the Court, Mr. Justice Stewart pointed out that Indiana's procedure violated the equal protection clause, stating that the "provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all ... [this] procedure, based on indigency alone, does not meet constitutional standards." In light of *Eskridge*, this decision appears to follow the expected development of the *Griffin* principle.

Thus, in summary, it can be said that, in all indigent criminal appeals, whether they be direct appeals or appeals from collateral proceedings, and in all civil appeals from a denial of a petition for a writ of habeas corpus, a state has a constitutional duty to provide an indigent defendant with a trial record of sufficient completeness to ensure that subsequent appellate review will be as adequate and effective as that review made available to affluent defendants. This constitutional duty includes an actual review by the appellate tribunal itself, and it is not permissible to substitute some other agency.

**Indigency and the Constitutional Right to Counsel**

In American legal practices the right to counsel is considered "fundamental." Counsel is necessary if fairness is to prevail, and if our adversary system is to work. Thus, counsel is considered to

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92 In a concurring opinion, Mr. Justice Harlan, joined by Mr. Justice Clark stated that he believed that the due process clause had been violated and that if Indiana would allow a review of the public defender's decision not to appeal the denial of coram nobis, then the due process clause would be satisfied.

93 Lane v. Brown, 372 U.S. 477, 485 (1963). "The present case falls clearly within the area staked out by the Court's decisions in *Griffin*, *Burns*, *Smith* and *Eskridge*. To be sure, this case does not involve, as did *Griffin*, a direct appeal from a criminal conviction, but *Smith* makes clear that the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits." *Id.* at 484-85.

94 "A defendant needs a lawyer as urgently as a sick man needs a doctor, and in many instances even more urgently, for while nature often heals the sick without outside aid, it seems to have little concern for the plight of the accused." *Fellman, The Defendant's Rights* 112 (1938).

95 "The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance..."
be part of the institutional framework. As the United States Supreme Court has put it: "A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." The presence of counsel expedites matters—for example, counsel frequently elicits a plea of guilty, recognizing the futility of litigation, at a considerable saving of tax funds. For these, and other, reasons, developments in the constitutional right to counsel are of paramount significance. Consequently, cases such as Gideon v. Wainwright and Douglas v. California, decided March 18, 1963, significantly articulating an indigent's constitutional rights to counsel, should be welcomed and analyzed within the requirements of fairness and the necessities of the adversary system. Although the subject has been canvassed before, a bit of background on the right to counsel is necessary to set the Gideon and Douglas cases in perspective.

The common law of England, contrary to its solicitousness for the right to trial by jury, was not protective of an accused's right to counsel, until comparatively recently. And, interestingly, when the duty to advise an accused of his constitutional rights—the right to counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands—Watts v. Indiana, 338 U.S. 49, 54 (1949). Williams v. Kaiser, 323 U.S. 471, 476 (1945). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, Federalism and State Criminal Procedure, 70 HARV. L. REV. 1, 8 (1956).

"Thus, in the Northern District of Illinois in fiscal 1961, an initial plea of guilty was entered by approximately 75% of all defendants represented by assigned counsel whereas the figure was about 20% in cases represented by private counsel. In the District of Connecticut the figures for the same years were 60% and 41%. In fiscal 1960 and 1961 the figures were 75% and 53% in the San Francisco Division of the Northern District of California, 53% and 45% in the Sacramento Division. The Attorney General's Committee on Poverty and the Administration of Criminal Justice, Report, 29 (1963). In fiscal year 1960 there were 26,728 criminal convictions in the federal district courts where an indigent's right to counsel has long been guaranteed, and 24,245 convictions resulted from guilty pleas. 1960 Director of The Ad. Office of The U.S. Courts Ann. Rep., 304.

Even here one may have some qualms because a jury verdict of not guilty sometimes subjected the jurors to severe penalties. For example, the reporter ominously added at the end of the proceedings of the trial of John Lilburne: "The jury having acquitted him were summoned before the Council of State, on the 23rd of August, 1653; in pursuance of an order of parliament, of the 21st, to answer for their conduct." Trial of John Lilburne. 5 Howell's State Trials 407, 444 (1653).
English did provide for counsel, they did so in misdemeanor cases, the least serious in the criminal law. It appears that the reason accounting for this development was that the government's desire for convictions in petty offenses was so minimal that it could well afford to be charitable towards the accused. Prior to 1695, the date parliament partially remedied the situation, a person accused of the serious crime of treason had no right to be represented by counsel. Apart from treason trials, and in all other felony prosecutions, the accused did not have a clear legal right to counsel until a parliamentary enactment in 1836. The Act of 1836 simply permitted defendants in felony cases the right to hire counsel if they had sufficient funds. It was not until 1903 that parliament provided that counsel could be appointed for indigents accused of felony.

In the United States, every state constitution, except Virginia where the right is supplied by case decision, contains a provision that a defendant in a criminal case, has a right to hire counsel for his defense. These provisions date from the colonial period, or from the time of a state's admission to the Union. The provision of the sixth amendment to the United States Constitution, ratified in 1791, completes the historical picture in the United States, showing that an

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103 Id. at 397-99 where Stephen points out the superior position of the crown in criminal trials other than the petty offenses of battery, libel and perjury, etc.
104 7 and 8 Will. 3, c. 3, § 1 (1695). Parliament did two things: (1) It permitted the accused to retain counsel of his own choosing, and (2) if an accused were not represented, it required a court to appoint counsel, not exceeding two. It appears that all members of parliament were potential targets of a treason trial and, it seems, that they were particularly interested in a fair criminal proceeding for those cases in which they might be personally involved.
107 E.g., New Jersey's constitution of 1776 provided that the accused "shall be permitted to the same privileges of witnesses and counsel, as their prosecutors are, or shall be entitled to." For discussion see Journal of the Courts of Common Right and Chancery of East New Jersey 130 (Edsall ed. 1937).
108 E.g., Washington, "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel,..." Wash. Const. art. 1, § 22; Wash. Const. amend. X.
109 "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense..." U.S. Const. amend. VI.
accused has always been allowed to be represented by retained counsel. Thus, an accused's right to counsel is considered fundamental by state and nation alike. It should be noted, however, that this right has traditionally been the right to retain counsel, and the very important qualification of money has severely limited an accused indigent's right to counsel. Historically, the right to assigned counsel has been distinguished from the right to hire counsel and has progressed differently in the federal and state court systems. The origin of the constitutional right of an indigent accused to be supplied with counsel is more recent than the right to retain counsel although, obviously, it can be no less important either to the achievement of "fairness," or to the requirements of the adversary system.

A good beginning point for analysis of the federal practice is 1938. A strong and clear statement of an indigent's right to counsel in all federal criminal cases came with Johnson v. Zerbst. This federal case, a landmark in the criminal law, interpreted the sixth amendment, and its substance has been incorporated into Rule 44 of the Federal Rules of Criminal Procedure: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." This right of an indigent accused is far-reaching because the Supreme Court has indicated that if an indigent is subjected to trial without counsel, and if he has not knowingly, and thereby effectively, waived his right thereto, then, the trial court loses jurisdiction to proceed; and if a conviction should occur under these circumstances, then the judgment is void. This last point means that a defendant imprisoned as a result of such a judgment would be entitled to release by way of habeas corpus. The Supreme Court summarized Johnson v. Zerbst this way:

If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A court's jurisdiction at

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114 For a tracing and comparison of the historical roots see Becker & Heidelbaugh, The Right to Counsel in Criminal Cases—An Inquiry Into the History and Practice in England and America, 28 NOTRE DAME LAW 351 (1953).


116 304 U.S. 458 (1938).

the beginning of a trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine "the facts for himself when if true as alleged they make the trial absolutely void."

Thus, the right of an indigent accused to have counsel provided at all stages during a federal criminal trial is assured by the sixth amendment.118 This right includes representation in federal criminal appeals as well.119

Note that the federal constitutional guaranty protects an indigent's right to effective counsel.120 The meaning of this requirement is that the constitutional guaranty "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."121 Furthermore, "representation in the role of an advocate is required."122 But "effective assistance of counsel" does not require that court-assigned counsel be happily acceptable to an accused, and it is not prejudicial error for a district court to refuse to allow assigned counsel to withdraw.123 However, where a federal court fails to inquire into the nature of serious disagreements between the accused and assigned counsel, a denial of the right to effective assistance occurs.124 An indigent’s right to effective counsel is obviously impaired if counsel is incompetent, and incompetency can cause a reversal of a conviction.125

119 Johnson v. United States, 352 U.S. 565 (1957); Ellis v. United States, 356 U.S. 674 (1958). See also Coppedge v. United States, 369 U.S. 438 (1962). There may still be times during the appellate stage, such as the period between conviction and appointment of appeal counsel, when an indigent is left on his own to get the necessary appeal papers timely filed. See discussion in Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783 (1961).
121 Glasser v. United States, 315 U.S. 60, 70 (1942).
123 United States v. Dennis, 183 F.2d 201, 234 (2nd Cir. 1950); United States v. Guterman, 147 F.2d 540 (2nd Cir. 1945).
125 Johnson v. United States, 110 F.2d 552 (D.C. Cir. 1940); see Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945).
However, the general rule in the federal courts is that a licensed practitioner is presumed competent, placing a heavy burden on the accused to prove otherwise.  

Prior to March 18, 1963, the constitutional right to counsel of indigent defendants tried in state courts was complex and uncertain. Three states, Indiana, Kentucky, and New Jersey, have state constitutions which require the appointment of counsel for indigent defendants in criminal cases; the remainder appear silent. The statutes of the fifty states vary considerably. Thirty-five states require appointment of counsel for indigents in capital and non-capital felony cases; the remaining fifteen states either appoint counsel only in capital cases, or make no explicit provision for the appointment of counsel, or leave the matter to the discretion of the trial judge.

Washington’s statutes indicate that “if the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned. . . .” The Washington supreme court has held, similar to other courts, in furtherance of the constitutional guarantee of counsel, that this statutory section imposes four duties upon a trial judge. Whenever a defendant appears in court without counsel, a trial court judge must: (1) ascertain whether the defendant is incapable of employing counsel because of his poverty; if so, (2) he must fully inform the defendant of his right to have appointed counsel at public expense; (3) he must ask whether the defendant desires the aid of such counsel, and, in any event, (4) he is responsible for the record clearly showing that the first three steps have been taken.

In addition to state constitutional and statutory provisions, the fourteenth amendment to the United States Constitution binds the states to afford counsel to indigent defendants in certain circumstances. Prior to Gideon v. Wainright, which incorporated the sixth amend-

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126 See, e.g., Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941); Hagan v. United States, 9 F.2d 362 (8th Cir. 1928); Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945), cert. den., 325 U.S. 889 (1945). In Washington see State v. Bird, 31 Wn.2d 777, 198 P.2d 978 (1948).
127 IND. CONST. art. 1, § 13.
128 KENTUCKY CONST. § 11.
129 NEW JERSEY CONST. art. I, § 10.
130 See the appendix to the opinion of Mr. Justice Douglas in McNeal v. Culver, 365 U.S. 109, 119 (1961).
131 RCW 10.40.030 and RCW 10.01.110.
132 Ibid.
ment into the fourteenth, the fourteenth amendment’s guarantee was fluid, flowing from its due process clause. However, it now appears that, because of Gideon, an indigent’s right to counsel will be particularized by the configurations of federal precedent construing the sixth amendment. It is conducive to understanding to sketch the constitutional background of the Gideon case.

It is elementary that the first ten amendments to the United States Constitution impose limitations upon the federal government and do not restrict the states unless those provisions have been made binding upon the states by their having been incorporated into the fourteenth amendment. The criterion of incorporation is “that a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the fourteenth amendment.” That is, the fourteenth amendment embraces those fundamental principles of liberty and justice which lie at the base of our civil and political institutions, even though they specifically have been dealt with in another part of the Constitution of the United States. Thus, the first amendment’s freedoms of speech, press, religion, assembly, association and petition for redress of grievances have all been incorporated. Similarly, the fifth amendment’s command that private property shall not be taken for public use without just compensation, the fourth amendment’s prohibition of unreasonable searches and seizures, and the eighth amendment’s ban on cruel and unusual punishment, are all binding upon the states. What has been the development regarding the sixth amendment’s guarantee of counsel?

138 Id. at 341. The test of “fundamental” is often repeated: “Rights implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937); “Principles of justice so rooted in the traditions and consciences of our people as to be ranked fundamental.” Brown v. Mississippi, 297 U.S. 278, 285 (1936); “Principles of liberty and justice which lie at the base of our civil and political institutions.” Hebert v. Louisiana, 272 U.S. 312, 316 (1926), and see Twining v. New Jersey, 211 U.S. 78, 99 (1908).
A convenient starting point is 1932 and the celebrated Scottsboro case, Powell v. Alabama.143 Nine Negro boys, 13 to 21, were taken off a train and charged with the capital crime of having raped two white girls who were hoboing their way from Chattanooga to Huntsville, Alabama. One of the boys "was almost totally blind. One had a facial twist that had contorted his features into an insane grin. Four of them were mental defectives of the lowest possible intelligence. Only three of them could read or write at all. All were uneducated, underfed and unhealthy."144 On the trial morning, and not before, the trial judge appointed an iconoclastic lawyer, Mr. Milo Moody, to represent the nine defendants who were then convicted. Their convictions were affirmed on direct appeal.

On certiorari, the Supreme Court reversed, by vote of seven to two,145 holding "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, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty 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."146 Thus, an indigent's right to effective, not ritualistic, counsel was part of due process of law, but, on the facts of Powell, that right was limited to capital, and did not extend to all felony cases.147 The question arose whether Powell would be extended to all criminal cases, including felonies and misdemeanors, or whether it would be restricted in some way.

An answer to this question came with the Court's decision in Betts v. Brady,148 holding that under the due process clause, a state need not necessarily supply counsel to an indigent in every non-capital, felony offense. In spite of the widespread protection of the right to counsel by state and nation, the Court rejected a contention that the sixth amendment's right-to-counsel provision was "fundamental and

143 287 U.S. 45 (1932). For graphic accounts of this case see, Reynolds, Courtroom 248-314 (1950) and Chalmers, They Shall Be Free (1951).
145 The two dissenting justices agreed that the due process clause required that an indigent be afforded the effective assistance of counsel, but they disagreed with the majority, holding that defendants had received the required representation.
147 For discussion of the capital vs. non-capital distinction see Bute v. Illinois, 333 U.S. 640 (1948).
148 316 U.S. 455 (1942).
essential to a fair trial,” and therefore, binding upon the states. Instead, the Court stated that, “the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”

Betts v. Brady, then, came down to something like this. The fourteenth amendment did not incorporate the sixth amendment’s guarantee of counsel, but it did require that counsel be offered to every indigent defendant in all capital cases because, in such cases, the presence of counsel was “fundamental and essential to a fair trial.” However, counsel need not be afforded indigent defendants in all non-capital felony cases because, in such cases, counsel was not “fundamental and essential;” but, counsel was deemed “fundamental and essential to a fair trial” in certain non-capital felony cases which contained “special circumstances.” Thus, the question in every non-capital case was whether “special circumstances” were present: Did an indigent defendant receive a “fair trial”? “Special circumstances” could be presented, but need not necessarily be presented, by an indigent defendant’s youth, degree of ignorance, mental capacity, experience, or by the nature of the events transpiring at trial. This ad-hoc determination was to be “tested by an appraisal of the totality of facts in a given case.”

The futility of this position has long been apparent. The “fair trial” doctrine, with its emphasis on “special circumstances,” placed a state trial judge in an untenable position. It placed upon him the duty to ascertain, before trial, whether he should appoint counsel for an indigent defendant in order to afford him a fair trial; but, the “fairness” of the trial, and hence the judge’s duty to appoint counsel, was tested by the “totality of facts” occurring during the trial which necessarily had to be viewed after the trial had ended. Thus, in order to discharge his duties faithfully, a state trial judge was called upon to be omnis-

149 Id. at 473.

150 For discussion of applications of the fair-trial doctrine, see BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 160-99 (1955).

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cient because the Betts v. Brady doctrine expected him to know the results of a trial before it took place.\(^\text{152}\)

In addition, the fluidity of the fair-trial doctrine encouraged prisoners in all the state prisons to petition for review in the hope that their case would be found to contain "special circumstances" and result in reversal. Thus, there came a flood of petitions for writs of habeas corpus. It is now clear that Betts v. Brady created more problems than it solved. Scholars predicted that it would be overruled;\(^\text{153}\) hence, it came as no surprise\(^\text{164}\) when the Supreme Court, last year, granted certiorari in the Gideon case, requesting counsel to argue this question: "Should this Court's holding in Betts v. Brady ... be reconsidered?"\(^\text{155}\)

Gideon, an indigent, was tried for a non-capital felony offense. He had timely requested counsel, but was refused because counsel could be assigned only in capital cases under the state law. Gideon conducted his own defense, and after conviction, petitioned the state supreme court for a writ of habeas corpus which was denied. The Supreme Court granted certiorari.

Mr. Justice Black delivered the opinion of a unanimous Court. He noted that the facts of Betts v. Brady were "strikingly like the facts upon which Gideon here bases his federal constitutional claim."\(^\text{156}\) Thus, the two cases could not be distinguished. The opinion then proceeds to declare that the right to counsel is "fundamental and essential to a fair trial" and that "Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of those fundamental rights."\(^\text{157}\) Twenty-two states entered the case

\(^{152}\) See the discussion of this problem in Gibbs v. Burke, 337 U.S. 773 (1949).

\(^{153}\) E.g., Beaney, THE EFFECTIVE ASSISTANCE OF COUNSEL IN FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 39 (1959).

\(^{154}\) In Crooker v. California, 357 U.S. 433 (1958) four dissenting Justices—Brennan, Black, Douglas and Mr. Chief Justice Warren—repudiated Betts v. Brady. In Spano v. New York, 360 U.S. 315 (1959) Mr. Justice Stewart showed that he had doubts about the doctrine. A logical extension of Spano would indicate that retained counsel has a right to be present whenever an accused is questioned by the government after indictment, except where that right has been knowingly waived. See People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445 (1961), and People v. Di Basi, 7 N.Y.2d 544, 166 N.E.2d 825 (1960). In addition, the serious nature of a felony charge and the complex technicalities of its issues were held sufficient under the doctrine to require counsel. See Chewning v. Cunningham, 368 U.S. 443 (1961), and Carnley v. Cochran, 369 U.S. 506 (1962). Hence, by 1962, the fair-trial rule was little more than an anachronism because the Court had adopted the position that it was almost impossible for an indigent layman to defend himself without thereby working a denial of due process of law.


\(^{156}\) Id. at 342. "The fact is that in deciding as it did—that 'appointment of counsel is not a fundamental right, essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own well considered precedents." Id. at 343-44.
as amici curiae, arguing that Betts v. Brady, "already an anachronism when handed down, has spawned twenty years of bad law,"¹⁵⁸ and that Betts v. Brady should be overruled. The Court agreed, holding that the sixth amendment's guarantee of counsel was incorporated into the fourteenth amendment and that it was binding upon the states.

Messrs. Justice Douglas, Clark and Harlan wrote separate concurring opinions. Mr. Justice Harlan agreed "that Betts v. Brady should be overruled"¹⁵⁹ and that "the right to counsel in a case such as this should not be expressly recognized as a fundamental right."¹⁶⁰ He refused, however, to embrace the idea "that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such."¹⁶¹ It would appear that, were Mr. Justice Harlan's view to have prevailed, then an indigent's constitutional right to counsel in state criminal trials would be most uncertain, having vague and unclear contours. It would not be made specific by federal precedent interpreting the sixth amendment, and would apply only to some non-capital cases, and perhaps, not to others. If this be true, then Mr. Justice Harlan really did not want to overrule Betts v. Brady, but instead, he simply wished to broaden and extend, but not destroy its "special circumstances" doctrine. Mr. Justice Douglas attacked this position, indicating that the "rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees."¹⁶² In another concurring opinion, Mr. Justice Clark approvingly pointed out that Gideon erased the distinction between capital and non-capital cases which really had "no basis in logic and an increasingly eroded basis in authority."¹⁶³

The Gideon case poses many new problems. There can be no doubt that Gideon imposes an absolute mandate on state courts to appoint counsel for indigent defendants in criminal trials. However, a threshold question concerns the breadth of application of the Gideon case: Does an indigent's right to counsel extend to all criminal cases, including misdemeanor cases, or is it limited only to felony cases?¹⁶⁴ There is precious little in the opinion of the Court bearing on this

¹⁵⁸ Brief for the state government Amici Curiae, Gideon v. Wainwright supra, note 156.
¹⁶⁰ Id. at 352.
¹⁶¹ Ibid.
¹⁶² Id. at 347. The weight of authority seems to be with Mr. Justice Douglas; see Speiser v. Randall, 357 U.S. 513, 530 (1957).
¹⁶³ Id. at 348.
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question. At the outset, it should be noted that the opinion has no language strictly limiting the Gideon decision to felony cases. Secondly, there is language in the opinion which, if literally followed, is broad enough to include misdemeanors.\textsuperscript{165} Thirdly, that part of the sixth amendment which has been incorporated flatly applies to all cases: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."\textsuperscript{166} Furthermore, although the Court has never decided squarely that Johnson v. Zerbst\textsuperscript{167} applies to federal misdemeanor cases, there is language, in other cases, indicating that it does.\textsuperscript{168} In addition, a court of appeals has held that Johnson v. Zerbst applies to a misdemeanor case.\textsuperscript{169} On the other hand, the Supreme Court has held that the sixth amendment does not guarantee any person, rich or poor, charged with a petty offense to a right to trial by jury.\textsuperscript{170} By analogy, then, an argument could be made that an indigent defendant need not be given counsel and could still be afforded a fair trial. However, there is doubt that retained counsel could be barred from such a trial,\textsuperscript{171} without denying a defendant his right to a fair trial. Consequently, the counter-argument arises that if a fair trial is denied when retained counsel is excluded from a petty offense trial, then a fair trial is similarly denied when an indigent defendant fails to be represented by counsel.\textsuperscript{172} In summary, one can only say that this point has yet to be resolved by the Court, and that, literally, as matters inconclusively now stand, it appears that Gideon's requirement that counsel be offered indigent defendants in "all criminal prosecutions," includes misdemeanor prosecutions.\textsuperscript{173}

\textsuperscript{165} Gideon v. Wainwright, 372 U.S. 335 (1963): "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided. . . ." Id. at 344. "This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer. . . ." (Emphasis added).

\textsuperscript{166} U.S. Const. amend. 6 (Emphasis added).

\textsuperscript{167} 304 U.S. 458 (1938) see text discussion at notes 116-126.

\textsuperscript{168} "By virtue of the [sixth amendment] . . . counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances." Foster v. Illinois, 332 U.S. 134, 136-37 (1947) (Emphasis added); see also Bute v. Illinois, 333 U.S. 640, 666 (1948).

\textsuperscript{169} Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942) (conviction for failure to provide child support).

\textsuperscript{170} Dist. of Columbia v. Clavans, 300 U.S. 617 (1936); Schick v. United States, 195 U.S. 65 (1904); see also Dist. of Columbia v. Colts, 282 U.S. 63 (1930).

\textsuperscript{171} E.g., "Indeed the right to assistance of counsel whom the accused has himself retained is absolute, whatever the offense for which he is on trial." Spano v. New York, 360 U.S. 315, 327 (1959) (concurring opinion).

\textsuperscript{172} If this latter view is correct, then RCW 10.01.110 should be reconsidered because it limits an offer of counsel to felony cases.

\textsuperscript{173} "[N]o reason appears in logic, morals or humanity' why anyone accused of
Another concern raised by the *Gideon* case is whether it will be given retroactive application. It should be noted that *Griffin v. Illinois*, discussed above, involved a closely allied right, and has been applied retrospectively. *Griffin* is of great importance when combined with the unanimous decision of *Walker v. Johnston* which indicated that the rule of *Johnson v. Zerbst*, a 1938 decision holding that, unless properly waived, the sixth amendment requires that an indigent defendant have counsel in all criminal prosecutions, would apply retrospectively to a 1936 conviction. Thus, since *Gideon* "incorporates" the sixth amendment, and since it is highly analogous to *Griffin*, it appears that *Gideon* will apply retroactively. If so, the question of what amounts to a proper waiver by an indigent of his right to counsel will become important.

By far, however, the most perplexing problem raised by *Gideon* concerns the stage in the total criminal law process at which an indigent defendant must be offered counsel. There is, however, no perplexity concerning the time when counsel is actually needed. Professor Zechariah Chafee has aptly stated that "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." The question is, does an indigent have a right to counsel immediately after his arrest?

At this juncture it is necessary to see clearly that, although the historical gap has been closing, the constitutional right to counsel has been divided into two parts—the right to retain counsel and an indigent's right to have counsel appointed. Under the fourteenth amendment, the right to retain, and to be represented by, counsel attaches early and continues throughout the entire criminal law pro-

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174 I do not consider whether counsel may have to be appointed for indigent delinquents; one case would indicate the affirmative; see People v. Manfredi, 27 Misc. 2d 7, 8, 215 N.Y.S.2d 781, 783 (Schenectady County Ct. 1960).

175 See text at notes 25-43.

176 312 U.S. 275, 286 (1941).

177 This topic goes beyond the bounds of this paper, but for discussion of the waiver doctrine, see, Beaney, The Right to Counsel in American Courts, 66-72 (1955), and Fellman, The Constitutional Right to Counsel in Federal Courts, 30 Neb. L. Rev. 559, 572-583 (1951).

178 CHAFE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, 541 (1951-52). And, according to Mr. Justice Jackson: "To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom... If the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel." Watts v. Indiana, 338 U.S. 49, 59 (1949) (concurring opinion).
cess, including a preliminary hearing or any other proceedings preliminary to trial. On the other hand, an indigent’s right appears to attach much later. There is no doubt that an offer of counsel must be made at some time before the morning of trial. This much is clear because an indigent accused is entitled to effective representation, and mere appearance of a lawyer on the morning of the trial will not, in itself, satisfy the constitutional requirement. In Washington, the right clearly attaches at least sometime “before being arraigned.” However, recent interpretations of the fourteenth amendment indicate that this standard may be inadequate as offering counsel too late in the criminal law processes.

One of the most recent and relevant cases is *Hamilton v. Alabama.* Hamilton, charged with a capital crime, was arraigned after indictment without the benefit of counsel and pleaded guilty. Although he was assigned counsel prior to trial, he was found guilty and sentenced to death. Under Alabama procedures, the arraignment denoted the time when a defendant had to enter certain defenses, such as insanity, or waive them, and failure to plead these defenses was not reviewable on appeal. Hamilton sought to attack his conviction in the Alabama courts by way of coram nobis, but was denied relief. On certiorari, a unanimous Supreme Court reversed. It declared that “whatever may be the function and importance of arraignment in other jurisdictions, in Alabama it is a critical stage in a criminal proceeding.”

Although *Hamilton* was a capital case, the crux of the decision is bound up in the concept of the “critical stages of a criminal proceeding.” Since *Gideon* eliminates the capital versus non-capital distinction, then it is clear that *Hamilton* requires a state to provide counsel at all “critical stages” in all criminal proceedings. “Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.” This consideration raises many questions, one of which is whether a preliminary hearing is a “critical stage.”

This question was presented in *White v. Maryland.* White, ar-

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170 But not in an administrative proceeding, see *In re Groban,* 352 U.S. 330 (1957) where a statute authorizing a fire marshal to exclude counsel at an investigative proceeding was upheld by a sharply divided court on the “civil investigation—criminal trial” distinction.


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rested on a charge of murder, was taken before a magistrate for a preliminary hearing where he pleaded guilty without having the benefit of counsel. At his formal arraignment, he pleaded not guilty; however, the plea of guilty made at the preliminary hearing was later introduced into evidence. White was convicted and sentenced to death; this was affirmed by Maryland’s court of appeals. The Supreme Court, on a grant of certiorari which was “limited to the point of law raised in Hamilton v. Alabama . . .,” reversed. In a unanimous per curiam opinion, the Court specifically noted that the rationale of Hamilton “does not rest . . . on a showing of prejudice.” It then went on to hold that the preliminary hearing, under Maryland’s law, was “‘a critical stage in a criminal proceeding’ where rights are preserved or lost.” Consequently, an offer of counsel should have been made at the preliminary hearing stages.

It is interesting to note that in neither opinion—Hamilton nor White—does a statement appear to the effect that the petitioners were indigents. Thus, it appears that the fourteenth amendment places a duty upon a state trial judge, whenever an accused appears without counsel during any “critical stage” of a criminal proceeding, to ascertain whether that accused is indigent, and if so, to make an offer of counsel. This view is in harmony with precedential antecedents. Even under the fair-trial doctrine of Betts v. Brady, it has long been a negative implication that an indigent’s right to counsel attached before trial if “special circumstances” were presented.

These two cases—Hamilton and White—are of great significance for Washington’s criminal procedure since it is peculiar in several respects. For example, there is no requirement in Washington, similar to that found in the statutes existing in the vast majority of the other states and in the rules governing federal criminal practice, which requires that every person who has been taken into custody by a police officer, without a warrant, be taken without unnecessary delay, before a magistrate for a preliminary hearing to see whether there exists

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186 Ibid.
187 Id. at 60, footnote.
188 Ibid.
190 A survey of the statutes governing an accused’s right to a preliminary hearing in England, Scotland, France, Italy and the United States appears in the commentaries to Ch. 2, Am. Law Inst., Code Crim. Proc. 266 et seq. (1931).
probable cause for charging the accused with a criminal offense.\textsuperscript{192} The purposes of such a procedure, in states other than Washington, are to protect an accused from illegal detention and to deter illegal arrests.\textsuperscript{193} Washington does provide for a preliminary hearing procedure, but its use is optional, in the discretion of law enforcement officials.\textsuperscript{194} A complaint must be filed before a magistrate is empowered to hold a preliminary hearing,\textsuperscript{195} and this statute has been construed only as a regulation of the complaints brought by private persons and is not a condition that police or prosecutors must meet.\textsuperscript{196} However, prosecutors can, and do, use this device, particularly when they wish to test, under oath, some shaky evidence before relying upon it for purposes of filing an information.\textsuperscript{197} Thus, one cannot say

\textsuperscript{192}Although aimed in the right direction, the recently adopted criminal rules for courts of limited jurisdiction, see Rules 1.01 et seq. in RCW, Vol. "O," do not meet this problem. Rule 2.03(b) provides that when a person is arrested without a warrant, he must be taken to jail; and "if the offense with which he is charged is subject to bail," and "if his physical condition warrants," and if it is "practicable" (presumably in the discretion of the police), then, "the person arrested . . . shall be permitted to deposit bail." It should be noted that there is no requirement that the person arrested actually be charged with a crime, but rather, the rule assumes that a charge will be made. Rule 2.03(c)(3) does not remedy the situation, for it, too, assumes a charge and an appearance before a judge. It provides that if "the offense charged is not bailable," then, the arrested person must be taken before "the nearest judge" without unnecessary delay." Thus, the rules simply require that an arrested person be taken to jail where further proceedings can take place. Furthermore, there is no sanction in the rules, or elsewhere, for failure to take an arrested person to jail, or in the appropriate case, before the nearest judge "without unnecessary delay." Thus, the needed stimulus to assure compliance with the rules appears lacking.

\textsuperscript{193}"A person is arrested. It may very well be that even the most superficial look at the facts would at once show that he could not possibly be guilty of the offense charged. It is nothing more than obvious fairness to him, then, that he should be discharged at the soonest possible moment. Accordingly, promptly after an arrest the arrested person is entitled to be brought before a judge—in this phase of the work we usually refer to him as a 'magistrate'—so that the latter may decide whether, if the state's evidence is true, it presents a strong enough case to warrant holding our man for further proceedings, or whether the showing is so weak that there is no chance of a conviction. If the former is the case then it is the magistrate's duty to set the bail. If the latter, then the accused is entitled to his immediate liberty and the case ends then and there. From this it will be plain that the preliminary examination is a stage in the entire proceedings which is almost wholly to the advantage of the accused. . . ." Puttkamer, \textit{Criminal Law Enforcement} 6 (U. of Chi. L. Sch. Papers, 1941) quoted in \textit{Paulsen \& Kadish, Criminal Law and Its Processes} 918 (1962).

\textsuperscript{194}Pennington v. Smith, 35 Wn2d 267, 212 P.2d 811 (1949): "Where, however, the prosecutor elects to proceed independently, he . . . may file an information on his own authority."

\textsuperscript{195}RCW 10.16.010. There is no requirement that an arresting officer or prosecuting attorney must file such a complaint without unnecessary delay upon the arrest of a person without a warrant.

\textsuperscript{196}Pennington v. Smith, 35 Wn2d 267, 212 P.2d 811 (1949): "A preliminary hearing is not necessary to due process."

\textsuperscript{197}It would seem that Washington's procedure, which seriously upsets the relatively equal balance of contending forces, and which favors the state, may well place undue discretion in the prosecutor, and place throttling controls on the proper functioning of the adversary system. See Dession, \textit{From Indictment to Information—Implications of the Shift}, 42 \textit{Yale L.J.} 163 (1932), and Goldstein, \textit{The State and the Accused: Balance of Advantage in Criminal Procedure}, 65 \textit{Yale L.J.} 1149 (1960).
that the guiding purpose of Washington’s preliminary hearing procedure is to protect an accused or to deter illegal arrests.198

Washington’s preliminary hearing is similar in many respects to an actual trial. A prosecuting attorney will introduce evidence to support the charges to which an accused can enter a plea, or testify on his own behalf. The testimony is frequently, if not always, reduced to writing and signed.199 In the event of a subsequent criminal trial on the charges, not only may the magistrate200 who presided at the preliminary hearing, or the stenographer201 who transcribed the testimony, testify against the accused, but the plea of the accused (if one was made) and, in most instances, the transcript which was made at the preliminary hearing are admissible into evidence.202 Thus, it would appear, under Hamilton and White, that whenever a preliminary hearing is held, it qualifies as a “critical stage in a criminal proceeding where rights are preserved or lost.” If so, counsel must be offered to an indigent accused whenever he appears at a preliminary hearing.203

This conclusion is supported by another recent case, Haynes v. Washington,204 which has critically important implications for Washington’s criminal law processes. The reason is that this case appears to exclude confessions taken from an accused during a period when he has unreasonably been held incommunicado;205 thus, it may foreshadow the imposition upon the states of a rule similar to McNabb-Mallory,206 which operates in the federal courts.

198 The awesome extent of illegal arrests is little known. However, the FBI Uniform Crime Reports show that an arrest on suspicion is common police practice in this country. Obviously, since there is no such crime, these arrests are all illegal. Those arrested in 1956 on “suspicion” and then released without there being any prosecution whatsoever, ran at the rate of 280.4 people per 100,000 inhabitants. (FBI, Uniform Crime Reports No. 1, Semiann. Bull. 65 (1957)). The figure for arrests on suspicion in 1958 was 96,740. (1958, id., at 93), and in 1962, the figure climbed to 121,218. (1962, id., at 93, table 19). See generally Fraenkel, From Suspicion to Accusation, 51 YALE L.J. 748 (1942), and Hall, Arrest in Relation to Contemporary Social Problems, 3 U. CHI. REV. 345 (1936).

199 RCW 10.16.060 and RCW 10.16.160.

200 Under the intelligent bystander doctrine, see State v. Bixby, 27 Wn.2d 144, 166, 173, 177 P.2d 689, 701, 705 (1947).

201 See State v. Fetterly, 33 Wash. 599, 74 Pac. 810 (1903).


203 The Washington supreme court is moving in this direction; see Pettit v. Rhay, 162 Wash. Dec. 506, 383 P.2d 889 (1963). This case appears circumscribed by the “special circumstances” doctrine of Betts v. Brady, but its portent is obvious.

204 373 U.S. 503 (1963).

205 Also important are Gallegos v. Colorado, 370 U.S. 49 (1962) (conviction of a 14-year-old boy on the basis of a confession obtained while he was held incommunicado for five days was reversed), and Lynum v. Illinois, 372 U.S. 528 (1963) (conviction of a woman on the basis of a confession obtained by police threats to deprive her of her children was reversed).

206 McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States,
Haynes was convicted on a charge of robbery and sentenced to prison. His conviction was affirmed by the Washington supreme court. During the trial, and over Haynes' timely objection, a written confession was admitted in evidence. It had been obtained after Haynes had been held incommunicado for sixteen hours, having “several times asked police to allow him to call an attorney and to call his wife.” No claim was made that Haynes “was physically abused, deprived of food or rest, or subjected to uninterrupted questioning for prolonged periods.” The incommunicado detention was in express contravention of a Washington statute, and “though the police were in possession of evidence more than adequate to justify his being charged without delay, it is uncontroverted that Haynes was not taken before a magistrate and granted a preliminary hearing until he had acceded to demands that he give and sign the written statement. Thus, “the only fair inference to be drawn under all the circumstances is that he would not be booked on the robbery charge until the police had secured [the confession].”

On certiorari, by vote of five to four, the Supreme Court reversed. Mr. Justice Goldberg delivered the opinion of the Court, holding that the sixteen-hour incommunicado detention of Haynes plus promises by the police to allow him to call his wife if he would give a written confession, created an “unfair and inherently coercive context in which . . . that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment.” The bounds of due process had been exceeded.


207 Supra, note 204 at 504.
208 Ibid, note 1.
209 RCW 9.33.020(5).
210 Supra note 204 at 510. The police had Haynes’ “prior oral admissions, the circumstances surrounding his arrest, and his identification by witnesses . . . .” Id. at 512.
211 Id. at 512.
212 Id. at 514.
213 “This case illustrates a particular facet of police utilization of improper methods. While history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence to sustain a conviction . . . . Official overzealously of the type which vitiates the petitioner's conviction below has only deleterious effects. Here it has put the State to the substantial additional expense of prosecuting the case through appellate courts and, now, will require even a greater expenditure in the event of retrial, as is likely. But it is the deprivation of the
In a dissenting opinion, joined by three other Justices, Mr. Justice Clark thought the confession had been voluntarily given. For him, the Court's reversal was a "departure" from prior cases and an "enlargement" of the requirement previously demanded of state courts in confession cases. He would look only to Haynes' "age, intelligence and experience with the police," and not to the period of incommunicado detention. In short, he would not consider imposing McNabb-Mallory on the states.

It is obvious that Haynes disallows the use of confessions given by any person who has been held incommunicado by law enforcement officials for an unreasonable period of time, in that case sixteen hours, and during which time the officials have in their possession sufficient evidence to show probable cause at a preliminary hearing. Suppose, under similar circumstances, an indigent accused makes a request for counsel before giving any statements; if counsel were not provided, would Haynes make inadmissible any subsequently obtained confession?

The obvious way to avoid the Haynes rule is for the legislature or Washington's supreme court to require that, after an arrest, an accused must be taken before a magistrate without unnecessary delay, and to exclude from evidence all statements given by an accused during the time law enforcement officials are not in compliance. Rule 5 of the Federal Rules of Criminal Procedure appears appropriate. Rule 5(a) provides that an arrested person must be taken before a magistrate without unnecessary delay, and Rule 5(b) requires that the magistrate inform the accused, inter alia, of his right to retain counsel. In addition, if the preliminary hearing is one that is a "critical stage of a criminal proceeding," and if the accused is indigent, then it would appear appropriate for the legislature, or the supreme court, to require that the magistrate make an offer of counsel. Otherwise, confessions obtained during periods of incom-

protected rights themselves which is fundamental and the most regrettable...because of the effect on our system of law and justice....Official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement." Id. at 519.

Messrs. Justice Harlan, Stewart and White.


A step in this direction would be for the Washington court to place the exclusionary rule behind RCW 9.33.020(5) as a sanction for its violation, thereby excluding from evidence statements made while the law enforcement authorities are in breach of law.
municado detention will run the risk of being excluded from evidence, which, under Haynes, it is the constitutional duty upon the courts to exclude.

One final case, Douglas v. California,\footnote{218} decided on March 18, 1963, governs an indigent's right to counsel on appeal. Douglas and another were jointly tried; convicted of thirteen felonies, and sentenced to imprisonment. Both appealed as of right to California's district court of appeal, and being indigent, they moved that counsel be supplied to assist them on appeal. Following a local rule, that court made an ex parte examination of the record, and denied the motion, concluding that the appeal was frivolous and that appointment of counsel would not be "of advantage to the defendant or helpful to the appellate court." Then, the direct appeal was heard without assistance of counsel; the convictions were affirmed, and California's supreme court denied a petition for further discretionary review. Thus, the issue, clearly presented, was whether, under the fourteenth amendment, a state may deny an indigent the assistance of counsel on direct appeal where state law grants the appeal to rich or poor as a matter of right.

On certiorari, by vote of six to three, the United States Supreme Court reversed. Mr. Justice Douglas delivered the opinion of the Court, holding "that the denial of counsel on appeal to an indigent would seem to be at least as invidious as that condemned in Griffin v. Illinois . . . a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty."\footnote{219} It appears that the unconstitutional discrimination lay in California's pre-appeal procedure. It required that an indigent's appeal demonstrate "a preliminary showing of merit,"\footnote{220} thus forcing the appellate court, without benefit of counsel, "to prejudge the merits before it can even determine whether counsel should be provided."\footnote{221} On the other hand, whenever a non-indigent appealed, "the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel."\footnote{222}

\footnote{219} Id. at 355.
\footnote{220} Id. at 357.
\footnote{221} Id. at 356. It appears that counsel may be allowed to "prejudge" an appeal. "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." Ellis v. United States, 356 U.S. 674, 675 (1958).
\footnote{222} Thus, there "is lacking that equality demanded by the Fourteenth Amendment
One point is of special interest. It should be noted that *Douglas* holds that an indigent's right to counsel is part of the *Griffin* principle elaborating the equal protection clause, and does not rest the right to counsel on appeal upon the due process clause of the fourteenth amendment. This position is not surprising because, as Mr. Justice Schaeffer, of the Illinois supreme court, had earlier indicated, the rationale of *Griffin v. Illinois* was directly applicable to right-to-counsel cases. Thus, *Douglas* came as no surprise, and, in terms of reality, it appears warranted because, obviously, counsel on appeal makes important differences.

Mr. Justice Clark's dissenting opinion in *Douglas* indicates that he adhered to the *Griffin* principle, but thought that the effectiveness of California's review procedures satisfied its standards. For him, an independent examination of the record by a judge, a person obviously within a state's judicial machinery, and his conclusion that an appeal was frivolous were sufficient to satisfy the demands of *Griffin*. This consideration, therefore, also explains Mr. Justice Clark's vote in *Lane v. Brown* where he denied constitutional validity to Indiana's procedure allowing a non-judicial officer, a public prosecutor, outside the judicial machinery, to preclude appellate review. It also accounts for his dissenting vote in *Draper v. Washington* where he would have allowed a judge to determine that an appeal was frivolous. Consequently, seven justices concluded that the *Douglas* case appropriately raised issues under the equal protection clause. Mr. Justice

where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. 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." *Id.* at 357-58.

223 "The analogy to the right to counsel case is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer. Since indigence is constitutionally an irrelevance, it would seem that a successful argument might be based upon the proposition that the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 10 (1956).

224 E.g., San Quentin's warden Duffy publicly has stated that "the punishment for murder depends more upon the resources of the killer than his crime." Duffy, 88 Men And 2 Women 256 (1962). This view cannot be squared with the ideal of "equal justice under the law." In addition, another study shows "that court-appointed counsel in death-sentence cases are somewhat less successful (or less zealous) in pleading their clients' causes. . . . [after trial] . . . than are privately-employed counsel." Ohio Legis. Serv. Comm., *Capital Punishment*, Report No. 46 p. 64 (1961). A Fortiori unrepresented indigents must, perforce, fare worse than those with court-appointed counsel.

Harlan, joined by Mr. Justice Stewart, in a second dissent, was of the opinion that the due process clause's requirement of "fair procedure" governed Douglas, and that, under the fair procedure test, California's procedure was adequate. It appears that this view is simply an attempt to extend the now defunct fair-trial doctrine of Betts v. Brady, with all its problems, to the appellate level. But, it should be recalled that Mr. Justice Harlan probably did not want to overrule that doctrine in the Gideon decision.

It should be noted that the Court's opinion in Douglas explicitly pointed out that the Court was "dealing only with the first appeal, granted as a matter of rights to rich and poor alike. . . ." Thus, Douglas is confined in its immediate application to those states, similar to Washington, where an appeal is granted as a matter of right. Nevertheless, Douglas necessarily embodies the notion that the denial of counsel to an indigent is embraced within the dynamic Griffin principle. Since the Griffin principle already has been held applicable to discretionary appeals, it appears that Douglas may foreshadow an extension of an indigent's right to counsel to discretionary appeals, and perhaps to collateral appeal proceedings as well. In addition, the Griffin principle has been held applicable to state habeas corpus proceedings, which is, of course, a collateral attack, non-appellate proceeding, and there appears no reason to believe that, therefore, the Griffin principle is less applicable to other non-appellate proceedings, such as preliminary hearings, thereby necessitating an offer of counsel to an indigent accused, even though the preliminary hearing is not viewed as constituting a "critical stage" of a criminal proceeding.

Realizing these implications which are inherent in the Griffin principle, the Oklahoma supreme court has held that counsel must be appointed for all indigents when they are brought before a magistrate on arrest. It appears that Washington's supreme court is cautiously,
and wisely, taking the same route. Although this position may imply something akin to a public defender system, this position appears to be the proper one for these reasons. First, this seems to be one reasonable way of handling the need for counsel under Gideon and Douglas. But, second, if the dynamic Griffin principle, requiring counsel, expands beyond Gideon and Douglas, as it appears probable, and since the Griffin principle applies retroactively, then Oklahoma, already having provided counsel at all stages in the criminal law process, will be confronted neither with severe dislocations of its criminal law processes, nor with onerous burdens upon its courts, or a mass release of people from its prisons. Oklahoma will have safeguarded itself from these eventualities by affording an accused his full measure of constitutional rights. That these eventualities are real is underscored by the final matter considered.

**Federal Habeas Corpus and State Prisoners**

The United State Constitution expressly protects the writ of habeas corpus which, aptly, has been called the most important human right in the Constitution. This writ has played a central role in our legal history, mediating the clashes of order with liberty. The function of the writ of habeas corpus is, simply, to test "the legality

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238 Indeed, on October 14, 1963, the Supreme Court vacated a judgment, remanding the case "to the Supreme Court of Florida for further consideration in light of Gideon v. Wainwright . . . " It appears that the "question is whether the denial of an indigent defendant's right to counsel in the state criminal trial as established in Gideon v. Wainwright . . . invalidates his pre-Gideon conviction." Pickelsimer v. Wainwright, 32 U.S. Law Week 3136, No. 14 (Oct. 15, 1963).
239 I will set forth only a brief sketch of the two recent cases because a full analysis would call for a separate article.
240 "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." United States Const. Art. 1, § 9, cl. 2.
242 E.g., Bollman v. Swartout, 8 U.S. 75 (1807) (alleged sedition of Aaron Burr's co-conspirators); Ex parte Milligan, 71 U.S. 2 (1866) (questioned presidential power
of the detention of one in custody of another." State courts are bound under the Constitution to apply "the Supreme Law of the Land." Thus, within a constitutional context, the function of the writ is to test those detentions which are in violation of the supreme law of the land, abridging a person's constitutional rights. Vindication of due process of law is the historical office of the writ.

It is well known that the non-constitutional principle of res adjudicata must give away, and is inapplicable, to bar the bringing of a habeas corpus proceeding. Constitutional rights cannot be defeated in every instance by mechanical, administrative court rules designed to punish a person for his state procedural defaults. This is simply another way of saying that judgments which embody a violation of a defendant's constitutional rights are void, and void judgments may be collaterally attacked, and impeached. Habeas corpus litigation can involve all constitutional rights, including attacks in federal district courts, by state prisoners on their detention when it has been based on a judgment rendered in a state case where, for example, an indigent accused has been denied his constitutional right to counsel, or his constitutional right to a transcript of sufficient completeness for appellate review purposes, or his constitutional right not to have a coerced confession introduced into evidence against him.

Congress has made explicit the power of federal courts to issue the writ whenever a person is being detained by state officials in violation of the Constitution. By another statute, Congress has prescribed the appropriate methods of exercising this power in relation to state prisoners, but, it should be noted, this measure does not circumscribe the power to issue the writ. Even so, federal habeas corpus juris-
diction has been a tangled and dimly lit network of precedents. The United States Supreme Court decided two cases on March 18, 1963, which should prove helpful in clarifying the darkened corners of federal habeas corpus jurisdiction.

The facts of *Fay v. Noia* are uncomplicated. In 1942, Noia and two co-defendants were convicted of felony-murder in a New York state court, and each was sentenced to life imprisonment. The sole evidence against each defendant was his confession. The two co-defendants, but not Noia, appealed their convictions which were affirmed by the appellate division of the New York supreme court. However, subsequent legal proceedings unequivocally showed that their confessions had been coerced, and they were released. After this decision, Noia, claiming that his constitutional rights had been violated, applied to the New York courts for a coram nobis review of his conviction, but his application was denied, ultimately, on the ground of his procedural failure to have taken a direct appeal. Making the same claim, Noia then petitioned a United States district court for a writ of habeas corpus. Although it was conceded at the hearing that Noia's confession had been coerced, the petition was denied on the ground that Noia's failure to have taken a direct appeal constituted a failure to exhaust his available state remedies under 28 U.S.C. § 2254. The court of appeals reversed, and certiorari was granted by the United States Supreme Court which, by a vote of six to three, affirmed the court of appeals, but on other grounds.

the state courts, then, 28 U.S.C. § 2254 will permit an immediate petition for a writ of habeas corpus in a federal district court: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254, and *Fay v. Noia*, 372 U.S. 391 (1963), and see, Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. Rev. 461 (1960).


252 "Why the upper New York courts did not reverse the conviction we do not know, as they filed no opinions. All decent Americans soundly condemn satanic practices, like those described above, when employed in totalitarian regimes. It should shock us when American police resort to them, because they do not comport with the barest minimum of civilized principles of justice . . . ." United States v. Murphy, 222 F.2d 698 (1955) cert. den. 350 U.S. 896.

253 Mr. Justice Clark dissented indicating that "Noia's incarceration rests entirely on an adequate and independent state ground—namely, that he knowingly failed to
The opinion of the court which was delivered by Mr. Justice Brennan includes a lengthy and scholarly historical analysis of the writ of habeas corpus. There appear to be three basic holdings: (1) Section 2254's requirement that a petitioner exhaust "the remedies available in the courts of a state" before seeking habeas corpus in the federal courts was construed to mean that this requirement did not refer to those state remedies once open but no longer available at the time of filing, but rather, it "refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus;" (2) Under the applicable statutes, therefore, federal courts have power to grant habeas corpus relief even though a petitioner has failed to pursue a state remedy, if that state remedy is no longer open and available to him at the time he petitions for habeas corpus. This means that the rule directing that state procedural defaults constitute an adequate and independent ground for state decision, barring direct Supreme Court review, is not, by analogy, to be extended to the federal courts, limiting their power under the federal habeas corpus statute. It is, simply, a practice confined to the United States Supreme Court, and (3) Noia's failure to appeal did not constitute an attempt deliberately to by-pass orderly state procedures. If it had, then, his deliberate failure to perfect any appeal from his conviction of murder." Id. at 445. Mr. Justice Harlan, joined by Messrs. Justice Clark and Stewart, dissented on the ground that the controlling question in the case was "the adequacy, or fairness of the state ground" and that Noia's case involved an adequate state ground which was his failure to appeal. Implicit in his position is the view that the test, whether a petitioner has exhausted his state remedies under section 2254, is to be made as of the time those remedies are made available under state law, and not at the time he files a petition for habeas corpus; thus, state procedural failures would bar relief by way of federal habeas corpus.

Although the Court held that the jurisdiction of a federal court on habeas corpus is not affected by procedural defaults incurred during state court proceedings, it should be pointed out that the effective
operation of this case will not be to substitute federal habeas corpus proceedings for the necessity of a convicted defendant's properly taking a state appeal, or properly seeking to exhaust other state remedies. Nothing in Noia indicates that federal judges need be blind to the exigencies of federalism. The case operates only in the context where state courts have refused to consider, or actually have passed on, a state prisoner's claim to a federal constitutional right. Thus, the integrity of the states has been preserved, and the requirements of federalism have been met.

Fay v. Noia clearly indicates that federal court jurisdiction on habeas corpus is not necessarily affected by state procedural defaults, but the Court did recognize a "limited discretion in the federal judge to deny relief to an applicant under certain circumstances."²⁵⁶ A federal "judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."²⁵⁶ When making this decision, it is necessary, the Court indicated, for a federal judge to apply the classic waiver doctrine, enunciated in Johnson v. Zerbst, discussed above; "an intentional relinquishment of a known right or privilege."²⁵⁷ When this doctrine was applied to Noia,²⁵⁸ the

²⁵⁶ *Id.* at 438. However, "where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding." Barton v. United States, 32 U.S. Law Week 3162, No. 16 (Oct. 29, 1963).


²⁵⁸ "For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal, which, if successful, might well have led to retrial and death sentence... He declined to play Russian roulette in this fashion.... This is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found. Each case must stand on its facts." *Id.* at 439-40. It appears that the facts of Noia's case involved a trial judge who, not being bound to accept the jury's recommendation of a life sentence, had said when sentencing Noia: "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning was to give you a chance." *Id.*, note 3 at 397. It would appear that if Noia, who was represented by counsel, were not faced with such a "grisly choice," i.e., the possibility of electrocution, then, on the facts presented, a waiver would have been found. This view is supported by Norvell v. Illinois, 373 U.S. 420 (1963), and would be the more usual case.
Court could not justify the inference that Noia deliberately had bypassed New York's court system. Thus, conscious waiver or deliberate by-passing appears to be the exclusive means whereby a state prisoner can forfeit his right to have a federal court pass on his federal claim, and the question whether a waiver has, in fact, taken place is a federal question.

_Fay v. Noia_ dealt with the power of a United States district court to grant habeas corpus in cases presenting procedural imperfections in state proceedings, but where a state court had already passed on a prisoner's claim to a federal constitutional right. Additionally, however, the Court did discuss the breadth of a federal district court's power of independent adjudication, indicating that, even where a state court adjudication had turned wholly on primary, historical facts, a district court has the broad power on habeas corpus, to order another evidentiary hearing, relitigating the federal question, to determine the facts. This power gives rise to several necessary questions. Is the exercise of the power to order a de novo hearing discretionary with a district court judge, or must he, in some circumstances, hold a plenary hearing? If a plenary hearing is required, what should be the nature and extent of that hearing, and what weight should a federal district court afford prior state court proceedings wherein a state court has already passed on a prisoner's federal claim? These questions were the subject of another opinion handed down on March 18, 1963; _Townsend v. Sain._

In a jury trial in an Illinois state court, Townsend, a narcotic addict, was convicted of murder and sentenced to death. After exhausting state remedies, he petitioned a federal district court for a writ of habeas corpus, claiming that he had been coerced into giving a confession, obtained while he was under the influence of drugs, including a "truth serum" which, unknown to Townsend, had been administered by a police physician under the guise of giving him narcotics to alleviate narcotic withdrawal symptoms. Townsend's confession had been admitted into evidence over his objection that it had been co-

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259 It is important to note that this holding does not indicate that a state prisoner can be released on habeas corpus if he has been properly imprisoned on some other, non-defective criminal charge. Thus, the autonomy of state law within the proper sphere of its substantive regulation is fully preserved. If "a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas corpus." _Id._ at 432.

260 But, "A choice made by counsel not participated in by the petitioner does not automatically bar relief." _Id._ at 439.

261 _372 U.S. 293 (1963)._
erced. There was conflicting evidence on the coercion point during trial, but the trial judge "made no findings of fact and wrote no opinion stating the grounds of his decision."262

In the federal district court hearing on the petition for habeas corpus, it was conceded that a dispute existed about the nature of the drugs administered to Townsend, their effects, and whether facts bearing on a resolution of these questions had been concealed during the state court hearing on the admissibility of the confession. Townsend argued that, on the record of his case, he was entitled to a plenary hearing wherein he might produce evidence supporting his allegations on the coercion point and that the district court was not bound solely to the undisputed state-court records in making its determination whether Townsend's confession had been freely and voluntarily given. Nevertheless, the district court held no hearing, finding that "Justice would not be served by ordering a full hearing. . . ."263 It dismissed the petition on the ground that the court was satisfied from the state court records that the decisions of the state courts were correct and that there had been no denial of due process of law. The court of appeals affirmed, and Townsend petitioned for certiorari.

The Supreme Court, by vote of five to four, reversed, holding that "on this record the federal district judge was obliged to hold a hearing."264 The opinion of the court was delivered by Mr. Chief Justice Warren. It goes well beyond the narrow holding, stating, "we think that it is appropriate at this time to elaborate the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings."265

In its holding and elaboration Townsend settles that, in certain cases, a district court judge in a habeas corpus proceeding has no discretion and must grant such a hearing:

Where the facts are in dispute, the Federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. In other words, a Federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.266

262 Id. at 302-3.
263 Id. at 297.
264 Id. at 322.
265 Id. at 310.
266 Id. at 312-13. "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure
Townsend also demonstrates that if the record made in a state court is to qualify as a "full and fair evidentiary hearing," then it clearly must show that the state trier of facts applied the appropriate constitutional standard. For example, when the question is whether a confession has been coerced, it would be appropriate for a state trial judge to set forth the constitutional standard actually used to measure the relevant facts. Otherwise, it appears, that a petitioner on federal habeas corpus automatically will be entitled to an evidentiary hearing. As the Court indicated when it reversed Townsend: "In short, there are no indicia which would indicate whether the trial judge applied the proper standard of Federal law in ruling upon the admissibility of the confession." A state trial judge should set forth the applicable constitutional standard in his findings of fact and conclusions of law.

In a dissenting opinion in Townsend, Mr. Justice Stewart, joined by Messrs. Justice Clark, Harlan and White, agreed fully with the Court that a confession induced by drugs was constitutionally inadmissible; that, in a habeas corpus proceeding, a district court's inquiry is not limited to a study of the undisputed portions of the state-court's records, and a district court has power to receive evidence and try facts anew to determine the truth of allegations which, if true, would justify relief. The dissenters differed with the Court only about the wisdom of using the Townsend, or any other, case as a vehicle for cataloging a set of standards governing habeas corpus proceedings and, secondly, about the appropriate application of the standards set forth in Townsend, believing that a de novo evidentiary hearing was not required on the Townsend facts.

When Townsend is considered in conjunction with Fay v. Noia, it appears clear that a state prisoner, who alleges that a denial of a federal constitutional right occurred during a state criminal proceed-


\footnote{208 Id. at 320.}
\footnote{209 Id. at 325.}
ing, 270 will be able to obtain federal district court review of the manner in which the state courts have handled his federal constitutional claim, unless he has consciously waived that right or has deliberately tried to by-pass orderly state procedures. Where the facts are in dispute, if a state should fail to hold a hearing that complies with the standard of a "full and fair evidentiary hearing," elaborated in Townsend, then the federal court has no discretion. It must independently redetermine the evidentiary merits of the constitutional claim. Nevertheless, a state prisoner must exhaust whatever state remedies are open to him, but he need not petition the Supreme Court for certiorari before requesting habeas corpus relief. 271

The implications of these cases are too many to be covered here, but a generalized consideration does stand out in bold relief, overshadowing others. These cases underscore, and will help realize, federal constitutional rights. The basic principle embedded in the writ of habeas corpus is that, in a civilized society, all government, state and federal, must always be accountable to the judiciary for a man’s imprisonment, and that, ultimately, it is peculiarly the task of the federal courts finally to pass on the “Supreme Law of the Land.” If imprisonment cannot be shown to conform with the fundamental requirements of the supreme law of the land, then the individual is entitled to his immediate release and his liberty is guaranteed. The “Great Writ of Habeas Corpus,” assuring our constitutional rights, sets us apart from all totalitarian countries.

CONCLUSION

The cases reviewed in this article undoubtedly will have a profound physical and qualitative impact on the administration of American criminal justice. Surely, the decisions will provide a useful step toward lifting criminal law administration from the doldrums which spurred William Howard Taft to say: “The administration of the criminal law is a disgrace to our civilization.” Even so, the proportions of the problem are huge. The number of counsel needed is only one aspect, but consider the following: “It appears that approximately one out of three of the accused persons facing federal judges is an indigent.” 272

270 “[W]e have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings.” Fay v. Noia, 372 U.S. 391, 426 (1963).

271 What the Court held, “necessarily overrules Darr v. Burford to the extent it may be thought to have barred a state prisoner from Federal habeas corpus relief if he had failed timely to seek certiorari in this Court from an adverse state decision.” Fay v. Noia, 372 U.S. 391, 435 (1963).
The number of indigents who are tried in our state courts is unknown. However, seventy-one public defender offices report to the National Legal Aid and Defender Association:\footnote{273}

Despite their limited coverage, 71 offices reporting to NLADA for the year 1960 handled 116,568 new criminal cases. There is a total population of 57\(\frac{1}{2}\) million in these counties. So, more than two cases are handled out of every 1,500 population. Applying this figure to the 28 million in the large, non-defender counties, it may be assumed that there are approximately 56,000 indigent defendants before the courts each year who must rely upon a court-appointment system for representation or none at all. This and the fact that there are scores of other counties with a population range of 200,000-400,000 without defender services, reveals a critical problem not only for the impecunious defendant, but for a system of justice based upon the principle of equality before the law.

Thus, these cases place extensive duties upon Bench and Bar, not to mention those upon the law schools.\footnote{274} Each must make its own unique contribution.\footnote{275} Not only will more counsel be needed, but, realistically, they must be better educated and better paid,\footnote{276} if the duties set forth by these cases are properly to be discharged.

Apart from the duties imposed, one thing should be made clear. These cases are not startling in their requirements. Little can undermine a society more quickly than the denial of its own laws, or worse, a casual disregard of its organic charter, \textit{i.e.}, the Constitution’s guaranty of “equal protection of the laws.” Unquestionably, law is one of

\begin{footnotesize}
272 Per Mr. Justice Tom C. Clark; this quote is taken from his Law Day Address delivered at St. Louis University, April 20, 1963.


275 Per Mr. Justice Goldberg:

“Lawyers will soon be tested as to their fidelity to constitutional principles.

“Our Court a few weeks ago ruled that the Fourteenth Amendment requires that an indigent charged with crime be afforded the right of counsel.

“This decision has been almost universally acclaimed as a step towards our goal of equal justice under the law.

“Today I ask you to reflect upon the responsibility which this constitutional principle imposes on the Bar and also to ask yourselves whether the Bar is ready to assume it.” Taken from the Law Day Address of Mr. Justice Goldberg before the Federal Bar Association, May 1, 1963.

276 Ohio is a good example. There is no limit on the fees that can be awarded counsel for cases of murder and manslaughter in the first or second degree, and counsel can obtain up to $300 plus expenses in cases involving other felonies. Ohio Rev. Code Ann. § 2941.51 (Page Supp. 1962). Also note, Minn. Stat. § 611.07 (1961) (reasonable expenses plus $25 per day for preparation and $50 per day in court), Conway v. Sauk County, 19 Wis.2d 599, 120 N.W.2d 671 (1963) (Counsel’s total award for representing an accused indigent in a murder case was $7,620.25).
\end{footnotesize}
the primary mirrors of a civilization, reflecting the fundamental values on which it rests. Neither the Supreme Court, nor any other court, can permit the ideal of equal treatment before the law "to remain an empty promise."277 "Tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."278 When comparing ourselves to other freedom-loving countries, we should recall that in the less affluent Scandinavian countries, "every accused in a criminal case [is] entitled to counsel of his own choosing at government expense, to make all necessary investigations (including searches for witnesses and documents) and to supply analyses of handwriting as well as expert testimony on behalf of the defendant."279 Thus, although the American criminal law practice, under the cases reviewed in this article, does not encompass as broad a protection for an indigent as does the Scandinavian practice, the Supreme Court has provided us with the opportunity described by those well-grounded and realistic words of Charles Evans Hughes: "Whatever else lawyers may accomplish in public affairs, it is their privilege and obligation to assure a competent administration of justice to the needy, so that no man shall suffer in the enforcement of his legal right for want of a skilled protector, able, fearless and incorruptible."280

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279 FRANK & FRANK, NOT GUILTY 87 (1957).
280 Hughes, Address to American Bar Association: Justice And Need of Legal Aid For Poor, 6 A.B.A.J. 83, 85 (1920); Hughes's view has been underscored by former Attorney General, Herbert Brownell, "... the burden of providing a fair trial is upon the community. The right to representation is a concomitant of fair trial, and though it is personal to the defendant and may vary with his choice and means, it cannot be permitted to fail just because the accused is a poor person. At that point the community must supply the deficiency." Representation of Indigent Defendants in Federal Criminal Cases, Hearing Before Subcommittee No. 4 of the Comm. on the Judiciary, House of Repr., Feb. 17, 1954, p. 21.