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Ephraim Margolin

Allen Wagner

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The Indigent Criminal Defendant and
Defense Services: A Search for
Constitutional Standards

By Ephraim Margolin* and Allen Wagner**

“The methods we employ in the enforcement of our crimi-
nal law have aptly been called the measures by which the
quality of our civilization may be judged.”1

This article is written at that stage in our constitutional develop-
ment when the formal right of indigents to appointed counsel is
well established but when its practical content increasingly occupies
courts’ attention. The article is limited to an examination of one
question: whether experts and investigators (hereinafter referred to as
“defense services”2) must be made available to assist the defense as a
matter of right. The approach employed here is the same approach that
would have been used in examining the right to counsel itself before
Powell v. Alabama3 or Gideon v. Wainwright.4

The article starts by reciting the facts of actual, unreported
cases. Next, it analyzes the theoretical justifications for defense
services. It continues with a classification of “needs” for such serv-
dices and, after viewing the largely porous reasoning underlying the
precedential law, concludes that (1) the right to legal services is a

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* Adjunct Professor of Law, University of California, Hastings College of
the Law; member of the California and Federal bars.
** Member, Third Year Class, University of California, Hastings College of
the Law.
2. For a partial listing of such services see Oaks, Obtaining Compensation
and Defense Services Under the Federal Criminal Justice Act in 1 Criminal Defense
ABA, Project on Minimum Standards for Criminal Justice, Standards Relating
to Providing Defense Services (1967).
3. 287 U.S. 45 (1932).

[647]
constitutional right; that (2) the test of "equal access to justice" means less than the words imply but more than most courts are willing to provide; and that (3) a reasonable, workable test for minimum assistance is available, and its application is constitutionally required regardless of whether there exist statutes on the subject and regardless of whether counsel is appointed or nonappointed in the case.

Defense Services in Actual Practice

Assume that you are the prospective counsel for a Mr. Barry, who is accused of killing a woman whom he just met in a bar. He admits to the police that he met the woman and gave her a ride to another location. He insists that he never saw her again. Her almost nude body and a blood-soaked washcloth were found the following noon on a snow covered hill. Upon examination by police experts, the cloth proved to contain a variety of fibers, vegetation, and dog hair, arguably traceable to the defendant's car. The police pathologist reported that the victim died of exsanguination (bleeding to death) and exposure to cold. The time and place of death was established on the basis of the physical and chemical condition of the victim's remains. The area where the body was found showed drag marks subject to varying interpretations. The body itself showed marks initially, erroneously, described as burns and bites.

The defendant was questioned by the police approximately one week after the body was discovered. He permitted the police to search and examine his car, where they discovered several blood drops along with fibers, dog hair and various kinds of vegetation. He allowed the police to examine his body and photograph various scratches and poison oak eruptions covering it. He gave the police a sworn statement which contained false information that he never had been arrested before and, after giving them clothes which he wrongly represented as the clothing he wore on the date of the victim's demise, he departed from the state. Two and a half months later he voluntarily surrendered to the police, stating that the reason for his flight was that as a parole violator from another state he feared automatic reincarceration. At the time of his surrender the district attorney was ready to prosecute him with the aid of almost one hundred witnesses and two hundred fifty exhibits. The work of the defense had not yet begun.

The court found the defendant indigent and appointed counsel to represent him. Subsequently, the court indicated concern with the adequacy of the representation. At this point you are approached by an ad hoc defense committee requesting that you represent Mr. Barry as private counsel. A nominal amount of money raised by public subscription is available as a retainer. Assume that both defendant's indigency and your own willingness to serve at a nominal fee are not in question. If you accept the case, how would you prepare for the defense?

At the outset you will have to examine all the available evidence for possible clues and interview all witnesses. The available physical evidence and specific reports would require expert help in interpreting their content and in determining whether expert testimony will be required at trial. Prosecution witnesses will have to be interviewed. Next, despite the time which has elapsed between the killing and your entry into the case, you will search for alibi witnesses. Only after all this is done could the case be evaluated properly and the client be advised about proposed strategy for his defense.

In the case of People v. Barry, counsel started his work on the case by moving for appointment of an investigator, a criminalist and a pathologist at public expense. He did so even though he himself was a private nonappointed counsel. He argued that once the indigency of the accused is established, the county in which the defendant is tried actually saves money when nonappointed counsel agrees to serve without fees or for reduced fees. He also argued that the need for defense services is the same, regardless of whether appointed or nonappointed counsel represents the indigent defendant. The court accepted these arguments in spite of unfavorable state law and local precedents by relying on constitutional

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6. See Drumgo v. Superior Court, 26 Cal. App. 3d 647, 103 Cal. Rptr. 100 (1972), hearing granted, No. SF 22953 (Cal. Sup. Ct., Aug. 24, 1972). In Drumgo the trial court refused to appoint for compensation the specific attorney requested by the indigent defendant although the attorney expressed his willingness to serve. The appellate court reversed on the ground of abuse of discretion. At present the case is pending before the California Supreme Court.


8. The significance of this is seen by a review of California law in the area of court appointed experts. An expert may be appointed either under Cal. Pen. Code § 987.2(a) (West 1972), or Cal. Evid. Code § 730 (West 1968). Under the former statute the expert is solely for defense use but the attorney must be appointed by the court. The statute is actually directed at compensating appointed counsel by providing for "a reasonable sum for compensation and for necessary expenses . . . ." But "necessary expenses" has been interpreted to at times include expert fees, 41 Ops.
requirements of fair trial, right to effective counsel and equal protection.

At trial the defense pathologist challenged the cause, place and time of death. The defense criminalists and investigators (1) neutralized police interpretation concerning fibers and blood on the washcloth, (2) proved that the “blood stained” seatcovers in the defendant’s car were not stained with blood and, in any event, were installed in the car three days after the killing, and (3) found and examined a bloody knife (which was then returned to its original place behind the cushion of defendant’s car). By the time the state criminalists discovered the knife, the defense investigator had succeeded in locating the probable owner and the knife was shown in court not to be the murder weapon. In the same case, defense criminalists rebutted testimony concerning hair, cigarette butts, lipstick, and several kinds of rare vegetation. After a twelve-week trial the jury hung nine to three for conviction and a negotiated disposition followed.

*Barry* is only one example of the practical implications of defense services to the indigent and his attorney. When a criminal lawyer enters the case he seldom is aware of the magnitude of investigatory and expert assistance that may be required. In an unreported 1972 case, *People v. Gutierrez*, involving a charge of assault with a deadly weapon (throat cutting) on defendant’s common-law wife, the defense was that the victim had attempted suicide. During discovery stages of the case the prosecution informed the defense of its intention to call as witnesses hospital personnel who actually treated the victim. In his opening statement, the district attorney for the first time disclosed that he also would offer testimony of the city coroner to show that the wound could not have been self-inflicted.

Defense counsel, who served in the case as a retained attorney,

[Cal. Att’y Gen. 151 (1963).] Under the latter statute the expert is a court expert subject to call by either party or the court. California law does not provide for the appointment of defense experts where counsel is not appointed, but rather is retained or volunteers his services. Appointment of experts under either statute is at the discretion of the court. *People v. Berry*, 199 Cal. App. 2d 97, 18 Cal. Rptr. 388 (1962); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955). The appointed counsel need only convince the court of the “need” for an expert; while the non-appointed counsel must further convince the court that under its discretion and without statutory authority the court should restrict the expert to defense assistance.

moved for appointment of a defense pathologist at the People's expense on the ground that at that point in time the defendant had exhausted all his resources and was indigent. Counsel argued that he was equipped to cross-examine treating physicians about their ministrations to the victim, but had neither the skills to examine forensic experts nor funds to present a rebuttal expert of his own. The court granted the motion as to one expert with an admonition that if further appointments of experts were to be requested, the court would rule on such motions only upon proper disclosure by the counsel as to the amount of fees paid him in the case.  

If Barry illustrates the extremely complex case, Guiterrez exemplifies the more common, one issue, one-week-long jury trial. In both types of cases, courts adopt inconsistent approaches to the problem of defense services. For example, in People v. Coates, a 1970 unreported case, a cablecar gripman was prosecuted for criminal negligence in operating a cablecar down a hill. His defense was that the braking equipment was faulty. The court refused to appoint a defense expert in mechanical engineering on the ground that California statutes did not provide for appointment of experts in cases where the counsel himself was nonappointed. Constitutional arguments of counsel were rejected, but the defendant was acquitted anyway.

With this short introduction concerning facts in three unreported cases, the article now turns to an analysis of the available arguments which elevate the granting of defense services by the courts to the high level of a constitutional imperative.

The Seven Rationales for Providing Defense Services

Most state courts require the defendant to show a particularized

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10. Compare this ruling with the federal procedure outlined in Oaks, supra note 2, at § 7.13(21). Oaks argues that the defense services are available to both retained and appointed counsel.


need or necessity for the requested defense services.\(^{13}\) Webster defines "necessary" as "[e]ssential to a desirable or projected end . . . ."\(^{14}\) In other words, what is "necessary" can be decided only after one answers the question: "Necessary to what end?" Court discussions of defense services annunciate the following "ends": (1) establishment of the defendant's innocence; (2) equality of access to justice as between the poor and the rich; (3) equality of access to justice as between the indigent defendant and the prosecution; (4) access to that which is fundamental for a "fair trial"; (5) access to that which assures "adequate defense"; (6) access to that which "assists counsel"; and, (7) access to that which assures an "effective defense." These talismanic formulae neither exhaust the subject nor explain it. Frequently they overlap; often they are used interchangeably. However, on closer examination, they are more than arbitrary variations in nomenclature; they represent diverse traditions in constitutional thought, evoke different philosophies of justice and invite potentially inconsistent results.

**Establishing Innocence**

On at least one occasion, a court has construed the "end" of establishing innocence as requiring that "[a] defendant's lack of funds should not prevent him from obtaining evidence which might establish his innocence."\(^{15}\) The verbal reach of this formula would seem to require only a plausible relation between the services sought and the expectation of success in unearthing some proof of innocence. Naturally, the practical limits of this test, as in all other tests, depend on how and by whom the plausible relations and the reasonableness of the request are determined. If this test be limited only by rules of relevancy and by a prohibition of cumulative testimony, it would have justified all of the appointments in *People v. Barry*. Indeed, a broad reading of this test—to authorize services where the evidence unearthed would not be inadmissible—could have resulted in appointment of several additional experts in that case.

**Equality with the Rich**

Equating of the poor with the rich requires an examination

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of what the rich do or could do under similar circumstances. Yet, what the rich could do frequently is not reasonable by an average defendant's standards. The rich could shop for experts without seeking court permission and use only those experts who are most responsive to any given theory. The rich could employ more expensive experts and more of them. They could reach out of state for the most qualified and articulate individuals to pursue even unlikely leads. The test of "equality with the rich" could not and does not contemplate "ideal equality."  

Indeed, some inequality is inherent in the very requirement that an indigent defendant seek court approval of defense services by articulating particularized needs for the court, an act not required of the rich. Apart from this, there are legitimate limits imposed by society on all seekers of communal largess, even as to rights deemed "fundamental"—from criminal defense to education. The courts are unlikely either to bring the poor to a truly equal footing with the rich or, conversely, to equate the rich with the poor by more stringent enforcement of limitations on cumulative proof attributable to affluence. The latter solution is particularly untenable, since evidence, once located, ought not to be suppressed. Once the rich defendant uses his funds to good advantage, the results should not be kept out. The conclusion, in the words of the Sixth Circuit construing the Federal Criminal Justice Act is: "[T]he Congressional purpose . . . was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants."  

Equality with the Prosecution

The test of equality with the prosecution is demonstrated most dramatically in the notorious, political or highly visible cases such as Sirhan, Manson or the Angela Davis case. In Davis, for example, the state of California made available for the prosecution three full time members of the state attorney general's staff, several deputy district attorneys, services of the F.B.I., C.I.A. and district attorney's investigating staff, the police, and unlimited resources for experts.

In addition, the California legislature enacted special legislation to reimburse the trial county for all costs including those of appointed counsel.\textsuperscript{21} In their motion for appointment and costs, defendant's nonappointed counsel argued that the issue was not "whether or not the defendant is a pauper but whether she is overwhelmed by the superior resources of the State . . . ."\textsuperscript{22} Nonetheless, extreme cases merely dramatize what is equally true but less dramatically represented in ordinary criminal trials. President Kennedy referred to such equality in a more general sense, when he wrote:

> In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his case.\textsuperscript{23}

In an adversary system, equal access to trial resources for both adversaries is at the very roots of fair play.\textsuperscript{24} However, in this context "equality" has many meanings. One could compare the resources of the "average," hypothetical defendant with those of the abstract "system"; one could compare the resources of a specific defendant with those state resources which might reasonably be expected to be brought to bear on the specific case; or one could compare the resources of a specific defendant with state resources which in retrospect actually were committed in the case. Each formula creates problems of its own. In comparing "a defendant" with "the system," it must be remembered that there are cases where the defense is better prepared than the prosecution, indeed, sometimes better financed and backed by an array of more sophisticated legal talent. On the other hand, there are cases where no cost and effort is spared by the prosecution in total determination to win a conviction. Not only "notorious" cases belong in this category; sometimes, for reasons of personality conflict, ambition, local policy, or for no apparent reason, a case of oral copulation or a case of obscenity or a case of gambling will turn into a multiweek, multiwitness, multi-expert "federal case."

\textsuperscript{21} CAL. PEN. CODE § 4700.2 (West 1972).
\textsuperscript{22} Motion to Appoint Experts at 5, People v. Davis, No. 52613 (Cal. Super. Ct., Santa Clara County, June 4, 1972).
Where all the facts in the case are fairly known before trial, it is easier to predict the minima of equal access to defense resources necessary to put the indigent defendant on a more equal footing with the prosecution. A more difficult, and more common, problem arises where the prosecution itself does not know or will not tell what kind of case it has against the defendant. Even where the defendant obtains the relatively infrequent order for continuing discovery against the prosecution, new evidence may develop mid-trial, tactics may change or new witnesses may be brought in. In a typical case, neither the court nor the defense (and often not the prosecution itself) can predict what the prosecution will end up doing before the trial is over. In many jurisdictions the very identity of the prosecutor may not be known until fairly close to the date of trial. In many state courts the prosecution habitually "reviews" the case only in time for pretrial conference.

Furthermore, in many cases both the police and the prosecution are either willfully selective or negligent in the preparation and presentation of the evidence. Frequently the district attorney relies on the "totality of facts in the case"—the testimony of eyewitnesses, confessions or circumstantial evidence at hand—while downgrading the careful examination of physical evidence for possible exculpatory clues. All practitioners of criminal law will recount endless tales of prosecutorial reliance on eyewitnesses to the exclusion of fingerprinting, blood and sperm typing, or even blood alcohol tests. In such cases, if scientific testing is still possible, it may

25. Generally, the results of the prosecutor's investigations are not discoverable. See Britt v. North Carolina, 404 U.S. 226, 233-41 & n.7 (1971) (Douglas, J., dissenting); Moore, Criminal Discovery, 19 HASTINGS L.J. 865 (1968). But see cases cited in notes 26 & 27 infra; People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963) (balancing of interests to determine if discovery is to be allowed); People v. Vick, 11 Cal. App. 3d 1058, 90 Cal. Rptr. 236 (1970) (state has no interest in denying access to all evidence).


27. As a practical matter, once the unscrupulous prosecutor has accumulated what he considers sufficient evidence for a conviction, he may be reluctant to continue his investigation since any exculpatory evidence found must be disclosed lest he be subject to a charge of suppressing evidence. See, e.g., In re Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971).

28. Such testing could become impossible with the passage of time since evidence may disappear, e.g., fingerprints get smudged, blood dries and can no longer be typed by subgroups, etc.
be the only chance for the defense to show innocence.\textsuperscript{29} For the prosecution, such testing may be no more than an exercise in foot-
noting what it considers to be self-evident.

Where the defense desires a scientific test, the rich simply buy it. The poor must either obtain appropriate appointment of an expert or compel the prosecution to perform neglected tests. No defense counsel generally will risk requesting a prosecution-conducted test without foreknowledge of its result. Even in that rare case where the defense is inclined to take such chances, courts seldom would force a reluctant prosecutor to run tests "for the defense."\textsuperscript{30} The theory is that the courts will not tell the prosecution how to run its case. Nevertheless, the results for the defense are obvious: if the prosecution is not ordered to run the test, the test may not be made at all in the absence of funds. Furthermore, even if the courts would order the prosecutor to perform such tests, can the adversary system compel the indigent, but not the rich, defendant to rely on his adversary's testing skills and procedures?\textsuperscript{31} Even more im-

\textsuperscript{29} Failure to assist the defense in performing such tests may preclude a defense. \textit{E.g.,} People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966). \textit{Watson} was a forgery case in which the prosecution did not perform a handwriting analysis. The court held that to deny the defendant the services of a court-appointed expert documents examiner might, under this circumstance, preclude a defense. Although the court did not mandate action by the prosecutor, it did find the constitutional right to summon defense witnesses sufficient for the appointment of an expert. \textit{Accord,} State v. Bowen, 104 Ariz. 138, 449 P.2d 603 (1969), \textit{cert. denied,} 396 U.S. 912 (1969). But here the court found no constitutional mandate to supply assistance to the defendant in performing a sperm typology test even though it was an admittedly simple test which might have exculpated him completely from the charge of rape.

\textsuperscript{30} \textit{See} People v. Berry, 199 Cal. App. 2d 97, 18 Cal. Rptr. 388 (1962); People v. Talman, 26 Cal. App. 348, 146 P. 1063 (1915). In both cases the court found no duty upon a public officer to assist the defendant in locating witnesses. \textit{But see} State v. Superior Court, 2 Ariz. App. 458, 463-64, 409 P.2d 742, 747-48 (1966) (dictum) (prosecutor is duty bound to protect rights of the innocent).

\textsuperscript{31} Two problems may arise: conflict of interest, and variation in expert interpretation. In Marshall v. United States, 423 F.2d 1315, 1319 (10th Cir. 1970), in reviewing the court appointment of the F.B.I. to assist the defendant in investigation, the court said: "[I]t seems apparent that only the most unusual circumstances could relieve such a designation from the taint of plain error . . . . \[Investigative aid \{given to the defendant must\] serve him unfettered by an inescapable conflict of interest. The Bureau . . . is obviously faced with both a duty to the accused and a duty to the public interest." In State v. Hancock, — Iowa —, 164 N.W.2d 330 (1969), the court found that a defendant charged with forgery was entitled to his own handwriting expert, even though the prosecutor already had performed an evaluation, based in part upon the recognition that handwriting analyses by experts vary. \textit{But see} \textit{In re} Imbler, 60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963), \textit{cert. denied}, 379 U.S. 908 (1964), where in a habeas corpus attack, a showing that the prosecutor's fingerprint expert was negligent and in error was not sufficient to overturn the verdict.
portantly, what of the cases where the significance of physical evidence has escaped the attention of the prosecution? May we legally require the indigent, but not the rich, defendant to disclose anticipated results to the prosecution as a precondition for the opportunity to examine the evidence for such results?

One other alternative requires examination. In those cases where the physical evidence escaped nobody's attention and where both parties realize its potential importance, some courts tend to consider it sufficient to appoint "impartial" witnesses selected by the court, beholden to neither party and, in theory at least, neither coached nor influenced by either.\(^3\) This alternative could still provide for "adversary" experts, but only in helping the parties to prepare their cross-examination. In theory, this solution offers the advantage of eliminating the "battles of the experts."\(^3\)

Yet, perhaps "the battles of the experts" are neither unnecessary nor improper. The very fact that experts do disagree demonstrates that an expert should not be presumed infallible merely because he is selected by the court.\(^3\) In fact, experts, from psychiatrists and pathologists to professors of criminalistics, remain quite human behind the facade of their superior qualifications and much in their testimony goes not to abstract factual findings but to findings anchored in their philosophical predispositions, rooted in their unconscious tendencies and sprouting a veritable forest of personal mannerisms. For example, on the issue of diminished capacity or prurient interest in obscenity cases, a psychiatrist must first determine whether the legal definition itself is meaningful and acceptable to him. In areas of lesser moral or emotional involvement, an interpretation of a wound could be rigid ("there is no doubt in my mind that") or flexible ("it is likely that").\(^3\) The experience in

\(^32\) For example, on the issue of sanity, most jurisdictions require court appointed psychiatrists. \(\text{E.g., Cal. Pen. Code} \S 1027 \) (West 1972). In other areas court appointments may conflict with Fifth Amendment rights. \(\text{See, e.g., United States v. Brodson, 136 F. Supp. 158, 166 (E.D. Wis. 1955), rev'd on other grounds, 241 F.2d 107 (7th Cir. 1957).} \)

\(^33\) An alternative would be the use of stipulations. \(\text{See, e.g., Oaks, supra note} \) 2, at \$ 7.15(4).

\(^34\) \(\text{Cf. United States v. Schappel, 445 F.2d 716, 720-21 (D.C. Cir. 1971).}\)

\(^35\) In California v. Gutierrez, No. 84415 (Cal. Super. Ct., San Fran. County, Nov. 11, 1972), the coroner testified "with 95% conviction" from a post-suture photograph of the wound and without reference to any other facts, that the wound could not have been self-inflicted but had to be assaultive. He based this opinion on the absence of "hesitation marks" typical of suicidal wounds, and the curving angle of the wound. The defense pathologist, equally adamant in his opinion, testified that
People v. Barry\textsuperscript{36} illustrates genuine and honest disagreements on substance even where the data is objectively measurable. For example, in that case, two experts pointed to the same pathological slide and to one it demonstrated tissue depleted of blood, while to the other it clearly showed tissue satiated with blood. Where incomplete or less than objective data confronts experts, disagreements are bound to multiply.

Furthermore, the argument that the state has an interest in minimizing the expenses of a criminal trial cannot overcome the obvious fact that a criminal prosecution is an adversary proceeding. To deny defense services to the indigent prevents the poor—but not the wealthy—from becoming equal to the prosecution. If the financial interest argument is valid, it seemingly should work both ways—\textit{i.e.}, where the defendant has performed certain evidentiary tests, the prosecutor should be precluded from expending state funds to repeat the same tests, absent a showing that the defendant’s experts were biased. The obviously unacceptable result would be a race to perform the test first, and, furthermore, few if any prosecutors would be willing to rely on the defendant’s experts.

In sum, where there is physical evidence in a case, the performance or nonperformance of tests by the prosecution on that physical evidence ought to be irrelevant to the right of the defense to examine such evidence independently, just as the defendant’s performance of tests could not preclude the prosecutor from performing similar tests. Where the prosecution’s expert reports are available to the defense, independent evaluation by the defense is equally justified. The test is not what the prosecution actually did in any given case, because this can never be reliably known ante factum; rather, one starts with what is known about the prosecution’s case and adds what the prosecution reasonably could be expected to do.

\textbf{Fairness}

The test of fairness comes complete with historical barnacles. It

\textsuperscript{36} No. 136128 (Cal. Super. Ct., San Mateo County, Sept. 11, 1968).
reflects old norms of due process dating back to an era when "fairness" was satisfied without any assistance of appointed counsel at any stage of the criminal proceedings. For that reason, paradoxically, the test of fairness is the least "fair" among tests, falling considerably short of the more recent formulae of equal protection.  

Webster defines "fair" as a general term, "[which] implies, negatively, the absence of injustice or fraud; positively, the putting of all things on an equitable footing, without undue advantage to any . . . ." Thus, Webster describes "fairness" Janus-like, facing both towards the language of due process and to equal protection. Historically, however, the courts became fixated exclusively on the first part of the definition: if the trial is not "unjust," it could not be "unfair." Nonetheless, the second part of the definition is equally vital and constitutes a natural bridge from the historicity of due process to the latter day strictures of equal protection. "Without undue advantage to any" commands a clear, simple, workable test of treatment in lieu of the fuzzy tautology that the "process" meted out to a defendant was "due," because neither "fraudulent" nor "unjust." The very term "justice" thus comes for a redefinition: could that be just which unduly advantages one party over the other?

The traditional test of fairness has been the most subjective of tests. On occasion the appellate courts have compounded arbitrary decisions of the lower courts with their own measure of arbitrariness. Thus, for example, "fairness representation" could be found where counsel showed diligence in the areas of law and motion, arguing that appointed counsel who knew enough law to churn motions must have also known enough to represent his client competently. Courts habitually peruse the record for "un-fairness," although such unfairness inherently lies outside the record, which could not reflect evidence counsel did not find due to lack of experts or investigators.  

Returning to Webster's definition, the question could also be propounded in terms of unfairness to the prosecution. Could it be argued that the prosecution is prejudiced when its pathologist is de-throned from his position of exclusiveness and the defense is allowed to challenge his opinions? Surely, challenges by the defense only would be "putting all things on an equal footing, without undue

38. WEBSTER'S NEW INTERNATIONAL DICTIONARY 910 (2d ed. 1959).
advantage to any." Furthermore, if the prosecution is not prejudiced thereby, should the argument be allowed that the taxpayers, as opposed to society at large, might prefer a cheaper brand of "justice"?

Assistance to Counsel and Adequate Defense

The test of that which "merely assists counsel" arose out of judicial comments on the Criminal Justice Act. For example:

The rule in allowing defense services is that the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation, not that the defense would be defective without such testimony. 40

This test, and the test of "adequate defense," 41 are variations on the theme of "fairness." Semantically, they are quite elastic. Unqualified "assistance to counsel" could mean "some" assistance, "meaningful" assistance, or assistance which is "fair," "adequate" or "effective." "Adequacy" as a test brings to mind the old joke of "How is your wife? As compared to what?" The federal courts, however, tend to construe broadly both the assistance to counsel and adequate defense tests as authorizing that experts be made available, both to testify, as well as to aid in pretrial preparation. 42 History, again, explains the result. Statutory construction of the Criminal Justice Act is less hampered by long standing constitutional strictures of the due process clause.

Effective Defense

Finally, no discussion of right to counsel cases could be complete without a look at the line of precedents under the Sixth Amendment's right to counsel. 43 "Effective counsel," first mentioned in

41. The "adequate defense" test is also a derivation of the Criminal Justice Act of 1964. 18 U.S.C. § 3006A (1970). In United States v. Theriault, 440 F.2d 713, 715 (5th Cir. 1971), the court said: "The [Criminal Justice Act] expert ... supplies expert services 'necessary to an adequate defense,' which embraces pretrial and trial assistance to the defense as well as availability to testify."
42. 440 F.2d at 715.
43. U.S. CONST. amend. VI, provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." To satisfy this mandate in the federal courts there exists FED. R. CRIM. P. 44. A line of Supreme Court decisions, starting with Powell v. Alabama, 287 U.S. 45 (1932), through Gideon v. Wainright, 372 U.S. 335 (1963), and culminating in Argersinger v. Hamlin, 407 U.S. 25 (1972), apply this same mandate to the states.
Powell v. Alabama,\textsuperscript{44} has been construed by the California Supreme Court to include "the aid and advice of experts whom counsel deems useful to the defense ... ."\textsuperscript{45} Effectiveness of counsel is increasingly under scrutiny. Counsel clearly is ineffective if he cannot cross-examine and raise proper objections.\textsuperscript{46} Yet, to be effective counsel must also "investigate carefully all defenses of fact and of law that may be available ... ."\textsuperscript{47} This includes not only legal research; it also requires a search for evidence, investigation of witnesses\textsuperscript{48} and facts, interpretation of facts, and presentation of facts.

In cases of diminished capacity, for example, counsel cannot be effective without psychiatric evaluation of the defendant, and without the advice and testimony of the psychiatrist. In alibi cases, neglecting to find, interview and produce the witnesses renders the value of counsel's role questionable. In forgery cases, a handwriting expert is required\textsuperscript{49} in the absence of a confession which satisfies defense counsel that his only role in the case is that of trying to mitigate the penalty. In rape cases, sperm typology and sperm count may be exculpatory. If exploration of facts is within the required duty of defense counsel, expert assistance to counsel in such exploration becomes an inescapable corollary of the right of a defendant to defend himself in propria persona. As one commentator wrote:

The story of the indigent defendant who, upon being offered counsel by the court, replied "If it's all the same to you, Judge, I'd rather have a couple of good witnesses," summarizes what defense

\textsuperscript{44} 287 U.S. at 71.
\textsuperscript{45} In re Ketchell, 68 Cal. 2d 397, 399, 438 P.2d 625, 627, 66 Cal. Rptr. 881, 883 (1968).
\textsuperscript{46} In State v. Hancock, — Iowa —, 164 N.W.2d 330 (1969), the court justified a defense expert in part on the basis of defense counsel’s need in cross-examining the state’s handwriting expert.
\textsuperscript{48} Some courts require counsel to do their own investigation. But counsel is not trained as an investigator. A. AMSTEDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES—II 2-87 to 2-88 (2d ed. 1971). If counsel attempts to impeach a witness he interviewed, he risks violating ethical standards. ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 231 (1970). He also risks personal sanctions, Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961) (Burger, J., concurring), and a possible need to withdraw from the case midtrial. \textit{Id.}; Fish v. Commonwealth, 208 Va. 761, 160 S.E.2d 576 (1968).
counsel will quickly learn—most cases turn on presentation of evidence and not on legal argument.\textsuperscript{50}

In short, the right to defense services is a defendant's right to equality of treatment. Logically, this right is established by virtue of poverty, regardless of whether counsel is assigned. The same logic requires that the right to defense services extend to some cases where the defendant is not indigent, but where prosecution resources are so overwhelming as to invest the prosecution with undue advantage. This logic, transcending precedents and statutes, turns directly to the constitution for its authority.

**Procedures for Demonstration of the Need**

A careful examination of state and federal legislation and reported cases suggests that throughout the United States a defendant is required to demonstrate a “particularized need” in order to obtain defense services.\textsuperscript{51} Before examining further the concept of “needs” and their classification, it is necessary to digress to resolve a procedural problem in demonstrating such needs to the court. The statutory federal procedure calls for an \textit{ex parte} showing of need \textit{in camera}, in the absence of the prosecution.\textsuperscript{52} A transcript of the proceedings is prepared and sealed. Since a showing of need requires disclosure of defense theory or, at least, of defense tactics, there could be no justification for such disclosure becoming an automatic discovery device for the prosecution solely because of the defendant's indigency. Where rich defendants need disclose nothing to the prosecution except possibly that a motion to inspect has been filed, the indigent is required to particularize what his inspection is expected to show. The implications of equal protection are so strong in this situation that even in the absence of legislation, state courts should grant an \textit{in camera} hearing upon request. When such a hearing is granted, the procedure is to file a motion for defense services tendering both the nature of the services sought and the reasons for seeking them in a subsequent proceeding \textit{in camera}. If the motion is granted, court records will reflect a one-line entry that the motion was granted, and separate orders, naming the experts, their compensation and their ex-

\textsuperscript{50} A. Amsterdam, B. Segal & M. Miller, Trial Manual for the Defense of Criminal Cases—II 2-85 (2d ed. 1971).
\textsuperscript{51} E.g., Criminal Justice Act, 18 U.S.C. § 3006A(e)(1) & (2) (1970); cases cited note 13 supra.
pected function, are signed but not filed until the verdict is entered in the case.

Classification of Needs

Threshold Problems in Identification of the Need

The earlier discussion of People v. Barry noted that before applying to the court for appointment of experts, counsel must first satisfy himself that the need for expert testimony exists. This alone frequently requires expert advice. When counsel is shown a pathology report, a post-mortem photograph and a drawer full of autopsy specimens and slides, unless he himself is trained in pathology, he will be unlikely to spot possible errors of interpretation or description, the omission of relevant data and procedures, or indeed, the very significance—both medical and forensic—of what he is shown. Similar problems confront counsel in cases involving plant identification, handwriting, blood typology, identification of drugs or fingerprints.

Reported cases where defense services are denied for failure to show a particularized need uniformly assume that the need itself was readily identifiable to counsel. However, as suggested above, this seldom is true. To determine the need for expert examination in any nonlegal field, defense counsel must rely on expert advice which, in some cases, would result in corroborating the findings of the coroner, in other cases it would raise doubts and provide counsel with a meaningful cross-examination, and in a small number of cases it would establish the "need" for further expert testimony. In other words, where expertise is required not to prove a point but merely to check whether the point exists, the defendant should not be required to demonstrate the same type of need which he is required to show in order to have an appointed expert fully investigate and prepare to testify in court. There are at least two levels of "need": a threshold level

53. E.g., Christian v. United States, 398 F.2d 517, 519 (10th Cir. 1968). The court held: "When counsel requests court authority for the employment of an investigator or experts, he should point out with specificity the reasons such services are necessary." In People v. Berry, 199 Cal. App. 2d 97, 105, 18 Cal. Rptr. 388, 392 (1962), in passing on a request for an expert, the court noted that, "No proposed expert was named, nor was there any statement of any preliminary interview with an expert . . . ." In Dolan v. People, 168 Colo. 19, 36, 449 P.2d 828, 836 (1969), the court required a showing of "prejudice or possible prejudice . . . upon a failure to appoint." In State v. Geelan, 80 S.D. 135, 138, 120 N.W.2d 533, 535 (1963), the court noted: "Defendant's application did not intimate any reason why an expert witness should be appointed or that any were available or had been consulted by him or anyone on his behalf."

54. This two-tier classification will aid in eliminating the fear of "fishing ex-
which involves nominal funding and ought to be available as a matter of course, solely upon a showing of indigency and the existence of physical evidence or investigative need, or both; and the less frequent situation where the expert is needed to fully investigate and prepare to testify, where “particularized need” should be demonstrated before serious expenditures of funds are incurred.

This procedure is neither revolutionary nor even new. Under the Federal Criminal Justice Act, appointed counsel is permitted reimbursable expenses of up to $150.00 without prior application but subject to subsequent review. Although the figure of $150.00 is not sacrosanct, it could serve as a guideline for threshold expenditures. The new elements in the present proposal are to do away with the distinction between “appointed” and “nonappointed” counsel for purposes of availability of defense services at public expense and to apply threshold funding to the states.

Thus the threshold fund would assist in determining if the “need” exists and would assist the defense in demonstrating that need. Beyond this problem of demonstrating a need lies the greater question of whether some needs should be presumed by the very nature of the crime charged and the type of evidence which exists.

**Presumed Needs**

A presumed need is defined here as one implied from the existence of certain actually or potentially relevant physical evidence. The nature of certain types of evidence creates a right to the services of experts as a logical corollary. The test of presumed need covers, *inter alia*, a handwriting expert in a forgery charge, a pathologist in a murder case, a chemist where blood analysis is involved, a psychiatrist where diminished capacity or insanity are at issue. For purposes of

55. Cf. Douglas v. California, 372 U.S. 353, 357 (1963) (requirement that indigents make a preliminary showing of merit to obtain an appeal is discriminatory); Coppledge v. United States, 369 U.S. 438, 445 (1962) (a requirement of “good faith” is to be judged by an objective standard which is satisfied if the issue raised is not frivolous); Ellis v. United States, 356 U.S. 674 (1958) (a mere request for counsel and appeal, unless frivolous, is sufficient for the appointment of counsel).


57. It is not suggested that the “right” to satisfy presumed needs should be automatic. It is suggested that no such “right” exists until a request is made by the defense. But once the request is made, judicial discretion should be minimized in order to protect the defense from the subjectivity of those for whom even the right to court appointed counsel borders on coddling of criminals and superfluous extravaganza.
presumed need—i.e., a need which is assumed without a particularized showing by the defendant—one expert per discipline ought to be appointed upon the defendant's request regardless of whether the prosecution employs experts of its own. Where the prosecution uses more than one expert, the defense presumptively ought to be entitled to a similar number of experts.

Although some courts deny expert assistance for the defense on the grounds of an absence of statutory authority and others hold that the "totality of facts and circumstances" in each case ought to control the outcome, some courts already have recognized presumed needs. Experience with criminal practice yields a list of minimum needs which ought to be presumptively granted as a matter of course, on the basis of ex parte affidavits, subject only to court supervision over the fact of defendant's indigency and the proposed expert's fee schedule.

Where the alleged need is not one that should be presumed, the decision of whether to grant defense services must be made on a case by case basis. In such instances, since the defense would be able to utilize the threshold fund, it should carry the burden—at least until more cogent criteria are developed—to show ex parte the basis and reasonableness of the request for defense services and the facts sought to be discovered or proved.

The Uncharted Areas of Other "Needs"

The dimensions of the uncharted areas of needs are seldom explored. Several examples come to mind. For example, your client is charged with acts of oral copulation with two minors who claim that the acts took place in your client's apartment. Your client has a prior conviction for contributing to the delinquency of minors. The two boys are "male prostitutes"; they are neither above having enticed your cli-


ent into his predicament nor, indeed, above blackmail or lying about acts which did not happen. While your client is in jail, unable to post bail, and the boys are in juvenile hall, you wish to bring fingerprint experts into your client's apartment to prove that no fingerprints of either boy will be found anywhere on the premises. "Proof of the negative" by lack of fingerprints is difficult at best, especially when some period of time has elapsed since the arrest. Could you successfully ask for appointment of a fingerprint expert? Must you ask for a court-appointed expert, in which case the results will be revealed automatically to all parties for better or for worse, or would you ask for an appointment "to aid the defense," so that if prints are found you will not be convicting your own client with your diligence and zeal?61

Another example is that your client is charged with possession for sale of a large quantity of LSD and some marijuana after your client's friend had brought a "friend" (an informer who was anything but a friend) to your client's home. The "friend's" testimony purported to justify the search of the premises by implicating your client in an oral admission upon entry into the front room. It proceeds to describe visual observation by the informer of loose marijuana on a table three feet away and a "brick-like" object in a paper bag in the corner of the living room and relates a conversation between your client and an unknown person in the kitchen, purportedly overheard by the informer while still in the living room. Your client denies any knowledge of the loose marijuana and the "brick," denies conversations and especially disclaims knowledge of the 20,000 LSD pills found after his arrest in his own bedroom, off the kitchen.

On the motion to suppress you produce an acoustics engineer to reproduce the conditions as they were on the date of arrest in order

61. Consider the tactical advantage to the defense in the demand itself, as in People v. Brown, No. 78406 (Cal. Super. Ct., San Fran. County, April 20, 1970), where defendants were charged with receiving stolen property. Two days before the arrest they brought into a junkyard nearly three tons of brass for sale and sold it openly for $1400. The brass was peculiarly shaped in long strips. It subsequently was identified as part of a $150,000 brewing machine, stripped from it during a theft in a warehouse within one month preceding the arrest. The defense made an immediate written demand on the owners of the machine, the police and the district attorney to permit fingerprinting of the machine. The police and the owners ignored the request. The district attorney opposed it successfully on the ground that defendants were not charged with theft. Fingerprint evidence was irrelevant to the prosecution; it was defense's only chance to corroborate their version of receiving the goods. As a result of the frustrated demand to fingerprint the machine, the case against Sexton was dismissed and Brown was allowed to plead to a misdemeanor which resulted in neither a fine nor confinement in the county jail. This case illustrates a defense technique of using the very demand for expertise to achieve a satisfactory disposition.
to prove that it would have been physically impossible to overhear the alleged conversation. You produce several witnesses to testify that at the time in question the living room was so dark that one could not tell whether he held in his hand a copy of Newsweek or a copy of Time magazine, let alone identify "the leaves of grass." But your witnesses are both unconventionally dressed and equipped with unconventional haircuts. You fear that the judge may be inclined to believe the police informer. Could you show sufficient cause to justify the appointment of the engineer? Since the engineer will conduct the experiment in the living room, could you also obtain an appointment of another expert whose job it will be to supervise the other end of the experiment in the kitchen? Should it make any difference to the outcome of your motion whether you were an appointed counsel or a volunteer counsel for the defendant? 

In a final example, you represent an "adult theatre" whose lowest man on the totem pole, the ticket taker, was just arrested for his part in exhibiting an obscene film. From past experience you know that at trial the prosecution will call to the stand police "experts" on community standards. You know that police officers were assigned to make such a personal "study" of local standards and you know from fellow attorneys that, incongruously, most courts allow these "experts" to testify. In the absence of a strong rebuttal, such testimony could tip the case against your client. Clearly, you would like to have an expert of your own to rebut the police experts. You know that another local attorney who represents more and richer clients than you represent in that field has chartered a highly respected, statewide poll, for a reputed sum of $10,000.00, to conduct a serious study of "community standards" under objective auspices and under statistically valid conditions. You know that every case in which the $10,000.00

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62. In the actual case, People v. Chaney, No. 80477 (Cal. Super. Ct., San Fran. County, Oct. 20, 1971), the engineer testified without appointment and the motion to suppress was continued to another date. Counsel advised the court that defense funds would run out after the next court appearance and requested a date certain. He cleared it with the court on the eve of the second day of hearing but, upon arriving in court with the second expert, he found that a jury trial was assigned to that department. He then asked his expert whether he would agree to waive fees. The expert refused. Counsel then moved for a hearing in camera to appoint the expert. He filed an affidavit of the defendant's indigency, an affidavit of the public defender that if appointed to replace counsel he would file the same motion to appoint the same expert, and his own waiver of demand for fees. The offer of proof was heard in chambers. The motion was denied on the ground that the second expert was merely a witness, not an expert witness, thereby providing the defense with a major appellate issue and the 20,000 LSD pills were suppressed anyway.
poll was used resulted in a defense verdict or in a hung jury. Your client can afford attorneys' fees and costs of $1500.00. Assuming that you cannot force the “rich” attorney to share his study with you, what do you do? What motions do you frame? What will you decide as a judge when the motions land on your desk? 63

These examples could be multiplied ad infinitum. Legal norms do not operate in a social vacuum. Clearly, at some point judicial discretion 64 will be invoked against the defense. This article argues only for the modest assertion that the lines be drawn at a different minimum level than some reported cases require. 65 Beyond the new threshold of constitutional minima, there will be a vast area of unexplored case-by-case issues ranging from the case of obvious need to the extreme position, perhaps best exemplified by the sedition indictment in United States v. Powell, 66 where defense counsel requested

63. These facts were taken from an “Evidentiary Hearing on a Demurrer” in People v. Hubach, No. H-1431 (San Fran., Cal., Mun. Ct., Oct. 31, 1972).

64. Epithets on judicial discretion abound in legal literature. The fear or arbitrariness is best reflected by Lord Camden's remarks quoted in State v. Cummings, 36 Mo. 263, 278-79 (1865): “[T]he discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is often caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.” Mr. Justice Marshall expressed the viewpoint that discretion must be strictly subject to the law, with little or no latitude, in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824), when he wrote: “Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.” Judicial discretion has had an entire spectrum of descriptions attached to it; perhaps the best is the reasonable assimilation offered in Hubbard v. Hubbard, 77 Vt. 73, 77-79, 58 A. 969, 970 (1940): “All agree that by judicial discretion is never intended the whim or caprice of the magistrate, nor a course of judicial action inconsistent with itself . . . [. T]he judge should have in mind, first, a rule or standard, and second, the facts which are to be tested thereby . . . [. W]here no prior rule exists, the judge] is not altogether a law unto himself . . . . All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice . . . [. I]t is most usually found in matters of procedure and the conduct of trials . . . where the situation itself is not easily reproduced in its original character, and cannot safely be reviewed.”

65. The argument, of course, is the obvious one that certain rights should be transposed from the objective or procedural law to the substantive law. As pointed out in Isaacs, The Limits of Judicial Discretion, 32 Yale L.J. 339, 346-47 (1923): “All that can be said of . . . judicial discretion . . . is that there are fields in which it is eminently desirable to have certain substantive rights clearly and easily predicated and that as to these particular substantive rights as little leeway as possible should be given to the courts.” A further argument is drawn from the fact that in the area of defense services the defendant could not demonstrate prejudice without producing the very showing for which the assistance was denied.

funds to bring one thousand witnesses from Communist China.\textsuperscript{67}

\textbf{A Quick Look at the Precedents}

In the introduction to this article, it was proposed that the subject of defense services be examined by using the same approach one would have employed in examining the constitutional right to counsel before \textit{Powell v. Alabama}.\textsuperscript{68} Even though it is submitted that the comparative lack of favorable precedents in the field and the endless roll of adverse precedents are not controlling, they are reviewed briefly here in order to show why they are not controlling.

\textit{United States ex rel. Smith v. Baldi}\textsuperscript{69} is the only case in which the Supreme Court has specifically treated the question of pretrial indigent defense services. The 1953 Court rejected the contention that pretrial denial of psychiatric assistance to the defense amounted to a denial of adequate counsel. In dictum the Court stated, “We cannot say that the State has that duty by constitutional mandate.”\textsuperscript{70} Nevertheless, the facts of the case show that at least three psychiatrists did testify at the trial—two as defense witnesses and one at the court’s request.\textsuperscript{71} In addition, the record contained a serious question whether in fact the defense ever requested the extra assistance.\textsuperscript{72} Qualifying its holding, the Court stated, “As we have shown, the issue of the petitioner’s sanity was heard by the trial court. Psychiatrists testified. That suffices.”\textsuperscript{73}

In \textit{Baldi}, the Court favorably cited the First Circuit 1951 decision of \textit{McGarty v. O’Brien}.\textsuperscript{74} \textit{McGarty} rejected the contention that the state is required to furnish the defense with its own psychiatrists when two impartial psychiatrists already had been appointed as court witnesses.\textsuperscript{75} Absent a challenge of impartiality, the state was found un-

\begin{enumerate}
\item Id. Appointed counsel for Powell was given public funds to go to China and to interview witnesses. However, the court did not authorize funds to bring the witnesses to California at public expense. The case ultimately was dismissed by the United States Attorney.
\item 287 U.S. 45 (1932).
\item 344 U.S. 561 (1953).
\item Id. at 568 (dictum).
\item Id.
\item Id.
\item Id.
\item 188 F.2d 151 (1st Cir.), cert. denied, 341 U.S. 928, rehearing denied, 341 U.S. 957 (1951).
\item Id. at 155: “This is not a case where the state has refused to provide an impartial psychiatric examination of the accused . . . . Quite the contrary . . . . the state has, at public expense. . . . The doctors designated by the Department of Mental Health . . . are not partisan of the prosecution . . . .”
\end{enumerate}
der no obligation to finance a battle of psychiatric experts. However, the McGarty court left unanswered, indeed did not ask the question, of how a challenge to court or prosecution psychiatrists could have been made without a psychiatrist aiding the defense counsel in formulating the challenge. McGarty, then, is not truly determinative even as to the issue of adequacy of impartial, court-appointed witnesses that go unchallenged, since the reason for the defendant’s failure to challenge was neither briefed nor considered. Beyond this, both Baldi and McGarty, two decades old, were decided solely on the basis of due process of law and preceded the development of the right to counsel and of the equal protection clause in indigent criminal proceedings.

Mayer v. City of Chicago and Britt v. North Carolina, both 1971 Supreme Court decisions, foreshadow the development of the indigent defendant's pretrial right to defense services under the equal protection clause, leading to the probable interment of Baldi. In Mayer, the Court held that state-paid transcripts must be afforded indigent defendants who need them for purposes of appeal, regardless of whether the offense is a felony. This right apparently obtains even in the

76. See id. at 157: “Appellant’s contention comes to this, that the state has the constitutional obligation to promote such a battle of experts... We do not think that this is so... where there has been no challenge of the professional standing and competence... and no question... raised as to their complete impartiality...”

77. In Baldi even the dissent by Justice Frankfurter was based on a due process argument: “A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment.” 344 U.S. at 571. The Third Circuit, from whence Baldi was appealed, also based its decision on due process: “We do not think the requirements of due process go so far.” United States ex rel. Smith v. Baldi, 192 F.2d 540, 547 (3d Cir. 1951). In McGarty, the First Circuit held: “[E]xamination and report by two competent and impartial experts supplied at state expense is enough, we think, to satisfy the state's constitutional obligation under the due process clause.” 188 F.2d at 157. Note that the First Circuit did recognize the disparity between the indigent and the rich but confined its inquiry to whether due process was violated: “Obviously enough, an indigent defendant with assigned counsel may be at a disadvantage as compared with a wealthy defendant having unlimited means for the hiring of investigators, of various sorts of expert witnesses, of a battery of lawyers... How far the state, having the obligation to afford to the accused a fair trial, a fair opportunity to make his defense, is required under the due process clause to minimize this disadvantage is a matter which, in other contexts, may deserve serious examination.” 188 F.2d at 155.

81. 404 U.S. at 195-96.
absence of assignment of counsel. In *Britt*, the Court denied defendant's claim to a mistrial transcript, but only after carefully limiting its holding to the facts of that case and recognizing the "assumed" need of such a "tool" at retrial. Justice Douglas, dissenting as to the result in *Britt*, went beyond the transcript question and pointed out the vast inequity between the prosecution and the defense in the area of "marshalling of evidence." The combined effect of these cases suggests that "the indigent defendant seems to be entitled to everything that the common experience of lawyers and judges indicates that the defendant of more than moderate means would buy in a serious criminal matter."

Even under the old due process test there is a cogent argument for state-paid defense services. This argument is implicit in the earlier right to counsel decisions. In denying appointment of counsel in the "noncritical" stages, the Court reasoned that through cross-examination and use of *his own experts*, the defendant is sufficiently protected when the evidence is of a physical or scientific nature. Such reasoning is, of course, sound if, and only if, the defendant is suffi-

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82. *Compare* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel where incarceration is imposed), *with* Mayer v. City of Chicago, 404 U.S. 189 (1972) (right to transcript even where only a fine is imposed).

83. 404 U.S. at 228: "[E]ven in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: As a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." The two-pronged test used by the court in *Britt*—(1) the value for the purpose sought, and (2) the availability of alternatives—seems equally applicable to other pretrial assistance. *Id.* at 227.

84. *Id.* at 235-39 & n.7.


86. The right to counsel has been extended and attaches to the defendant at all pretrial "critical stages," including any custodial interrogations, *Miranda v. Arizona*, 384 U.S. 436 (1966); or confrontations such as postindictment line-ups, *United States v. Wade*, 388 U.S. 218 (1967).

87. *E.g.*, *Gilbert v. California*, 388 U.S. 263, 267 (taking of handwriting exemplars is not "critical stage"). *But see* dissent by Justice Black. *Id.* at 279.

88. *Id.* at 267. For example, in *Gilbert* the taking of handwriting exemplars was not a critical stage because: "If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, 'the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary process of cross-examination of the [State's] expert handwriting witnesses and the presentation of the evidence of his own handwriting experts.'" *Id.* at 267 (inserts by Court) *quoting* *United States v. Wade*, 388 U.S. 218, 227-28 (1967).
ciently aware of scientific issues that he is able to cross-examine effectively and he has access to his own experts for rebuttal. For treatment of the indigent, then, to meet due process requirements, the state would need to supply experts or counsel, or both, at such physical examinations. Counsel alone, however, would be of doubtful utility if he lacks training in the technical methodology of scientific investigation.

Baldi does not support, and could not support, the extravagant contention that there is no constitutional obligation to supply defense services, but post-Baldi circuit court decisions reflect conflicting philosophies, most frequently couched in terms of “fundamental fairness.” Those circuits which construe Baldi as denying the right to state-provided defense services as a constitutional requisite for indigents are well represented by the Tenth Circuit holding in *Watson v. Paterson.* In that case, the denial of some expert assistance to an indigent was held not to transgress constitutionally protected rights. Conversely, the Ninth Circuit's *Brubaker v. Dickson* decision typifies a position that “effective assistance” of counsel implies the necessity for further defense services. *Brubaker,* still using the fundamental fairness test, concentrated on the question of “counsel’s preparedness.” The Fifth and Seventh Circuits have taken a similar approach. None


90. 358 F.2d 297 (10th Cir.), *cert. denied,* 385 U.S. 876 (1966).

91. In *Watson* the court denied the defendant’s request for two ballistic experts, in addition to one already appointed, and a psychiatrist to explain the defendant’s motive for attempting to escape arrest. *Watson v. People,* 155 Colo. 357, 394 P.2d 737 (1964).


93. This reasoning was based upon the expansion of the right to effective assistance of counsel expounded in *Gideon v. Wainwright,* 372 U.S. 335 (1963); see notes 95 & 96 infra.

94. 310 F.2d at 37.

95. “[T]he critical factual inquiry . . . [is]: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy.” *Id.* at 32.

96. In *Hintz v. Beto,* 379 F.2d 937, 941 (5th Cir. 1967), the court said: “The right to counsel afforded under the Sixth Amendment means the effective assistance of counsel . . . . [E]ffective assistance of counsel in such a case may necessitate a psychiatric examination of a defendant.” In *United States ex rel. Robinson v. Pate,* 345 F.2d 691, 695 (7th Cir. 1965), *remanded on other grounds,* 383 U.S. 375 (1966), the court said: “[T]he denial of a reasonable request to obtain the services of a
of these decisions adequately examined the implications of *Douglas v. California* and the equal protection aspects of the issue, and all of them preceded *Boddie v. Connecticut*.97

The new due process test, such as that set forth in *Boddie*, seem to require that defense services be made available even if one refuses to accept an argument based on equal protection. In *Boddie* the Supreme Court held violative of due process a divorce filing fee. If requiring filing fees in divorce cases violates due process,98 as a denial of access to the court for indigents, surely the criminal defendant deserves at least equal consideration in overcoming the financial barrier he encounters. Whether in the "search for intermediate premises,"99 increasing experience and evolving practice now make defense services a due process right, or whether the test of fairness and standards of decency have evolved to a new maturity, or whether it is simply said that material disadvantage to one of the adversaries renders the proceedings unfair, by any test, due process, like equal protection, must now incorporate the right to defense services.

**Conclusion**

This article suggests that where the need is clear, the remedy cannot be far behind. Whether the test of "equality with the prosecution" or the test of "equality with the rich defendant" is applied, equal protection compels relief. This is so both because of the fundamental character of the right to effective counsel100 and because of the suspect classification of indigency.101 Either of these factors requires a "compelling state interest" and careful scrutiny before a court should deny poor defendants their effective defense. As suggested above, no compelling state interest is apparent which could justify denying poor defendants their equality of access to justice.

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98. *Id.*
Under the due process test the same results will follow. In the age of *Boddie v. Connecticut*, where due process was construed to prohibit legislative denial of access to civil courts in divorce cases for those unable to pay filing fees, access to services necessary for criminal defense must be assured, a fortiori. If, under *Gideon v. Wainwright*, the right to counsel is "absolute," the right to effective counsel, through the use of defense services, must be at least "fundamental." This is true whether one applies the due process test of *Boddie v. Connecticut*, the test of *Griffin v. Illinois* with its due process and equal protection combination, the purely equal protection test of *Douglas v. California*, or the analogy in the *Williams v. Florida*\(^{102}\) Sixth Amendment inquiry into "the function that the particular feature [defense services] performs and its relation to the purposes of the [right to effective counsel.]"\(^{103}\) Whatever the changes in theory or personnel of the Supreme Court, we can conceive of no theory, now viable, under which a carefully documented need for services required for an indigent's defense should be rejected.

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103. *Id.* at 99-100.