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Indigents' Right to Counsel on Appeal

*Nothing rankles more in the human heart than the feeling of injustice.*¹

Fallibility is a trait inherent in every human institution, including the American judicial system. Although Perfect Justice may always remain a philosopher's fantasy, a nation dedicated to the preservation of human freedom and dignity must constantly strive to reduce the margin of judicial error. Toward that end, federal and state constitutions have erected elaborate procedural safeguards to protect the defendant in a criminal trial. Recognizing, however, that no safeguard capable of preventing all human error has yet been designed, and that innocent people may still be convicted by the most cautious trial courts,² American legislatures have provided extensive corrective appellate procedures.³

Appellate review of criminal cases is a development of relatively recent origin,⁴ as is that procedural right so essential to the exercise of an effective appeal — the right to be represented by counsel.⁵ It is the purpose of this note to consider the interdependence of these two developments — the necessity of providing counsel in order to assure the accused an adequate and effective appellate review.

If the accused is financially able to secure his own counsel, his right to be represented on appeal is not questioned.⁶ The issue, then, is whether an indigent must be *provided* with counsel by the government to prosecute an appeal from conviction. To determine whether representation by counsel is essential to effective appellate review, it is necessary to consider the nature of the right to counsel and the constitutional character of the right to appeal.

1. R. H. SMITH, *JUSTICE AND THE POOR* 10 (1919).

2. For a collection of cases in which innocent men were convicted, and their innocence uncovered merely by the most fortuitous circumstances, see BORCHARD, *CONVICTING THE INNOCENT* (1932).

3. An account of the history and organization of state appellate courts may be found in ORFIELD, *CRIMINAL APPEALS IN AMERICA* 215-31 (1939).

4. Although appeals have long been familiar to the law, appellate review, as it is practiced today, is a recent development. Procedures for appellate review of criminal cases in federal courts were established by the Act of March 3, 1879, ch. 176, 20 Stat. 354, and the Act of March 3, 1891, ch. 517, §§ 5, 6, 26 Stat. 827. See *United States v. Sanges*, 144 U.S. 310, 319-22 (1892); see generally O'Halloran, *Development of the Right of Appeal in Criminal Cases*, 27 CAN. B. REV. 153 (1949), in which the author indicates that an adequate system of appellate review did not exist in England before 1907.

5. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955). The right of an indigent to have court-appointed counsel is of even more recent origin. Rackow, *The Right to Counsel: English and American Precedents*, 11 THE WILLIAM & MARY Q. 3 (1954).

6. Regardless of whether the accused is entitled to have court-appointed counsel, his right to be heard through his own counsel is "unqualified." *Chandler v. Fretag*, 348 U.S. 3, 9 (1954). The right to be represented by self-retained counsel is more vigorously protected than is the right of an indigent to the appointment of counsel. See *Ex parte Lee*, 123 F. Supp. 439, 445 (D. R.I. 1954), *aff'd*, 217 F.2d 647 (1st Cir. 1954), *cert. denied*, 348 U.S. 975 (1954), where the court held: "Petitioner erroneously regards as synonymous the right to be represented by counsel of one's choice and the privilege of enjoying assistance provided by the State . . ."

THE INDIGENT'S RIGHT TO COUNSEL — TRIAL LEVEL

To secure impartial laws and an equal administration of justice, and thereby to make possible the enjoyment of the rights and opportunities contemplated by a democracy, the State itself exists.⁷

Essential to any protection the accused may have in a criminal proceeding is the right to be represented by counsel; for without the assistance of counsel, his ability to assert any other rights he may possess is virtually non-existent.⁸ The sixth amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."⁹ There are similar guarantees in the constitutions and statutes of every state.¹⁰

In keeping with its insistence that "all people must stand on an equality before the bar of justice in every American court,"¹¹ the United States Supreme Court has held that the sixth amendment embraces the right to have court-appointed counsel if the accused is financially unable to secure his own attorney, as well as the right to be represented by self-retained counsel.¹² Ignorance of the technicalities of the law is not a trait peculiar to the wealthy; to force the indigent to stand trial without legal assistance would be to exact an extremely heavy penalty for the "crime" of poverty.

The Court in *Powell v. Alabama*¹³ held that failure in a state prosecution to afford the accused the opportunity to secure counsel is a denial of due process. This gave rise to the hope that the right to counsel would receive the same vigorous protection in state courts under the fourteenth amendment that it had received in federal courts under the sixth amendment. That hope has never been realized. In *Beets v. Brady*,¹⁴ the Court announced its now famous "fundamental fairness" doctrine:

As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and

7. SMITH, *op. cit. supra* note 1, at 3.

8. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

9. U.S. CONST. amend. VI.

10. BEANEY, *op. cit. supra* note 5, at 237. A table of the provisions for the assignment of counsel for indigent defendants in criminal cases is to be found in THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED, *Appendix* (1959).

11. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

12. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

13. 287 U.S. 45 (1932).

14. 316 U.S. 455 (1942).

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.¹⁵

Thus, even at the trial level, a state need not always provide the accused with counsel or give the accused an opportunity to secure counsel. The age, intelligence, education, and experience of the accused; the nature of the offense and the harshness of the sentence which may be imposed; the circumstances in which the trial is conducted: all of these are factors to be considered in determining whether a trial without counsel is consistent with fundamental concepts of fairness. Although a seventeen-year-old illiterate Negro is not afforded due process if tried without counsel,¹⁶ a thirty-one-year-old college graduate can assert no such complaint.¹⁷ A man who has had several encounters with the courts may be deemed competent to defend himself without legal assistance, at least to the extent that trial without counsel is not violative of due process.¹⁸ Although the law shows no less solicitude for liberty than for life,¹⁹ the accused in a non-capital case has been denied due process only if he can show "special circumstances" indicating that he could not have an adequate defense without a lawyer assisting him.²⁰

These decisions can only be supported by one or more of the following premises: (1) That the assistance of a trained and competent attorney is of little importance to the defendant in a criminal case. (2) That legal training is not necessary to enable one to conduct an adequate defense.²¹ (3) That the standard of justice essential to due process is abysmally low.

15. *Id.* at 473. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id.* at 462.

16. *Moore v. Michigan*, 355 U.S. 155 (1957). See *Uveges v. Pennsylvania*, 335 U.S. 437 (1948) (conviction of seventeen-year-old on plea of guilty reversed for want of counsel); *Wade v. Mayo*, 334 U.S. 672 (1948) (reversal of conviction of an eighteen-year-old who had requested and was refused counsel in a non-capital case); *De Meerleer v. Michigan*, 329 U.S. 663 (1947) (one day trial of a seventeen-year-old who had pleaded guilty to a murder charge, and who had not been advised of his right to counsel, was held to be violative of due process).

17. *Crooker v. California*, 357 U.S. 433 (1958).

18. See, e.g., *Quicksall v. Michigan*, 339 U.S. 660 (1950). *But see Gibbs v. Burke*, 337 U.S. 733 (1949), where trial without counsel was held violative of due process although the accused had several previous convictions. The trial lacked "fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial." *Id.* at 781.

19. *Bute v. Illinois*, 333 U.S. 640, 681, (1948).

20. *Palmer v. Ashe*, 342 U.S. 134, 135 (1951).

21. For a general discussion of the fair trial doctrine see Rackow, *The Right to Counsel — Time for Recognition Under the Due Process Clause*, 10 WEST. RES. L. REV. 216 (1959). For discussion of the right to counsel in state and federal courts see BEANEY, *op. cit. supra* note 5.

Traditionally, the right to be represented by counsel in state criminal proceedings has been considered as a matter of due process.²² Consequently, courts have directed their efforts toward establishing *minimum* standards of fairness.²³ But there is strong support for the argument that the right to appellate counsel must be measured by the more express standards of the equal protection clause, rather than in terms of due process. The argument, in essence, is this: Denial of the right to adequate appellate review is a denial of equal protection. If the appellant is without counsel on appeal, he is denied his right to adequate appellate review. Therefore, if the appellant is without counsel on appeal, he is denied equal protection. The major premise of this syllogism is established by *Griffin v. Illinois*.²⁴

GRIFFIN V. ILLINOIS — THE RIGHT TO ADEQUATE APPELLATE REVIEW

Few legal scholars are unfamiliar with the principle that the right to appeal is not essential to due process of law.²⁵ The rule has been frequently applied,²⁶ and is readily available to aid the courts in disposing of some rather perplexing problems.²⁷ Those who cling to that which is familiar and certain in the law may abhor the forces which have caused the gradual narrowing of that principle, and which may ultimately render it valueless; however, it cannot be denied that such forces exist.

That the right to appeal is not essential to due process was authoritatively established in 1894 by the decision in *McKane v. Durston*.²⁸ The United States Supreme Court upheld the constitutionality of a New York statute which made appeals contingent upon a finding by the trial judge that there was reasonable doubt that the trial court's judgment would stand.

An appeal to a higher court from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing it, and a State may accord it to a person convicted of crime *upon such terms as it thinks proper*.²⁹ (Emphasis added.)

22. Michael v. Louisiana, 350 U.S. 91 (1955); Reece v. Georgia, 350 U.S. 85 (1955); Osborne v. Johnston, 120 F.2d 947 (9th Cir. 1941) (habeas corpus from state conviction); People v. Logan, 137 Cal. App.2d 331, 290 P.2d 11 (1935). See generally Roberts, *Right of an Accused to Have Counsel Appointed by the Court*, 45 MICH. L. REV. 1047 (1947).

23. See Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 182 (1955).

24. 351 U.S. 12 (1956).

25. See *McKane v. Durston*, 153 U.S. 684 (1894).

26. E.g., *United States v. Heinze*, 218 U.S. 532 (1910); *Reetz v. Michigan*, 188 U.S. 505 (1903); *De Maurez v. Swope*, 104 F.2d 758 (9th Cir. 1939); *McCue v. Commonwealth*, 103 Va. 870, 49 S.E. 623 (1905); *State v. Sorrentino*, 36 Wyo. 111, 253 P. 14 (1927).

27. E.g., *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954) (appeal denied in order to protect the collectibility of a money judgment).

28. 153 U.S. 684 (1894).

29. *Ibid.*

Concurrence with the *McKane* decision has been widespread,³⁰ but as appellate procedures became more extensive the rule has developed several limitations.

Although a state is not compelled to afford appellate review, once having done so, the appellate procedures it provides must comply with the requirements of due process.³¹ If a state does provide for appeal, it must not create arbitrary classifications in determining who is entitled to exercise the right to appeal, for to do so would be a violation of the equal protection clause of the fourteenth amendment.³² Furthermore, although a state need not afford appellate review in criminal cases, it must provide the accused at least one opportunity to obtain review of constitutional issues.³³

In *Griffin v. Illinois*,³⁴ the reasoning developed by the courts in the instances mentioned above was brought to its logical culmination. Illinois law provided that: "Writs of error in all criminal cases are writs of right and shall be issued of course."³⁵ The petitioners, convicted of armed robbery, requested as "poor persons" that a stenographic transcript of the record be furnished them without cost. Their request was denied and the appeal dismissed. The Court, in a 4-1-4 decision, held that the failure to provide a transcript was a denial of equal protection and of due process under the fourteenth amendment.³⁶ With these words, the Court placed the right to "an adequate appellate review" on virtually the same level as the right to a fair trial:

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.³⁷

It is not within the scope of this note to examine the many implications of the *Griffin* case,³⁸ but only to consider the effect which that

30. Cases cited note 26 *supra*.

31. *Price v. Johnston*, 334 U.S. 266 (1948); *Frank v. Mangum*, 237 U.S. 309 (1915).

32. *Dowd v. Cook*, 340 U.S. 206 (1951); *Cochran v. Kansas*, 316 U.S. 255 (1942) (suppression of appellate documents prepared by prisoners, until time for appeal had expired, held to be denial of equal protection).

33. *Young v. Ragan*, 337 U.S. 235, 239 (1949).

34. 351 U.S. 12 (1956).

35. ILL. REV. STAT. ch. 38, § 769.1 (1955).

36. The Court speaks in terms of both due process and equal protection, although it would seem that the issue was one solely of equal protection. See Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

37. 351 U.S. 12, 18 (1949).

38. For an excellent analysis of the significance of the *Griffin* case see Willcox & Bloustein, *The Griffin Case — Poverty and the Fourteenth Amendment*, 43 CORN. L.Q. 1 (1957). The authors' statement of the issue they consider indicates the conclusion they reach: "Is it a deprivation of an individual's fundamental constitutional rights to so administer justice as to condition the assertion of basic legal rights on the ability to pay?" *Id.* at 3-4. Also see comments on the *Griffin* case in 55 MICH. L. REV. 413 (1957), 17 OHIO ST. L.J. 553 (1956), 70 HARV. L. REV. 126 (1956); see Annot., 55 A.L.R.2d 1072 (1957).

case and others have had upon the right to be represented by counsel on appeal. That the holding in the *Griffin* case is not limited to situations wherein appeal is granted as a matter of right, rather than as a matter of discretion, has already been decided.³⁹ Since every state has some form of appeal in criminal cases,⁴⁰ the question is not whether it must provide for appeal, but, having done so, how must its appellate procedure be administered. More specifically, can there be an "adequate appellate review" if the accused is not represented by counsel to prosecute his appeal?

The concept of equal protection implicit in the *Griffin* decision does not merely prohibit a state from affirmatively imposing a discriminatory denial of the right to appeal to one class, while granting that right to members of another class; the decision imposes upon a state the duty of removing barriers arising from conditions which the state did not create, in order that rich and poor may both enjoy the same opportunity to exercise an effective appeal.⁴¹ If the necessity of counsel to effective appellate review can be demonstrated, it may be possible to apply the broader tests of equal protection, rather than the more limited tests of due process, to determine whether the accused has been afforded his constitutional right to counsel. Rather than striving toward minimum standards of justice, courts would be forced to determine whether the indigent had received treatment comparable to that granted the wealthy.⁴² The "fundamental fairness" test would be an inappropriate measure of the right to appellate counsel. Any failure to provide an indigent with counsel for appeal, in circumstances where a rich man could appeal, would be a denial of equal protection.⁴³

39. *Ohio v. Burns*, 360 U.S. 252 (1959). To examine the effect of the *Burns* decision on state law, see OHIO REV. CODE § 2953.03 (1959).

40. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); ORFIELD, *op. cit. supra* note 3.

41. Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 182 (1955).

42. Cf. Willcox & Bloustein, *The Griffin Case — Poverty and the Fourteenth Amendment*, 43 CORN. L.Q. 1 (1957).

43. It has been suggested that the *Griffin* decision be applied to the right to trial counsel: "The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to 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, *supra* note 36, at 10. However, in view of the fact that courts have distinguished between the right to be heard by self-retained counsel and the right to the appointment of counsel, and that the United States Supreme Court has frequently held that the right to a fair trial is not always violated merely because the accused is without counsel, the poor are deprived of no recognized right if counsel is not appointed, unless they are denied due process. The right to effective appellate review, on the other hand, may require that counsel be appointed for appeal.

COUNSEL ON APPEAL

In Federal Courts

The history of appellate review in criminal cases indicates that courts are becoming increasingly reluctant to permit an indigent to suffer discrimination because of his inability to pay the costs of the appellate procedure available to those who can afford it.⁴⁴ The United States Supreme Court has often taken the position that when the right of appeal is afforded by a state, it becomes but an additional step in one proceeding to determine finally the guilt or innocence of the accused.⁴⁵ Thus, in *Johnson v. United States*,⁴⁶ in a *per curiam* decision, the Court held that an indigent convicted in a federal court was entitled to have court-appointed counsel to appeal from the trial court's denial of leave to appeal *in forma pauperis*.⁴⁷ The Court referred to the holding in *Johnson v. Zerbst*,⁴⁸ that the accused is entitled to be represented by counsel "at every stage in a criminal proceeding," and concluded that appeal is merely another step in the proceeding. Because the petitioner was appealing from a refusal to appoint counsel and furnish a transcript for appeal, the result of the decision is that counsel must be appointed in order to help the courts determine whether counsel should be appointed.⁴⁹ Notable in this decision is the Court's complete failure to consider the issues relating to the right to be represented by counsel on appeal. That its holding is inconclusive is manifested by the refusal of several lower federal courts to follow the *Johnson* decision.⁵⁰

The post-conviction right to counsel in federal courts, considered by the Court in *Johnson v. United States*, generally arises under Section 1915 of Title 28 of the United States Code, which provides for appeals *in forma pauperis*:

Any courts of the United States, may authorize commencement, prosecution or defense of any . . . action . . . or appeal therein without prepayment of fees and costs

a) An appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

. . . .

d) The court may request an attorney to represent any such person

44. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956).

45. Cases cited note 32 *supra*.

46. 352 U.S. 565 (1957), reversing *United States v. Johnson*, 238 F.2d 565 (2d Cir. 1956).

47. 28 U.S.C. § 1915 provides for appeals *in forma pauperis*.

48. 304 U.S. 458 (1938). See also FED. R. CRIM. P. 44.

49. It is also necessary that the indigent be provided with a transcript in order that he might substantiate his allegation that a transcript be provided for appeal. *Farley v. United States*, 354 U.S. 521 (1957).

50. E.g., *Gilpin v. United States*, 265 F.2d 203 (6th Cir. 1959); *Anderson v. Heinze*, 258 F.2d 609 (9th Cir. 1958); *Gershon v. United States*, 243 F.2d 527 (8th Cir. 1957); *Brown v. Johnston*, 126 F.2d 727 (9th Cir. 1942); *Garrison v. Johnston*, 104 F.2d 128 (9th Cir. 1939).

unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous and malicious.⁵¹

The meaning of "good faith" and the effect of the trial court's certification have been the source of considerable controversy in federal courts. Although it has been held that good faith requires a showing that the appeal has merit,⁵² the more recent and better view is that "the applicant's good faith is established by the presentation of any issue that is not plainly frivolous."⁵³ Another court has suggested that an appeal *in forma pauperis* should be allowed "whenever justice is at stake."⁵⁴ Certainly it would be unreasonable to require that the applicant establish to the satisfaction of the trial court that he would succeed on appeal, in order that he be granted the right to appeal.⁵⁵ Such a procedure would impose a double burden on the indigent: first, to prove to the trial court that a prejudicial defect existed; second, to convince an appellate court on the identical issue. This system would succeed only in creating delay and unnecessary expense.

Unless the trial court's certification of lack of good faith is to constitute a complete substitute for the right to appellate review, the applicant must be given some opportunity to demonstrate that the certification was unwarranted. The certification must be given effect unless the applicant is able to show that it was not issued in good faith, or that his appeal is not frivolous.⁵⁶ Recent decisions of the United States Supreme Court attest to the principle that the accused is denied the right to appeal and, therefore, is denied equal protection, if he is not furnished a transcript of the trial record or some other appropriate means of substantiating his allegations of error on appeal from denial of leave to appeal *in forma pauperis*.⁵⁷ *Johnson v. United States*⁵⁸ extended that doctrine to embrace the right to be provided with counsel to appeal an adverse certification of the trial court. But lower federal courts have interpreted the *Johnson* decision to apply only to post-conviction procedures which are actual stages of the criminal proceeding and are, thus, within the scope of

51. 28 U.S.C. § 1915 (Act of June 25, 1948, ch. 646, 62 Stat. 954, as amended).

52. *Cf. Ellis v. United States*, 356 U.S. 674 (1958).

53. *Ibid.*

54. *Cash v. United States*, 261 F.2d 731, 734 (D.C. Cir. 1958).

55. This requirement has been imposed by some state courts. See, *e.g.*, *Spaulding v. State*, 137 Tex. Crim. 329, 127 S.W.2d 457 (1939).

56. *Wells v. United States*, 318 U.S. 257 (1943); *O'Rourke v. United States*, 248 F.2d 812 (1st Cir. 1957).

57. *E.g.*, *Farley v. United States*, 354 U.S. 521 (1957); see also *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958).

58. 352 U.S. 565 (1957).

the sixth amendment.⁵⁹ In habeas corpus proceedings and hearings on motions to vacate judgment, controlled by the rules of civil procedure,⁶⁰ courts have applied the tests of due process and have frequently concluded that counsel need not be provided in those proceedings.⁶¹ Furthermore, although appeal is recognized as a stage of the proceeding, courts have refused to require counsel when the defendant's attack on the trial court's certification is obviously without merit on its face.⁶²

In State Courts

The right to appellate counsel in state courts is controlled by statute.⁶³ Few states grant appellate counsel as a matter of right in both capital and non-capital cases;⁶⁴ generally, the discretion of the trial court is controlling. There is no uniform method of determining whether an appeal should be granted, and, if a case is appealed, whether counsel should be provided. These questions may be determined by the trial court,⁶⁵ by a special committee of the local bar association,⁶⁶ by the Public Defender in jurisdictions where such office exists,⁶⁷ or by the attorney who was appointed to try the case. Competent advice at this stage may save the indigent from prosecuting a

59. An appeal, for example, under modern practice is a continuation of the trial proceeding. See Parker, *Improving Appellate Methods*, 25 N.Y.U.L. REV. 1, 4 (1950). Because a motion for leave to appeal is not part of the proceeding, counsel need not be appointed to make that motion; but if leave to appeal is granted, counsel must be appointed to prosecute the appeal. Reid v. Sanford, 42 F. Supp. 300 (N.D. Ga. 1941). This distinction makes an important right rest upon a mere technicality.

60. United States v. Hayman, 342 U.S. 205, 209 (1952).

61. E.g., Anderson v. Heinze, 258 F.2d 479 (9th Cir. 1958); *In the Matter of Dinerstein*, 258 F.2d 609 (9th Cir. 1958); Gershon v. United States, 243 F.2d 527 (8th Cir. 1957); Hill v. Settle, 244 F.2d 311 (8th Cir. 1957); Brown v. Johnston, 126 F.2d 727 (9th Cir. 1942); Garrison v. Johnston, 104 F.2d 128 (9th Cir. 1939).

62. E.g., Gilpin v. United States, 265 F.2d 203 (6th Cir. 1959) (appeal held to be frivolous in three prior hearings); United States *ex rel.* Rodriguez v. Jackson, 246 F.2d 730 (2d Cir. 1957).

63. See *People v. Hyde*, 331 P.2d 42 (Cal. App. 1958); *State v. Delaney*, 332 P.2d 71 (Ore. 1958) (decision has been overruled by statute; see Oregon Laws 1959, ch. 636, § 23); *Commonwealth v. Kumtus*, 190 Pa. Super. 133, 151 A.2d 653 (1959).

64. See Wilkes, *Constitutional Rights Of Convicted Indigents In State Criminal Proceedings*, 33 TEMP. L.Q. 125, 147 (1959).

65. New York has held that assignment of counsel for appeal must be left to the discretion of the trial court. *People v. Breslin*, 4 N.Y.2d 73, 149 N.E.2d 85 (1958).

66. See *People v. Logan*, 137 Cal. App.2d 331, 290 P.2d 11 (1955), for a description of the procedure involved when the appellate court refers the record to a special committee of the bar association to determine whether there is merit for appeal. Some appellate courts conduct an independent examination of the record to determine whether counsel should be appointed. See *People v. Hyde*, 331 P.2d 42 (Cal. App. 1958).

67. See *Jackson v. Reeves*, 238 Ind. 708, 153 N.E.2d 604 (1958) "Obviously the public defender could not and should not be required to appeal all cases in which inmates of our penal institutions consider that error was committed in their respective cases. Therefore, of necessity he must be granted wide discretion as to whether the matters complained of present any appealable issue." *Id.* at 709, 153 N.E.2d at 605.

futile appeal which will serve only to increase the period he spends in jail.⁶⁸

It has been held that because appeal is not essential to due process, appellate counsel need not be provided in state courts.⁶⁹ But some courts have rejected that contention, with the principles of equal protection implicit in their reasoning:

If appeals are not desired in this state as a matter of right, recourse should be had to the legislature and not to the courts to change the law in this respect. It necessarily follows from the statutory provisions for appeal, as of right, to an accused in a criminal case, that an indigent defendant's right to be represented by counsel at public expense extends to his prosecution of an appeal.⁷⁰

However, the post-conviction right to counsel in state courts is generally considered in relation to the due process clause of the fourteenth amendment,⁷¹ just as the same right in federal courts is generally considered in terms of the due process requirements of the fifth amendment.⁷² Consequently, unlike the right to trial counsel guaranteed by the sixth amendment in federal courts, the right to appellate counsel is essentially the same in federal and state courts. The *Johnson* decision,⁷³ decided under the sixth amendment, promises more extensive enforcement of the right to appellate counsel in federal courts; but arguments expressed in terms of due process show little promise of strengthening that right in state courts. The necessary "objective standards" of due process — "the laws and practices of the community taken as a gauge of its social and ethical judgments"⁷⁴ — have yet to be manifested in widespread enforcement of the right to appellate counsel. The necessity of appellate counsel to due process has been eloquently expressed:

The mere naked right to a review for error and to have counsel is not sufficient. The right must be made available for the purposes for which it is granted. The right to a review is but a hollow grant to one who

68. In some states sentence is suspended while an appeal is pending; consequently, the accused may find that he has served years for which he will receive no credit because an appeal was noted. See, e.g., *Reid v. Sanford*, 42 F. Supp. 300 (N.D. Ga. 1941) (appellant's bill of exceptions lost by the court and appellant served over two years without receiving credit because an appeal had been noted).

69. See, e.g., *State v. Lorenz*, 235 Minn. 221, 50 N.W.2d 270 (1958); *McCue v. Commonwealth*, 103 Va. 870, 47 S.E. 623 (1905). This reasoning has also been employed in federal courts. See *Gargano v. United States*, 137 F.2d 944 (9th Cir. 1943); *Moore v. Aderhold*, 108 F.2d 729 (10th Cir. 1939) (failure of defendant's attorney to perfect appeal is not ground for discharge on habeas corpus).

70. *State ex rel. Grecco v. Allen Circuit Court*, 238 Ind. 571, 575, 153 N.E.2d 914, 916 (1958).

71. Cases cited note 69 *supra*.

72. See *Anderson v. Heinze*, 258 F.2d 479 (9th Cir. 1958), for an explanation of when the right to appellate counsel will be considered as a matter of due process, and when it will be considered as a right guaranteed under the sixth amendment.

73. 352 U.S. 565 (1957).

74. *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

cannot provide himself, and is not provided with counsel, learned and skilled in the law; and therefore withholding counsel as a practical matter withholds the right to review, and to corrective judicial process, and hence to due process of law.⁷⁵

Thus far, such eloquence has been rather futile.

Importance of Counsel on Appeal

To arrive at a sound conclusion regarding the importance of counsel on appeal, it is necessary to consider the function of criminal appeals. Certainly the primary function of an appeal is to protect the appellant from an unjust conviction.⁷⁶ The value of this function is no longer a matter for conjecture. Statistics indicate that a large percentage of cases heard on appeal are not affirmed.⁷⁷ From 1949 to 1954, in the state of Illinois, the percentage of reversals in criminal cases appealed to the supreme court of that state ranged from 25 per cent to 37.9 per cent.⁷⁸ In the years of 1952 and 1953, 40 per cent of the criminal appeals in Wisconsin resulted in reversals. During the same period of time, in the appellate courts of Kansas, 12 per cent of the criminal cases heard were reversed.⁷⁹ In federal courts, the percentage of reversals in criminal cases was 13.8 in 1952, and 26.1 in 1955.⁸⁰ These figures strongly support the conclusion that the accused who has the opportunity of full appellate review has a substantially greater chance of retaining life and liberty than one to whom that opportunity is denied.

What chance of success has the appellant who is not represented by counsel? Few would dispute the fact that the appellant, without counsel to aid him, is not capable of recognizing the impropriety of the admission or exclusion of evidence, the inadequacy of the court's charge to the jury, prejudicial conduct by the judge or the prosecuting attorney, or the insufficiency of the evidence to support the verdict. It has been suggested that the members of the appellate court may examine the record and reach a just result without the aid of counsel.⁸¹ However, this suggestion ignores the adversary nature of the American system of law. The adversary system proceeds on the theory that

. . . each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge to the impartial tribunal that makes the decision.⁸²

75. *State ex rel. White v. Hilgemann*, 218 Ind. 572, 576, 34 N.E.2d 129, 135 (1941).

76. ORFIELD, *op. cit. supra* note 3, at 32.

77. *Id.* at 212-14.

78. Brief for Petitioner, pp. 21-25, *Griffin v. Illinois*, 351 U.S. 12 (1956).

79. *Ibid.*

80. *Ibid.*

81. *Richardson v. United States*, 267 F.2d 867 (9th Cir. 1959); *United States v. Ballentine*, 245 F.2d 223 (2d Cir. 1957).

82. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 3 (1956).

When only one party is capable of presenting its case, the adversary system fails. Although an appellate court may give every consideration to the pathetic efforts of an indigent who appeals without counsel, it cannot be said that the aid of an experienced advocate would have no effect upon the outcome of a case.⁸³ Furthermore, if an indigent is not given legal advice, his appeal may be barred altogether by failure to file the proper papers within the time specified by law. All of these factors demonstrate the importance of appellate counsel to the adequate achievement of the primary purpose of criminal appeals — protection against wrongful convictions.

A second and vital function of criminal appeals "is to determine and maintain consistent standards in the trial courts."⁸⁴ This function may be of little importance to the individual appellant, but it is extremely important to the American judicial system and to society in general.

The taking of an appeal and perhaps even more the possibility thereof prevents or does much to check lack of uniformity in the administration of the criminal law. It assures that the same rules of substantive law will be applied in all the courts of the state. It furthermore assures that the more basic and essential rules of procedure will be followed in the lower courts.⁸⁵

Establishment of this uniformity also contributes to the accomplishment of securing justice for the accused.

It would be difficult to establish a precise correlation between the quality of representation in given cases, and the quality of decisions rendered. However, it is reasonable to assume that the presence of an attorney who can explain the particular facts of a case, relate those facts to the legal questions in issue, and provide the court with the precedent upon which it should rely, will have a real bearing upon the nature of the decision rendered. Thus, apart from the importance of counsel to the appellant, courts themselves will benefit from the presence of counsel, while the legal system will benefit by achieving greater consistency.

CONCLUSION

There is something wrong with a system of government which rations justice in accordance with the thickness of a man's wallet. It is true that there are some "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion",⁸⁶ but can it be said that the state owes its citizens no duty to

83. "[A]ppellate advocacy is an art. . . . It is a process wherein one human mind attempts to propel three other human minds into a certain channel to a certain result." Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285 (1953).

84. ORFIELD, *op. cit. supra* note 3, at 33.

85. *Ibid.*

86. *Griffin v. Illinois*, 351 U.S. 12, 25 (1956).