APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CRIMINAL APPEALS

IN THE LANDMARK decision of *Griffin v. Illinois*,[1] the Supreme Court of the United States, with contemporarily characteristic broad strokes in the field of individual rights, declared that a state denies both equal protection and due process under the fourteenth amendment by so administering an appellate review system as practically to discriminate against indigent criminal defendants by denying them recourse to it.[2] There, it was specifically found that the fourteenth amendment was violated by the failure to provide indigent defendants with trial transcripts which, under Illinois procedure at that time, were sometimes prerequisite to an appellate hearing.[3]

The case of *People v. Breslin*[4] raises perhaps the next logical question—whether the due process requirement[5] of the fourteenth amendment is likewise violated by a state's failure to furnish counsel on appeal for these defendants. The New York Court of Appeals, with two judges dissenting, said it was not.[6] The majority noted, quite correctly,

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[1] 351 U.S. 12 (1956).

[2] *Id.* at 19.

[3] In order to get full appellate review in Illinois, the defendant must furnish the appellate court with a bill of exceptions, normally a transcript of the trial proceedings. At the time of the *Griffin* case, free transcripts were not furnished by the state to indigent defendants in noncapital criminal cases. *Id.* at 14, 15.

[4] 4 N.Y.2d 73, 149 N.E.2d 85 (1958).

[5] It was not contended in the New York court that equal protection of the laws had been denied the defendant even though the New York Court of Appeals has followed the lead of the Supreme Court in holding that refusal to furnish an indigent defendant with a needed trial transcript violates equal protection as well as due process. See Griffin v. Illinois, 351 U.S. 12 (1956); People v. Pride, 3 N.Y.2d 545, 147 N.E.2d 719 (1958); and People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357 (1957). However, a careful analysis of these cases and the instant case would seem to indicate that the issue in all of them is really one of due process only. See note 8 *infra*.

[6] 4 N.Y.2d at 76-77, 149 N.E.2d at 86-87. The defendant had been convicted of attempted extortion and sentenced. He appealed to the Appellate Division in New York as a poor person and requested that counsel be assigned to him. The Appellate Division refused to assign counsel and affirmed the conviction. Subsequently, the defendant appealed to the New York Court of Appeals, and that court assigned counsel who submitted a brief contending only that the Appellate Division had erred in refusing to assign counsel to the defendant.

The instant case lacks sympathetic appeal. Not only was the defendant intelligent

that prior to the *Griffin* case, the general view entertained by both the state courts and the lower federal tribunals was that due process did not require the assignment of counsel to indigent criminal defendants on appeal.[7] With a minimum of analysis, however, the court indicated its belief that the *Griffin* pronouncement and its offspring[8] in no way altered this constitutional interpretation, and declared that any procedural change would have to come from the legislature.[9]

On its facts, the *Breslin* case may be easily distinguished from the *Griffin* case. As the New York court pointed out, the failure of Illinois to provide free trial transcripts at times completely denied the poor an opportunity for appellate review. In contradistinction, Breslin was able

enough to submit a brief of his own in which he raised certain nonconstitutional issues, but he told the New York Court of Appeals that he did not wish the question of right to counsel argued at all. *Id.* at 76, 149 N.E.2d at 86. Nevertheless, as pointed out in the text, *infra* at note 25, the fair trial doctrine, which weighs the intelligence and experience of the defendant, should have no application in cases involving counsel on appeal.

[7] *Id.* at 77, 149 N.E.2d at 87, and cases cited therein. But see Thompson v. Johnson, 160 F.2d 374 (9th Cir. 1947), wherein the court looked to the circumstances of the particular case before holding that due process of law did not require that counsel be appointed for the indigent defendant who was appealing a conviction.

[8] In People v. Pride, 3 N.Y.2d 545, 147 N.E.2d 719 (1958), where the dismissal of an indigent defendant's appeal from a conviction of a misdemeanor was based on his inability to serve the necessary return upon the district attorney, the dismissal was held to be a denial of both equal protection and due process. In People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357 (1957), an indigent defendant had been convicted of a felony and imprisoned so that he could not easily prepare an appeal. The court held that failure to appoint counsel for the defendant, under these circumstances, was a denial of equal protection and due process.

In Johnson v. United States, 352 U.S. 565 (1957), *reversing* 238 F.2d 565 (2d Cir. 1956), involving a federal criminal proceeding in which an indigent defendant was appealing a trial judge's certification that his appeal was taken in bad faith, the United States Supreme Court held, per curiam, that counsel must be appointed to assist the defendant in preparing an appeal to contest that procedural ruling. The United States Court of Appeals for the Second Circuit had held, with Judge Frank dissenting, that the defendant had no constitutional right to the appointment of counsel on an appeal. Judge Frank felt that the *Griffin* doctrine required that counsel be appointed for the defendant. United States v. Johnson, 238 F.2d 565, 571 (2d Cir. 1956). However, the United States Supreme Court in its brief opinion did not cite the *Griffin*, case nor did it specifically declare that the appointment of counsel was required by the Constitution. Also, the decision may well be grounded in some peculiar feature of the federal *in forma pauperis* procedure involved. The majority opinion in the *Breslin* case suggests this latter distinction. See 4 N.Y.2d at 77-78, 149 N.E.2d at 87. Nevertheless, this case may give further indication, however slight, of the direction the Supreme Court is taking in cases involving appointment of counsel.

[9] 4 N.Y.2d at 77-78, 149 N.E.2d at 87-88.

to bring his appeal; his poverty merely prevented him from enjoying the aid of counsel in presenting his case before the appellate forum. Thus, in one view of the case, no right was denied, for the state had merely failed to erase the economic disparity between Breslin and other criminal defendants financially more fortunate.[10] It is as if the state, having provided a road, need not guarantee that every man have equally as good a car to drive down it. Arguably, therefore, *Griffin v. Illinois* does not compel a result different from that reached in *People v. Breslin.*

Superficially, at least, this result is practical, reasonable, and fair. Yet, there remains the more fundamental question whether the *Breslin* case comports with the broad philosophy underlying the *Griffin* case: that the state must insure that the right adequately and effectively to appeal a criminal conviction be afforded to all, irrespective of individual capacity to defray the incident costs.[11]

At the outset, it should be noted that Mr. Justice Black, speaking for four members of the Court[12] in the *Griffin* case, seemed to interweave the traditional ideas and language of due process with equal protection.[13] Most commentators believe that, though emphasizing equal protection, Mr. Justice Frankfurter, in his separate concurring opinion, found a violation of due process also.[14] The more correct analysis would appear to be that offered by Mr. Justice Harlan, dissenting, that the issue is really one of due process only.[15] Neither Illinois in the *Griffin* case nor

[10] The identical argument was urged even in the *Griffin* case by the dissenters there, Justices Burton, Minton, Reed and Harlan. See 351 U.S. at 28-29.

[11] Mr. Justice Black, writing for four members of the Court, said:

"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." 351 U.S. at 18.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19.

[12] Justices Black, Douglas, Clark, and Chief Justice Warren. Mr. Justice Frankfurter wrote a separate concurring opinion.

[13] See Comment, 55 MICH. L. REV. 413, 416 (1957).

[14] See Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 10-13 (1957); Comment, 55 MICH. L. REV. 413, 417-18 (1957). At least one writer believes Justice Frankfurter saw a denial of equal protection only. See Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 126 (1956).

[15] "I submit that the basis for that holding is simply an unarticulated conclusion that it violates 'fundamental fairness' for a State which provides for appellate review . . .

New York in the *Breslin* case expressly classified "indigents" to receive different treatment. While there may be some discrimination in practical effect, the majority of the Court tendered no reasoning which justifies labeling such discrimination as arbitrary or unreasonable in criminal appeals, but not in civil suits, for instance, or in other situations where penury patently prejudices a party to a proceeding. And presumably the Court is not prepared categorically to require a state to mitigate all economic differences under pain of violating the equal protection clause.[16] Rather, the crucial issue, as Mr. Justice Harlan suggested, is whether the failure of the state to prevent such resulting discrimination in criminal appeals is so unreasonable as to be, in the standard words of due process, a violation of "fundamental fairness, shocking to the universal sense of justice."[17]

Even taking the Harlan approach, however, the *Griffin* result may be extended to the situation involved in *People v. Breslin*.[18] Due process is not a static concept. It is to be considered in individual cases under the light of ever-changing conditions.[19] Hence, what was deemed fair and just a century, or even a decade, ago may not be so considered today. Indeed, any other view would be a denial of basic common law philosophy and development. Thus, it somewhat begs the question to argue, as do some judges, that since due process does not require an appeal, it can be no denial of due process if the appellate system incidentally works practical distinctions between rich and poor defendants.[20]

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not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That of course is the traditional language of due process." 351 U.S. at 36. However, Mr. Justice Harlan concluded that the defendant had not been denied due process of law. *Id.* at 39. But see Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956); Fairman, *supra* note 14, at 128.

[16] Mr. Justice Frankfurter in his concurring opinion in the *Griffin* case expressly recognized the present impossibility of such a position. 351 U.S. at 23.

[17] Betts v. Brady, 316 U.S. 455, 462 (1942).

[18] Judge Schaefer of the Illinois Supreme Court would seem to agree. See Schaefer, *supra* note 15, at 10. And see Slovenko, *Representation for Indigent Defendants*, 33 TUL. L. REV. 363, 371-73 (1959).

[19] Mr. Justice Frankfurter expresses it in these terms: "'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." 351 U.S. at 20-21. And see Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 31-32 (1953). In Brown v. Board of Education, 347 U.S. 483, 490, 492-94 (1948), the Supreme Court emphasized that changing conditions must be considered as well in deciding questions of equal protection.

[20] This is one argument of the dissenters in the *Griffin* case. 351 U.S. at 27, 36-37 (1956).

First of all, the premise of that argument may be open to some doubt. The fact that all states today do provide for criminal appeals may somewhat belie the hoary rule that an appellate review is not essential to due process in criminal cases, involving, as they do, personal liberty. Were the issue squarely presented whether a state could, in this day and age, completely refuse to listen to the criminal defendant's meritorious claims of error at trial, it is at least questionable that a court would remain so resolute.[21] But assuming the continued validity of that premise, the argument, nevertheless, does not eliminate the basic unfairness of the situation where a state, having permitted an appeal, taps its resources to employ professional counsel against a penniless defendant, without similarly utilizing those same resources to provide an attorney to assist him in presenting his side of the case.[22]

The injustice in such a situation becomes more apparent when the nature of an appeal is considered. The appellate hearing, dealing mainly with questions of law, is normally the special province of those trained in the law. Interestingly, even the early common law of England, though denying the criminal defendant the right to counsel at trial as well as the rights to testify or produce witnesses in his behalf, recognized the defendant's need for legal assistance from counsel when points of law were in issue.[23] Indeed, it would seem that the need for an attorney is greater to the defendant on appeal than at the trial level. Even an intelligent, adult defendant would experience difficulty with many of the legal intricacies and niceties peculiar to appellate advocacy.[24] So different is an appeal from a trial that it may be reasonably contended tht the unsatisfying gauge of fundamentally unfair trial under all the circumstances,[25] used to measure the fairness of noncapital state cases in-

[21] See Willcox and Bloustein, *supra* note 14, at 11, n. 40.

[22] Mr. Justice Frankfurter may have been urging a similar idea in his concurring opinion in the *Griffin* case when he said:

"But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State . . . that offend the deepest presuppositions of our society." 351 U.S. at 21-22.

[23] See Heidelbaugh and Becker, *Benefit of Counsel in Criminal Cases in the Time of Coke*, 6 MIAMI L.Q. 546, 547, 549-50 (1952).

[24] See People v. Breslin, 4 N.Y.2d 73, 81, 149 N.E.2d 85, 90 (1958) (dissenting opinion of Judge Fuld).

[25] This test was definitely established in Betts v. Brady, 316 U.S. 455, 473 (1942). It has been contended that it is always fundamentally unfair to deny an indigent defendant counsel in criminal trials. See Becker and Heidelbaugh, *The Right to Counsel*

volving appointment of counsel for trial proceedings, has no proper application in the instant problem. Instead, it may be said that the failure to appoint counsel for the poor in criminal appeals is unfair per se, regardless of the seriousness of the crime or the intelligence, age, and experience of the particular defendant.

Of course, fairness cuts both ways; the state should not be asked to do the impossible nor should the courts establish rules which create an unjustifiable drain on the resources of the state.[26] Nowhere in its opinion, however, does the New York court indicate that a system of free counsel to the poor appellant would be objectionable as too costly. It was argued, however, the appointment of counsel in such situations "would be an undue burden on the comparatively small number of attorneys trained in the criminal law. . . ."[27] An easy, yet effective, answer is that appointment need not be restricted to such specialists, for surely the indigent defendant would prefer even a lawyer unschooled in the criminal law to the alternative of none at all. Furthermore, it would seem that experience in appellate advocacy in any field would be more meaningful than a highly developed criminal trial technique.[28]

Nor is it an answer to argue that appellate judges are entirely competent to protect the interests of the attorneyless defendant or are otherwise always able to provide the "adequate" appeal required by the *Griffin* standard. Even assuming that judges, by nature, take greater interest in the case of the defendant without an attorney and are more solicitous of his appeal, nevertheless, even the most conscientious judges lack the time to examine the record in each such case as carefully and critically as would individual counsel for the defendant.[29]

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in Criminal Cases, 28 NOTRE DAME LAW. 351, 354-56, 362 (1953), which criticizes as inaccurate the Supreme Court's historical analysis in Betts v. Brady, *supra*. "History does not support the United States Supreme Court's conclusion that the appointment of counsel is not a fundamental right essential to a fair trial." See Slovenko, *supra* note 18, at 367, where this test is discussed.

[26] See Mr. Justice Frankfurter's concurring opinion in Griffin v. Illinois, 351 U.S. at 23-24 (1956).

[27] 4 N.Y.2d at 78, 149 N.E.2d at 88.

[28] See the dissenting opinion of Judge Fuld in the *Breslin* case, 4 N.Y.2d at 82, 149 N.E.2d at 90.

[29] This is the view of Judge Fuld who said:

". . . [E]xperience has demonstrated that there are just not enough hours in the day to permit judges of busy appellate courts, no matter how conscientious and willing, to examine and read the records before them as carefully or as critically as single-minded counsel for the appellant. And, if, as is the case where an indigent defendant is involved, there is but one copy of the record, and that typewritten, the task of adequate

Admittedly, a rule requiring counsel for indigent criminal defendants on appeal would raise serious practical problems. For example, the New York court is probably justified in its fear of frivolous appeals which would only further congest its already overcrowded dockets. Also, further difficulty might be caused by the retroactive effect of such a rule upon those persons now incarcerated who, as indigent defendants, requested but were refused counsel on appeal.[30] Nevertheless, the rule itself would not restrict the various constitutional methods a state legislature might employ to achieve its practical implementation.[31]

There still remains the question whether the decision to appoint counsel for indigent criminal defendants should not be left entirely to the legislature. To say that it should, however, would be to reason from a conclusionary assumption. Having decided that failure to provide counsel in such cases is not a denial of due process, as did the New York court, it may legitimately be urged that judicial discretion alone should not determine the matter. However, it is not an encroachment upon the legislative sphere for a court to use contemporary standards of fairness to determine that existing appellate systems in their operation are violative of due process.[32] Such a decision may place on legislators the burden of correcting the details of appellate procedure, but it does not, of itself, intrude the legislative sanctum.

As with many constitutional issues, a determination of whether the *Breslin* case harmonizes with either the *Griffin* holding or its underlying philosophy depends in large measure, and perhaps in the final analysis, upon an individual's somewhat predetermined approach to the Constitution and the role of the judiciary within its framework. Moreover, the due process concept, though a permeating influence in American jurisprudence, does not readily lend itself to exact expression which

review without the aid of appellate counsel to point the alleged errors and call attention to the asserted questions of law, some of which might otherwise escape the judges, approaches the impossible." *Id.* at 81-82, 149 N.E.2d at 90.

[30] See Mr. Justice Frankfurter's discussion of the practical problems presented by the *Griffin* case. Griffin v. Illinois, 351 U.S. at 24, 25. Justice Frankfurter contended that the *Griffin* decision should be made prospective in effect. *Id.* at 25. See also Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 25-26 (1957), for a discussion of the problem of the retroactivity of the *Griffin* decision.

[31] 351 U.S. at 24-25 (Mr. Justice Frankfurter, concurring).

[32] See note 19 *supra*.

will satisfy all occasions for all time.[33] Rather, its proper application in given cases, as much as anything, must be sensed by the courts. Perhaps the best that can be done is to scrutinize less the individual cases that arise, rather emphasizing the various general situations in which due process is the fundamental factor, to determine whether the requirements of this elastic doctrine have been met when judged in the light of present conditions. Such an approach might well lead to the conclusion that the New York Court of Appeals in the *Breslin* case read the *Griffin* case and its progeny too narrowly, thereby missing an opportunity to advance the law along the course which it must someday surely come to take.

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[33] See Betts v. Brady, 316 U.S. 455, 462 (1942):

"The phrase [due process] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. 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. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed." And see Gibbs v. Burke, 337 U.S. 773, 781 (1949), to the effect that "the due process clause is not susceptible of reduction to a mathematical formula."