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The Representation of Indigent Criminal Defendants in Kentucky

By Jennings T. Bird

Ed note: This article was written in April, 1964, and revised in September, 1964. In a field as rapidly developing as right to counsel it is inevitable that some of the material will be dated. It is felt that Mr. Bird’s work is of great value, particularly in his historical analysis and his recommendations.

INTRODUCTION

The importance of skilled legal assistance in defending criminal actions has long been recognized, as is indicated by the Sixth Amendment of the United States Constitution. It is unfortunate that the adequacy of the defense available under this Amendment is largely determined by the amount of money available to the defendant. The problem of providing adequate representation for those accused of criminal offenses but unable to pay for an adequate defense has no easy solution. Several systems have been developed as a means of providing competent legal assistance for these persons and thereby fulfilling the state’s duty in this regard. This study investigates the adequacy of the system presently used in Kentucky to provide the needed representation of indigent defendants and to discharge the state’s duty. Of necessity it deals with the constitutional right to counsel as it has developed and with the unclarified extent to which states must provide counsel for indigent defendants under the recent decisions in Gideon v. Wainwright and related cases.

It seems appropriate to examine the status of the right to assigned counsel as it exists in the United States as a whole before turning to the specific situation in Kentucky.

No attempt has been made here to solve the problem of retrospective versus prospective application of the Gideon stand-

ard, once determined, and the right to counsel on appeal has been dealt with only secondarily. The emphasis has been placed on the scope of the state's duty to provide counsel, both as to the types of crimes to which it applies and the point in time at which it begins. The statewide assigned counsel system utilized in Kentucky is discussed, and its effectiveness as a means of protecting the indigent's rights and fulfilling the state's obligation is evaluated.

A study of the Kentucky constitutional and statutory provisions dealing with the right to assigned counsel does not give an understanding of the system as actually implemented. Therefore, questionnaires were sent to the judges of some of the trial courts to determine how the system is administered in reality and whether it varies from the statutory mandate. In addition, economic and demographic characteristics of Kentucky were taken into account in evaluating the effectiveness of the system for the state as a whole.

An evaluation of the existing system is of limited significance in itself. The conclusions are meaningful only to the extent that improvements are possible. Accordingly, the Kentucky system is compared with the organized defender offices as alternative methods of dealing with the basic problem. Recommendations are then made for improving the existing system and for incorporating alternative systems where necessary to provide for differences between communities, differences that are now largely disregarded.

**PART I: THE CONSTITUTIONAL RIGHT TO ASSIGNED COUNSEL**

A. The Need for Assigned Counsel

The need for counsel is evident from the nature of criminal proceedings and the layman's meagre knowledge of law, especially of the intricacies of legal procedure. A frequently quoted statement by Mr. Justice Sutherland in *Powell v. Alabama*\(^3\) explicitly presents the plight of the layman when charged with a criminal offense:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with

\(^3\) 287 U.S. 45, 69 (1932).
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 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The adversary system operates on the assumption that each litigant will discover and present materials that build the strongest case for him and show his adversary's weakness. This process should result in the truth being found by an impartial tribunal. The defendant without counsel does not receive the benefits of this system. It is contradictory to say there is an adversary proceeding where a specialized, skilled prosecutor proceeds against a poor defendant who is unable to understand the charge against him. Furthermore, a defendant cannot rely on an appeal to reverse an unjust conviction due to lack of counsel because he may have no knowledge of the right to appeal. Even if he does, he probably will not make the necessary objections during the trial, he may be unable to make an intelligent decision whether to appeal, and he is no more capable of taking an appeal effectively by himself than he is of adequately conducting his defense.

The need for the expert advice and counsel of a lawyer at the trial is clear. But this need is even greater for the indigent defendant than for his financially able counterpart since the indigent frequently is less educated and informed; and, since he usually cannot furnish bail, he is more often forced to remain in jail where he cannot prepare an adequate defense. No one

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5 People v. Breslin, 4 N.Y.2d 78, 149 N.E.2d 85, 90, 172 N.Y.S.2d 157, 164 (1958) (dissenting opinion); Special Committee to Study Defender Systems, Association of the Bar of the City of New York and the National Legal Aid and Defender Association, Equal Justice for the Accused 87 (1959) [hereinafter cited as Equal Justice].
6 Equal Justice, supra note 5, at 35.
should be deprived of the advantage of having counsel for his defense simply because he is poor. The "danger of conviction because he does not know how to establish his innocence" is not diminished by indigency, nor does it endow a defendant with the "skill and knowledge" necessary for defense preparation, qualities his financially able brethren lack. Such an indigent can have an adequate defense only if counsel is provided for him by some other means.

In addition to the need for protecting the rights of the individual, society itself has a need for the provision of counsel to the indigent. Our society is largely built on our concern for the protection of fundamental human rights, among them freedom and equality before the law. To arbitrarily deprive any segment of our society of freedom is to deny those persons the equal protection expressed by our substantive law. Concern for this societal need is expressed in these words by Reginald Heber Smith:

\[ \text{To withhold the equal protection of the laws, or to fail to carry out their intent, by reason of inadequate machinery, is to undermine the entire structure and threaten it with collapse. For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgment of the fundamental rights which the State is directly forbidden to infringe.} \]

Since this result is contrary to the ideals and principles upon which our society is based, the preservation of our society depends to an extent upon providing all elements of a fair trial for every accused unable to provide them for himself. The assistance of counsel is such an element.

The protection of society is another reason for providing counsel for the indigent. If a defendant is embittered over a legal process resulting in a conviction due to inadequate representation, society is not well protected. Until that bitterness is removed, the correctional function of our penal system cannot be served. Yet the prisoner is worthwhile to society only if he has a desire to

\[ \text{supra.} \]
\[ \text{Ibid.} \]
\[ \text{R. H. Smith, Justice and the Poor 5 (1919).} \]
find his place, make necessary adjustments and live a productive and useful life. If he leaves the courtroom hating the legal system that has convicted him without adequate defense, the chances for rehabilitation are minimal.\(^{10}\)

The need for assigned counsel extends beyond those who would be considered destitute. A common argument is that if a defendant can make bail, he should not receive the assistance of assigned counsel.\(^{11}\) The assumption underlying this argument, that if he can make bail he can afford to retain counsel, is dispelled by the results of an investigation by the Junior Bar Section of the Bar Association of the District of Columbia. Of the eighty-two defendants studied who were free on bond but who at the same time had court appointed, uncompensated counsel, “virtually all of the defendants . . . would, under any reasonable standard, be considered sufficiently impoverished to require free legal service.”\(^{12}\)

B. Development of the Constitutional Right to Assigned Counsel

The Right in Federal Courts

Recognition of the need for defense counsel was embodied in the Sixth Amendment of the United States Constitution which provides that “in all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.” This has been interpreted by the Supreme Court in *Johnson v. Zerbst*\(^{13}\) to mean that, in the absence of effective waiver, the defendant in all criminal cases has the right to have counsel furnished by the government if he cannot afford to employ his own. The argument has been made\(^{14}\) that the Sixth Amendment, when enacted, did not include the right to have assigned counsel. The argument is based on the fact that the Sixth Amendment was proposed in September, 1789,\(^{15}\) and in April, 1790, seven months before the Sixth Amendment was ratified, Congress passed an Act\(^{16}\) stating:

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\(^{11}\) See, e.g., 22 Legal Aid Brief Case 170 (1964).

\(^{12}\) *Ibid*.

\(^{13}\) 304 U.S. 458 (1938).


\(^{15}\) *Ibid*.

\(^{16}\) 1 Stat. 118 (1790).
Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours.

From this it is reasoned that Congress passed the Act because, in its view, the Sixth Amendment was irrelevant to the issue of appointment of counsel.\textsuperscript{17} That is, if the Sixth Amendment included the right to have counsel appointed, there was no reason for Congress to pass this measure.

Such an unqualified conclusion is unwarranted. If one proposal deals with a problem in a general way and a second proposal by the same body deals with a specific aspect of the general problem, then it is unsound reasoning to conclude that the first proposal excludes the content of the second. It must be borne in mind that the Act set forth both the right to retained counsel and the right to assigned counsel in these cases. If the “exclusionary” argument is to be made for the latter provision, it should also be applied to the former dealing with the right to retain counsel. The argument could thus render the Sixth Amendment meaningless with respect to treason and capital cases. It is more likely that this Act was the first step by Congress toward merging the incongruous English laws that there was a right to counsel for treason\textsuperscript{18} and for misdemeanors,\textsuperscript{19} but not in the large area in between.\textsuperscript{20}

Furthermore, if the legislative body is to be regarded as one of two interpreters of the Constitution, as it must be if it is to discharge its function of enacting legislation that falls within the limits set by the Constitution, such a statute can be considered a legislative ratification of the constitutional provision as applied to certain specific problems. Such ratification should not be interpreted as a full explanation of the constitutional provision since there is no requirement that Congress legislate to the maximum extent permissible.

Regardless, a final determination of whether the right to have

\textsuperscript{17} Holtzoff, \textit{supra} note 14 at 8, Beaney, \textit{op. cit. supra} note 14 at 28.
\textsuperscript{18} 7 and 8 W.3, c.3, s.1 (1695).
\textsuperscript{19} Beaney, \textit{op. cit. supra} note 14 at 8-9.
\textsuperscript{20} \textit{Ibid.}
counsel appointed was originally intended to be included in the Sixth Amendment is unnecessary for our purpose. The great generalities of the Constitution, especially equal protection and due process, prohibit assigning a static interpretation to the scope of the Sixth Amendment and provide the means by which the Constitution can meet new demands posed by changing circumstances. Due process speaks both for the future and for the present and thus cannot be confined to a particular set of circumstances; at any given time it "includes those procedures that are fair and feasible in the light of then existing values and capabilities."

The decision in Johnson v. Zerbst is sometimes regarded as a radical departure from previously accepted interpretations of the Sixth Amendment. Certainly a constitutional doctrine was reversed, as the federal courts before that case were not required to appoint counsel; but no precedent was overruled. However, the historic trend of our country since the middle of the eighteenth century has been to expand the protection of human rights. And a consideration of cases prior to Johnson v. Zerbst indicates that the Supreme Court was then concerned with the protection of the right to a fair trial. From this it can be seen that the case in reality established a rule protecting a right the Court had previously dealt with on an ad hoc basis.

The Right in State Courts

The standards established by the Supreme Court for the states under the due process clause of the Fourteenth Amendment were considerably different from those required in the federal courts under the Sixth Amendment. Six years prior to Johnson v. Zerbst, the Court in Powell v. Alabama held that in a capital case a state court must assign counsel to an accused incapable of adequately defending himself because of such factors as ignorance, feeble mindedness or illiteracy. The language of the

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21 Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 6 (1956).
22 304 U.S. 458 (1938); see text accompanying note 14.
23 E.g., Beaney, op. cit. supra note 14, at 44.
24 Before that case, the Supreme Court had not dealt with the duty of the federal courts to provide counsel in felony cases.
25 See the discussion in Beaney, op. cit. supra note 14 at 30-36 and the cases cited therein.
26 287 U.S. 45 (1932).
opinion made it clear that merely formal appointment of counsel must be distinguished from effective representation.\textsuperscript{27}

In \textit{Betts v. Brady}\textsuperscript{28} the Supreme Court rejected the opportunity to invoke upon the state courts the duty required of the federal courts after \textit{Johnson v. Zerbst}, that the trial court in all criminal cases must provide counsel for an accused unable to employ his own unless he effectively waived that right. The Court concluded in \textit{Betts} that the "appointment of counsel is not a fundamental right, essential to a fair trial,"\textsuperscript{29} and held that the failure to appoint counsel under the particular facts and circumstances of the case was not sufficiently offensive to amount to a denial of due process.\textsuperscript{30} Thus, the "fair trial" or "special circumstances" rule was established, requiring the state courts to advise the defendant of his right to counsel and to appoint counsel only if the failure to do so resulted in demonstrable and substantial injustice to the accused in view of all the circumstances of the case.\textsuperscript{31} This standard was less rigorous than that established for the federal courts.

The special circumstances rule was unsatisfactory since it was incapable of reasonably precise definition and it could only be applied retrospectively. Thus the courts were precluded from precisely satisfying the standard before trial since the fair trial determination must await the completion of the proceedings and the development of the special circumstances during the proceedings. As Mr. Justice Douglas pointed out in his dissenting opinion in \textit{Bute v. Illinois},\textsuperscript{32} the special circumstances test did not provide guidelines by which the need for counsel necessary to render the trial fair could be determined. His approach would have avoided the need for an \textit{ad hoc} determination of the

\textsuperscript{27} "... that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." \textit{Id.} at 71.
\textsuperscript{28} 316 U.S. 455 (1942).
\textsuperscript{29} \textit{Id.} at 471.
\textsuperscript{30} \textit{Id.} at 472-473.
\textsuperscript{31} Factors which were subsequently considered significant in determining that due process had been denied by the failure to appoint counsel were the gravity of the offense; the complexity of the issues; the defendant's age; his mental capacity; his previous training, education and experience; his knowledge of law and procedure; the degree of protection given him by the court; and whether any advantage was taken of him by officers or prosecutors before or during trial. Annotation 93 L.Ed. 137, 149; Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948).
\textsuperscript{32} 333 U.S. 640 (1948).
consequences of all the surrounding circumstances. In his view, "the need for counsel . . . is not determined by the complexities of the case or the ability of the particular person who stands as an accused before the court. That need is measured by the nature of the charge and the ability of the average man to face it alone, unaided by an expert in the law."\textsuperscript{33}

In addition to the Fourteenth Amendment protection, the right to counsel is contained in all state constitutions except Virginia's.\textsuperscript{34} These provisions are essentially the same as the Sixth Amendment provision, but the interpretations vary considerably, frequently excluding the right to assigned counsel as a state constitutional guaranty. Except for seven states these provisions are construed as merely giving the defendant the right to appear in court and defend himself with retained counsel.\textsuperscript{35}

C. \textit{Gideon v. Wainwright: Where to Draw the Line?}

After \textit{Betts v. Brady},\textsuperscript{36} in the absence of special circumstances a state was denied the power to force a person into a non-capital criminal trial without a lawyer if he desired one and could afford to retain one, but the limitation was removed if the defendant was too poor to retain counsel. This established a line between rich and poor that was repugnant both to due process and to equal protection. In \textit{Gideon v. Wainwright}\textsuperscript{37} the Supreme Court overruled \textit{Betts v. Brady} and held that the appointment of counsel is a fundamental right, essential to a fair trial, and that failure to appoint counsel was a denial of due process. The Court pointed out that when it decided to the contrary in \textit{Betts} it departed from its own well-considered precedents.\textsuperscript{38} The Court returned to these earlier precedents, restoring "constitutional principles established to achieve a fair system of Justice."\textsuperscript{39}

\textsuperscript{33} Id. at 682 (dissenting opinion).
\textsuperscript{35} Beaney, \textit{op. cit. supra} note 14, at 81-84.
\textsuperscript{36} 316 U.S. 455 (1942).
\textsuperscript{37} 372 U.S. 335 (1963).
\textsuperscript{38} Id. at 343-344, citing excerpts from Johnson v. Zerbst, 304 U.S. 458, 462 (1939), and Grosjean v. American Press Co., 297 U.S. 233, 243-244 (1936).
\textsuperscript{39} 372 U.S. 335, 344 (1963).
The essential problem now faced by the states is to determine the extent of this duty to provide counsel for indigent accuseds. It is quite likely that the court will not be unanimous in the extent of the applicability of the *Gideon* rule. Mr. Justice Harlan can be expected to attempt to confine its scope to prosecutions involving a "substantial prison sentence." This would, in effect, limit it to felonies, since felonies are typically punishable by confinement in prison whereas the place of imprisonment for misdemeanors is typically a county jail or workhouse. If he used the term "prison" to mean any place of imprisonment, then the limitation would depend upon his definition of a substantial sentence. On the other hand, Justices Black and Douglas will undoubtedly insist that the rule requires the states to provide counsel in "all criminal prosecutions." It is highly probable that Mr. Justice Black intended to incorporate the full scope of the Sixth Amendment right to assigned counsel into the due process clause when he wrote the opinion, as he was one of the four "incorporators" in fourteen non-capital cases which reached the Supreme Court on the issue of right to appointed counsel subsequent to *Betts v. Brady*.

It seems clear that a majority of the Court did intend to incorporate into the Fourteenth Amendment due process clause the Sixth Amendment right to assigned counsel in all criminal prosecutions. The problem then becomes one of defining a criminal prosecution. If the term were limited to felonies, a state could attempt to avoid the mandate of *Gideon* by reclassifying an offense from felony to misdemeanor. But the state characterization would not bind the Supreme Court when the content of

40 Id. at 351 (concurring opinion).
41 E.g. Ky. Rev. Stat. § 431.060 (1963) [hereinafter cited as KRS]. "Offenses are either felonies or misdemeanors. Offenses punishable with death or confinement in the penitentary are felonies . . ."
42 "All criminal prosecutions" is the term used in the Sixth Amendment. In *Gideon* Mr. Justice Black wrote: "We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights." 372 U.S. 335, 342 (1963). Mr. Justice Douglas stated that "rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees." 372 U.S.347.
43 See Beaney, *op. cit. supra* note 14, at 164-194, 230-232 and cases cited therein. The incorporators urged the outright incorporation of the Sixth Amendment right to counsel (including the right to original counsel) into the Fourteenth Amendment, opposing the appraisal of all the circumstances of each case urged by the fair trial adherents.
a federal right is at issue, and the right to assigned counsel is a federal right. Thus, even if the Gideon mandate were limited to felony cases, federal characterization of felonies would prevail. This characterization could be cast in the following terms: The due process right to assigned counsel extends to all indigents charged with any offense designated a felony by the state and, regardless of state classification, to any other state offense punishable by confinement for more than one year (the definition of felony now generally employed). The states’ entire class of felonies would be accepted without question because of the moral condemnation attaching to the label, the loss of civil rights, and the deprivation of many occupations.

Although such a federal characterization approach is feasible, the distinction it draws between felonies and misdemeanors is unsatisfactory. This distinction is offensive if any statutory misdemeanors involve conduct more dangerous to others than some felonies. For example, compare a common misdemeanor such as reckless or drunken driving with the felony of distilling alcohol in violation of revenue laws. In addition, such a distinction is unfair to the defendant, who is just as effectively deprived of his liberty by imprisonment for one year for a misdemeanor as for a felony. Though the loss of civil rights accompanying misdemeanor and felony convictions is not the same, the practical impact on the family from loss of a job and subsequent unemployment upon release may be the same.

Discarding the mechanical felony-misdemeanor distinction, the essential question is whether Gideon really extends to offenses which are in substance and reality misdemeanors. To extend the right to assigned counsel, at public expense, to such minor offenses as traffic violations, vagrancy and drunkenness which are in substance and reality misdemeanors would be impractical. Furthermore, fairness to the defendant does not require assigned counsel in these minor offenses; indeed, the injection of a lawyer into many of these cases is irrelevant. But “serious misdemeanors”

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45 Id. at 266.
46 Ibid.
47 E.g. KRS 189.520 (1963).
such as petty larceny, simple assault or drunken driving are different. Regardless of the penalty imposed, a conviction of an offense of this type involves some degree of moral condemnation which, though less than that attaching to a felony, does not attach to a conviction for a parking violation or for disturbing the peace.

Approaching the problem in this manner invokes an element of judgment rather than a mechanical standard. The problem is in determining what standard of judgment is to be used to split "criminal offenses" into two groups, to one of which the right to assigned counsel does not apply while to the other it does apply. All of the Sixth Amendment rights, including the right to trial by jury, are qualified by the term "criminal prosecutions." Since the Supreme Court has dealt with the term in trial-by-jury cases, it is appropriate to look for a definition there.

In Schick v. United States the Supreme Court upheld the distinction between petty offenses and other criminal offenses by referring to traditional colonial procedures involving minor offenses and held that "crimes" in Article III, Section 2, of the Constitution does not include "petty offenses." In short, there is no federal right to a jury trial for those charged with petty offenses. Although the term "petty offense" has been incorporated into a mechanical standard in the United States Code and a dividing line of a maximum penalty may raise a presumption of petty character, the petty offense concept invokes judgment and not mechanical tests in the use of common-law history in the life of the law today. We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not. The history of the common law does not solve the problems of judgment which it raises in demonstrating that the guaranty of a jury did not cover offenses which, because of their quality and their consequences, had a relatively minor place in the register of misconducts.

49 "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the assistance of counsel for his defense."

50 195 U.S. 65 (1904).

51 18 U.S.C. § 1. A petty offense is there defined as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of $500 or both."

52 Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 89 Harv. L. Rev. 917, 981 (1926).
Thus the moral judgment reflected in the historical classification of petty offenses must be considered in making a decision as to what crimes the right to assigned counsel extends. But of equal significance in this determination is the moral judgment involved in offenses which are new or are considered to be more or less serious than previously. The resultant variation in classification that could attach to a specific act with the passage of time is justifiable on the basis that due process has no static content but includes those procedures that are fair and practical in the light of values and capabilities existing at a given time.\textsuperscript{53}

Aside from the punishment invoked, a strong indication of the moral condemnation involved is embodied in the after effects of a conviction,\textsuperscript{54} whether they are loss of civil rights, deprivation of the right to engage in certain occupations or merely loss of a particular job not within those occupations. Unofficial sanctions of this sort may be more indicative of the moral condemnation involved than the penalties imposed by law.

There is already an indication of the federal courts' willingness to extend the right to assigned counsel beyond felony cases, and to base the determination on the nature and seriousness of the offense charged. In \textit{Evans v. Rives}\textsuperscript{55} the Court of Appeals held that the defendant was entitled to appointed counsel if he could not afford his own when charged with non-support of a minor child, an offense punishable by one year in the workhouse. The District Court contended that the right to counsel did not apply to any misdemeanor, but the court ruled to the contrary. The court points out there was no felony-misdemeanor distinction in the wording of the guaranty, there was no authority for the distinction and "as far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and loss for a long time."\textsuperscript{56}

The serious misdemeanor-petty offense distinction of the Sixth Amendment right to trial by jury is urged as the appropriate standard for determining the extent of the applicability of \textit{Gideon}.

\textsuperscript{53} Schaefer, supra note 21.
\textsuperscript{55} 126 F.2d 633 (D.C. Cir. 1942).
\textsuperscript{56} \textit{Id.} at 638.
It is fair to the defendant, it is not beyond the administrative capabilities of a well-organized system, and past decisions in a related area indicate that the Supreme Court may foreseeably establish this standard.

D. When the Right to Assigned Counsel Begins

The need for assistance of counsel is by no means limited to the confines of the courtroom or to the time actually spent in courtroom proceedings. Rather the need exists wherever "that which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." Thus it exists whenever a person's procedural or substantive rights are endangered because of his ignorance or inexperience. Such is the defendant's situation immediately after arrest.

Though the need for counsel prior to arraignment is evident, the right to assigned counsel in federal courts begins at arraignment. Rule 5(b) of the Federal Rules of Criminal Procedure requires the commissioner at the preliminary examination to inform the defendant of his right to retain counsel and allow him time and opportunity to consult counsel, but it does not mention assigned counsel. Rule 44 requires the assignment of counsel once the accused appears in court "unless he elects to proceed without counsel or is able to obtain counsel." In drafting the Rules, the Advisory Committee considered the possibility of requiring the assignment of counsel at the preliminary examination. The idea was rejected, the committee stating that the Rule was intended to demonstrate that the right to assigned counsel applies only to proceedings in court and does not include the preliminary hearing.

In general, the right to assigned counsel in the state courts follows the lead of Rule 44 of the Federal Rules and becomes effective at arraignment. In Hamilton v. Alabama, the Supreme

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70 Fed. R. Crim. P. 44.
Court held that the lack of counsel on arraignment in the state court was reversible error regardless of whether demonstrable prejudice resulted. The court reasoned that "only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." In other words, the advice of counsel was essential to fairness at the arraignment.

Subsequent to *Gideon v. Wainwright*, the Court held in *White v. Maryland* that the lack of assigned counsel at a preliminary hearing was reversible error. However, the preliminary hearing in that case was essentially equivalent to arraignment since the accused entered a plea before a magistrate, and the plea was later admissible against him. The Court affirmed its earlier statement in *Hamilton* that there was no need to determine whether prejudice resulted.

The Court of Appeals for the Tenth Circuit has held since *Gideon* that there is no constitutional right to be furnished counsel at a preliminary hearing in a state court in a capital case. But the court went on to say that the refusal to appoint counsel did not prejudice the defendant, implying that lack of assigned counsel at the hearing would be reversible error if prejudice occurred. This appears to be an application of the special circumstances rule of *Betts v. Brady* to the preliminary hearing. That rule is not amenable to precise application by a trial court and is equally unsatisfactory as a standard for an examining court.

The effect of *Gideon* on the question of when the right to assigned counsel accrues is to narrow the issue to a determination of whether the right to assigned counsel prior to arraignment is an essential element of a fair trial. It is submitted that the present system of denying assigned counsel until arraignment is inherently unfair to the accused.

If at any time, from the time of his arrest to final determination of his guilt or innocence, an accused really needs the help of an attorney, it is in the pretrial period . . . Indeed, the pretrial

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64 Id. at 55.
67 Latham v. Crouse, 320 F.2d 120 (10th Cir. 1963).
68 316 U.S. 450 (1942).
If the arraignment is a "critical stage . . . where rights are preserved or lost," fairness demands that the defendant be given an opportunity to adequately prepare his defense of those rights prior to the arraignment. As previously noted, preparation of an adequate defense requires legal assistance. Certainly a prosecutor in a serious criminal case would not consider waiting until arraignment to make an extensive investigation of the facts, to conduct a thorough interrogation of the accused or to locate and question witnesses. However, unless defense counsel is assigned in advance of arraignment there is no opportunity for equal preparation and the criminal proceeding cannot be said to be fair. The delay alone is unfair. Failure to appoint counsel prior to arraignment cannot be justified by showing that in a particular case no defense witness disappeared or no relevant facts became indeterminable. Such a standard is purely retrospective in application, thus making an adequate determination impossible when the question initially presents itself.

Failure to appoint counsel prior to arraignment also makes a distinction based solely on the amount of money available to the accused. If he has enough money he can retain counsel and prepare his defense in advance of arraignment; if he hasn't the money, he must await arraignment to even begin preparing his defense. Once the right of an indigent to have counsel appointed for his defense is recognized, the opportunity to prepare that defense should be equal to the opportunity possessed by the prosecution or by an accused with sufficient means to retain counsel. This equality can obtain by appointing counsel at the preliminary hearing. Failure to so appoint is a denial of equal protection as well as being unfair as between accuser and accused.

It is arguable that the right to assigned counsel should extend to the moment of arrest. If the assistance of counsel is needed

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69 Note, Criminal Procedure—Right to Counsel Prior to Trial, 44 Ky. L. J. 103-104 (1955).
70 White v. Maryland, 373 U.S. 59, 60 (1963).
71 See text accompanying note 3 supra.
72 Beaney, The Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771, 780 (1961) [hereinafter cited as Beaney, Counsel Before Arraignment].
to make our adversary system a reality, then the right to assigned counsel should accrue at the earliest moment the state assumes an adversary position as prosecutor. This role attaches when the accused is arrested and deprived of his liberty. However, it would be difficult to provide for assignment of counsel immediately upon arrest; and it would be unreasonable to expect the police, who are responsible for apprehending those suspected of crime, to willingly assign competent counsel to the accused.73 Furthermore, the Supreme Court has held that even the right to consult counsel does not necessarily accrue at arrest,74 even if the attorney has been retained prior to arrest.75 Until these cases are overruled, the right to assigned counsel cannot be expected to accrue at the time of arrest.

On the other hand, it is not unreasonable to require the assignment of counsel at the preliminary hearing, and there are distinct advantages to the court in doing so. It would not unduly burden the magistrate to be required to advise the defendant of his right to retain counsel and to provide counsel through the normal channels if the accused is indigent. This would not be an added burden on the courts as a whole, but merely a shifting of the duty from the trial court to the examining court. Such a procedure would be an aid to the courts by decreasing the number of attacks on the acceptance of guilty pleas at arraignment on the basis of insufficient advice.76 In addition, if the accused pleaded not guilty, the trial could proceed without delay and without danger of attack on the grounds of insufficient time to prepare a defense.77 Provision of adequate time between the preliminary hearing and arraignment would eliminate the need for continuances after arraignment and would thus help prevent inefficient use of the trial court's time.

Providing counsel at the preliminary hearing is a basic step in providing equal opportunities for both sides to prepare for trial. The prosecution's case appears at the preliminary hearing, allowing the defense counsel, if appointed at that time, to

73 Beaney, The Right to Counsel in American Courts 211 (1955) [hereinafter cited as Beaney, Right to Counsel].
76 Beaney, Right to Counsel, supra note 73, at 212.
77 Ibid.
investigate the strengths and weaknesses of the prosecution’s case before trial.\textsuperscript{78} This equates the defendant in this respect with the prosecutor, who now has the opportunity to investigate the defendant’s case before trial. Representation at the preliminary hearing is not a luxury for the rich but a necessary part of the administration of justice.

Requiring the assignment of counsel at the preliminary hearing would not prevent the police and prosecutors from interrogating accused persons after arrest to decide whether to charge them, nor exclude confessions then obtained.\textsuperscript{79} In order to prevent lengthy detention \textit{incommunicado}, the assignment of counsel at the preliminary hearing must be accompanied by a requirement that the preliminary hearing be held without unnecessary delay.

Admittedly the typical assigned counsel system may be inadequate to protect the rights of indigents at a preliminary hearing; but the experience of adequately staffed defender offices\textsuperscript{80} indicates that appropriate means are available by which a state can fulfill its responsibility once the duty is recognized.

E. The Right to Assigned Counsel on Appeal

In general, it is felt that an appeal is not necessary for due process and that counsel appointed for trial is not required to proceed after sentence.\textsuperscript{81} The right to assigned counsel at trial is considered a requirement of due process since the trial is a requisite to execution of a sentence; but an appeal is not a condition precedent to punishment, and hence the failure to assign counsel on appeal is not a denial of due process.\textsuperscript{82} In the federal courts, the trial court may refuse to appoint counsel if it thinks the appeal lacks merit;\textsuperscript{83} but a certification by the district court that the appeal is not meritorious is not binding on the circuit court, and the circuit court has a duty to appoint counsel on appeal from such a decision.\textsuperscript{84}

\textsuperscript{78} Wilcox and Bloustein, \textit{Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime}, 59 Colum. L. Rev. 551, 559 (1959).
\textsuperscript{79} Beaney, \textit{Counsel Before Arraignment}, \textit{supra} note 72, at 782.
\textsuperscript{80} \textit{Equal Justice}, \textit{supra} note 5, at 71, 74.
\textsuperscript{81} De Maurez v. Swope, 104 F.2d 758 (9th cir. 1939).
\textsuperscript{82} McKane v. Durston, 153 U.S. 684 (1894).
\textsuperscript{83} Gargano v. United States, 140 F.2d 118 (1944).
\textsuperscript{84} Johnson v. United States, 352 U.S. 565 (1957).
If the appeal is granted, failure by the trial court to appoint counsel may be error on the theory that the new state in the proceedings requires the presence of counsel, and the appellate court may appoint counsel on appeal in order to make the appellate procedure effective if the trial court fails to do so.

A similar situation is found in the state courts, where appellate review is not a constitutional right. But the Supreme Court held in Griffin v. Illinois that both due process and equal protection are denied where a state statute providing for appeal as a matter of right is administered so as to deny full appellate review solely on account of an appellant's poverty. The Court in Griffin pointed out that the state is not required by the federal Constitution to provide appellate review, but once it has extended the right it cannot discriminate in its availability on the grounds of poverty. The trial court in that case was required to furnish a free copy of the transcript of the trial testimony to an indigent appellant since presentation of such a transcript was a prerequisite to obtaining appellate review.

The right to assigned counsel would apparently fall within the rationale of Griffin since it pertains to the adequacy and effectiveness of appellate review. A dissent by Judge Fuld in People v. Breslin depicts the plight of the unassisted appellant in these words:

No matter how intelligent or educated, a layman does not have the know-how to analyze the evidence and evaluate it, much less the special ability necessary to search out errors or argue points of law, even if he happens to recognize them. Thus, effective submission of an appeal requires more than possession by the defendant of a transcript of the minutes of the trial. Any kind of effective presentation demands the aid of a lawyer.

In substance there appears to be no difference between giving

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86 Holmes v. United States, 126 F.2d 431 (8th cir. 1942); for a more complete discussion of the right to counsel on appeal, see Beaney, Right to Counsel, supra note 73, at 72-73.
89 4 N.Y.2d 73, 81, 149 N.E.2d 85, 90, 172 N.Y.S.2d 157, 164 (1958) (dissenting opinion).
the defendant a free transcript and providing him with an attorney for the appeal.

The Supreme Court has since dealt with the issue in *Douglas v. California*\(^0\) and has held it is a denial of equal protection for a state court to refuse to appoint counsel to represent an indigent on the only appeal granted as a matter of right. The Court struck down a California procedure by which the state appellate court, when requested by an indigent to provide counsel for appeal, investigated the record and appointed counsel only if it would be helpful to either the court or the appellant. The Court said this discriminated between the rich man who can require the court to listen to the skilled argument of counsel before deciding on the merits and the poor man who cannot. It is this discrimination that violates the rule of *Griffin v. Illinois*.

F. Summary

It cannot be denied that there is an urgent need for the assistance of skilled counsel in defending a criminal prosecution. The need for assigned counsel for those unable to retain their own is even more urgent since these people are frequently less educated and informed than their financially able counterparts and usually must remain in jail with no opportunity to adequately prepare a defense even if they have the ability. Society itself has a need for the provision of counsel for these people in order to avoid undermining the very principles upon which our society is based. Furthermore, the interest of society in its own protection from recidivists demands the assignment of counsel to indigents so that those convicted will be more receptive to the correctional process of our penal system.

The right to counsel in criminal proceedings in this country is embodied in the Sixth Amendment of the federal Constitution and in all but one of the state constitutions, but the interpretation of this right has not been uniform. Before *Johnson v. Zerbst* the federal courts did not recognize a duty to appoint counsel. That case imposed upon those courts the duty to appoint counsel in all criminal proceedings unless the accused has, or effectively waives, the assistance of counsel. It is debatable whether the

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\(^0\) 372 U.S. 353 (1963).
framers of the Sixth Amendment intended for the right to counsel to include the right to assigned counsel, but the great generalities of the Constitution render this issue irrelevant.

The standard for state trial courts differed considerably from the standard for the federal courts. In *Powell v. Alabama* the Supreme Court established the rule that state courts must assign counsel in a capital case if the defendant was unable to defend himself because of such factors as feeblemindedness or ignorance. But the Court rejected the opportunity to apply the rule to all felony cases in *Betts v. Brady*, where the special circumstances rule was established. This standard was incapable of reasonably precise definition and, being purely retrospective in application, it could not be effectively applied by a trial court. In *Gideon v. Wainwright* the Court explicitly overruled *Betts* and held that the assignment of counsel was an essential element of a fair trial, the denial of which was a denial of due process. But the Court failed to define in precise terms the limits of the right to assigned counsel. Clearly it would include all felonies; but it is uncertain how far beyond this the Court intended to go, though the language of the opinion sweeps beyond such artificial limitations as the felony-misdemeanor distinction. It is concluded that the petty offense concept, invoking an element of judgment rather than mechanical rules, is the proper place to draw the line. Furthermore, there are reasons of fairness to the defendant, administrative practicality and historical distinctions in the related area of the right to trial by jury for expecting the Supreme Court to eventually draw such a line.

Traditionally the right to assigned counsel begins at arraignment and ends with judgment. There is a distinct need for the assistance of counsel before this point and the delay is inherently unfair as between the accuser and the accused and denies the defendant the equal protection under law. Requiring the assignment of counsel at the preliminary hearing is essential in providing equal opportunities for both sides to prepare for trial. Although appellate review by itself is not a constitutional right, when an appeal is allowed as a matter of right it is a denial of equal protection to fail to appoint counsel to take the appeal for an indigent appellant.
PART II: THE RIGHT TO ASSIGNED COUNSEL IN KENTUCKY

A. The Scope of the Problem

The right to assigned counsel in Kentucky cannot be considered in any meaningful manner without a general idea of the size of the problem. First of all let us compare the overall crime rate in Kentucky with the national average. Though precise figures on the total number of all crimes committed in Kentucky are available, the Uniform Crime Reports, prepared by the Department of Justice, provides a means of comparing Kentucky's situation with the nation as a whole. The data dealt with here are the Crime Indices.

While Kentucky's population in 1962 was roughly the same as in 1958, the crime rate per 100,000 population (Crime Index) increased 26 per cent. The economic conditions caused by widespread unemployment in eastern Kentucky are undoubtedly a major factor in this increase; it could well have been greater had not large numbers of people left this region looking for employment elsewhere. During the same period, the Crime Index for the United States as a whole increased 23 per cent.

The difference in increase in the Crime Index for the two areas appears to be slight, but it is misleading because of the difference in population distribution. It will be observed that approximately two-thirds of the national population is located in Standard Metropolitan Statistical Areas, while in Kentucky...
those areas comprise only about one-third of the total.\footnote{Bureau of the Census, I U.S. Census of Population: 1960, as reported in Bureau of the Census, Statistical Abstract of the United States (1963).} Furthermore, the crime rates are higher in these metropolitan areas than elsewhere.\footnote{See Uniform Crime Reports, supra note 91, at 35 (1962).} When the national figures for the basic population distribution areas are weighted to approximate the Kentucky distribution, the national Crime Index is approximately 835 compared to Kentucky's 874.\footnote{Weighted computation based on data in Appendix B.} On the same weighted basis, the national Index increased only 18 per cent between 1958 and 1962 compared with Kentucky's increase of 26 per cent.\footnote{Ibid.} In other words, during this period Kentucky's Crime Index rose almost 50 per cent more than the national average relative to its population distribution. True, the data on which these conclusions are based are themselves only approximations, but at the very least the data indicate that Kentucky cannot justify refusing to deal with the problem on the ground that it doesn't affect the state or that the present system will continue to handle the problem as adequately as it has in the past.

In various studies, it has been estimated that from 30 per cent to 60 per cent of those accused of crime cannot afford counsel.\footnote{Brownell, Legal Aid in the United States 83 (1951); Equal Justice, supra note 5 at 80.} Estimates in replies to questionnaires\footnote{The questionnaire is set forth in Appendix A.} sent to judges in various parts of Kentucky, of both county and circuit courts, ranged from 40 per cent to 75 per cent. In half of the accused in Kentucky cannot afford counsel, the importance of the problem needs no underscoring. This estimate of the percentage of defendants who cannot afford counsel combined with the recent large increase in the state Crime Index and the relatively modest increase in the number of lawyers in the state\footnote{Comparison of the Roll of Members, Ky. St. B. J. 30 (1958) with Role of Members, Ky. B. Ass'n, Directory of the Judicial System of Kentucky 37 (1963) shows an increase during this period of less than 8%.} indicate that the assigned counsel system in Kentucky places an increasingly large burden on those members of the Bar who are appointed to defend the indigent. This conclusion is reinforced by personal conversation with Kentucky lawyers,\footnote{Conversation with Attorneys in Owensboro and Lexington, Ky., Jan. and Feb., 1964.} revealing that a few years
ago two to four assigned cases per lawyer per year was a normal load, while today the corresponding members of the Bar may receive from twelve to twenty cases per year.\textsuperscript{105}

B. Kentucky Constitutional and Statutory Interpretation

The Kentucky Constitution provides in Section 11 that "In all criminal prosecutions the accused has the right to be heard by himself and counsel. . . ." Traditionally this was interpreted by the Kentucky Court of Appeals to allow an accused charged with a felony to retain counsel if he desired and could afford it,\textsuperscript{106} but it was not interpreted as giving the accused a constitutional right to have counsel appointed. Although there was no statute providing for appointed counsel in any case, the Court in 1886 spoke of a duty of the courts to make appointments when appropriate, but refrained from referring to any right of the defendant to have counsel appointed.\textsuperscript{107} Later in \textit{Williams v. Commonwealth}\textsuperscript{108} the court implied that the duty arose from the Kentucky Constitution, but restricted it to cases where the accused was uneducated and did not fully understand his situation.

A series of cases\textsuperscript{109} then held that the court was under no duty to appoint counsel unless the defendant requested it and made the necessary showing of financial inability to retain counsel. But in \textit{Gholson v. Commonwealth}\textsuperscript{110} a failure of the trial court to advise the defendant of his right to counsel and to appoint counsel if necessary was held to be a denial of a fair and impartial trial as guaranteed by the due process clause of the Fourteenth Amendment. The defendant was convicted and sentenced to two years imprisonment for concealing a deadly weapon, even though the evidence was discovered by an illegal search. The court affirmed the view that "to the extent that there is a constitutional right to counsel in this type of case it stems

\begin{footnotes}
\footnote{105}{Ibid.; Replies to Questionnaire, Appendix A.}
\footnote{106}{Luntz v. Commonwealth, 287 Ky. 517, 154 S.W.2d 548 (1941).}
\footnote{107}{Turner v. Commonwealth, 59 Ky. 78, 1 S.W. 475 (1886).}
\footnote{108}{33 Ky. L. Rep. 330, 110 S.W. 339 (1908).}
\footnote{109}{Moore v. Commonwealth, 298 Ky. 14, 181 S.W.2d 413 (1944); Hamline v. Commonwealth, 287 Ky. 22, 152 S.W.2d 297 (1941); Holland v. Commonwealth, 241 Ky. 813, 45 S.W.2d 476 (1932); Grogan v. Commonwealth, 222 Ky. 434, 1 S.W.2d 779 (1927).}
\footnote{110}{308 Ky. 82, 212 S.W.2d 537 (1948).}
\end{footnotes}
directly from the Fourteenth Amendment..." and pointed out Kentucky's lack of a statute dealing with appointment of counsel in felony cases. The court set up the standard that the trial court, in order to provide a fair trial, must advise the defendant in a felony case of his rights and determine whether a waiver of the right to be represented by counsel was made "intelligently, competently, understandably and voluntarily," and expressly overruled the contrary views in Hamlene v. Commonwealth and Moore v. Commonwealth. After Gholson it is clear that Kentucky recognizes a constitutional right of the accused in a felony case to have counsel appointed, but this right is based on the Fourteenth Amendment of the federal Constitution and not on Section 11 of the Kentucky Constitution.

Prior to the Gholson decision, the Court of Appeals in Smith v. Buchanan had rejected the view that failure to assign counsel is a failure to complete the court and divests the court of jurisdiction to try the case. However, in the case of Hart v. Commonwealth the Court of Appeals held that failure to comply with the duties established in Gholson was a proper basis for awarding a new trial without a separate showing of prejudice. Though not dealing with the problem in terms of divesting the court of jurisdiction, the result is a refutation of the prior holding in Smith v. Buchanan.

Aside from the interpretation of constitutional provisions, both state and federal, there have been various statutes in Kentucky that have referred to the right to assigned counsel without guaranteeing it. The in forma pauperis provision states that "a court may allow a poor person residing in this state to prosecute or defend any action therein without paying costs, whereupon he shall have any counsel that the court assigns him. . . ."

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111 Wade v. Mayo, 334 U.S. 672 (1948). The Gholson case has been said to provide the indigent accused with the right to assigned counsel under § 11 of the Kentucky Constitution, Note, 38 Ky. L.J. 317, 325 (1949); however, the case is clearly decided under the due process clause of the Fourteenth Amendment.

112 Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537, 540 (1948).

113 287 Ky. 22, 152 S.W.2d 297 (1941).

114 296 Ky. 14, 181 S.W.2d 413 (1944).

115 291 Ky. 44, 163 S.W.2d 5 (1942).


117 296 S.W.2d 212 (Ky. 1956).

118 KRS 453.190 (1963).
(Emphasis added). Though not restricting it to any particular types of cases, this section leaves the appointment of counsel entirely to the court's discretion and awards the defendant no absolute right to assigned counsel in any case. No case has been found whereby a defendant succeeded in obtaining assigned counsel for a criminal trial under this statute. The main use of this provision in criminal cases has been to obtain a transcript of the trial at state expense in order to appeal a conviction.\textsuperscript{119}

Though \textit{Braden v. Commonwealth}\textsuperscript{120} is limited on its facts to requiring the trial court to provide a copy of the transcript for the appeal without prepayment of costs, the reasoning of the court bears on the right to assigned counsel. The trial court in this case refused to grant appellant's petition to be furnished a free transcript under the in forma pauperis provision because the petitioner had paid four attorneys Two Thousand Two Hundred Dollars for their assistance at the trial. The court felt that one who could afford to pay such amounts should not be allowed to take a pauper appeal. But the Court of Appeals looked beyond the bare facts of the case and held that under the "peculiar facts and unusual circumstances"\textsuperscript{121} of the case, it was an abuse of the trial court's discretion to refuse to order the clerk and reporter to furnish the transcripts. This willingness of the court to look beyond the presumption raised by the payment of a substantial fee should also be invoked by the trial courts in determining whether a defendant should have assigned counsel. For example, if the charge were sedition, as in \textit{Braden}, and the defendant made a clear showing of being able to pay only five hundred dollars, whereas preparation of an adequate defense would require several thousand dollars, he should not be denied the extra assistance he would have received had he been unable to pay at all.\textsuperscript{122} Defendants of this sort, able to retain counsel in form but unable to bear the cost of even a reasonably adequate defense, are in danger of having their right to effective counsel nullified. Though a willingness to protect these defendants' rights

\textsuperscript{119}Moy \textit{v. Bradley}, 306 S.W.2d 296 (Ky. 1957); \textit{Braden v. Commonwealth}, 277 S.W.2d 7 (Ky. 1955).

\textsuperscript{120}277 S.W.2d 7 (Ky. 1955).

\textsuperscript{121}Id. at 11.

\textsuperscript{122}Replies to the Questionnaire for this study (see Appendix A) indicate that a defendant in a case such as this would receive experienced counsel, and may have been assigned two attorneys.
has thus far been shown only on appeal, the rationale of Braden is equally applicable at the trial level.

Another statute provided that if a misdemeanor defendant were incarcerated in default of bail and the court before which he was ordered to appear were not in session, his case would be transferred to the county court, which would proceed with the trial, and "if the prisoner has no attorney and is too poor to employ one, the court shall, at his request, appoint an attorney to defend him."\(^{123}\) Although this section has been said to invoke a duty on the courts to assign counsel on request in all misdemeanor cases,\(^ {124}\) no cases have been found to that effect; and such an interpretation is much broader than the prima facie meaning of the words. Taken in context,\(^ {125}\) the provision seems to have been almost inadvertently added to a general provision designed to protect incarcerated defendants from being unnecessarily detained in jail while waiting for the state circuit courts to reconvene for the following term. When the statute was repealed in 1962,\(^ {126}\) it was compiled with other sections into a new section\(^ {127}\) providing for the same transfer of misdemeanor cases from a court not in session to the county court but omitting any reference to assignment of counsel. Not only would the provision in the old statute be inconsistent with the rationale of Gholson by putting the burden of the initiative on the defendant, but this specific failure to re-enact the assignment of counsel provision in 1962 would seem to be an indication by the legislature that the section was never intended to extend the absolute right to assigned counsel to misdemeanor cases. During the period this statute was in effect, the Court of Appeals pointed out that there were no Kentucky statutes conferring an absolute

\(^{123}\) KRS 455.010 (Repealed, Ky. Acts 1962, c. 234, § 57).

\(^{124}\) Beaney, Right to Counsel, supra note 73, at 238, Appendix II; Brownell, Legal Aid in the United States 302, Appendix C (1951).

\(^{125}\) When a person charged with a misdemeanor is imprisoned in default of bail and the court in which he was indicted or before which he was ordered to appear is not in session, the jailer shall at once notify the county judge and the county attorney . . . The judge shall . . . notify the county attorney who shall prosecute. The judge shall give the accused notice of the charge against him, and proceed at once to try the case, or fix a day for its trial, and issue summons for any witnesses needed by either party. If the prisoner has no attorney and is too poor to employ one, the court shall, at his request, appoint an attorney to defend him. KRS 455.010 (Repealed, Ky. Acts 1962, c. 234, § 57).


\(^{127}\) KRS 23.145 (1963).
right to assigned counsel even in felony cases. It would be logically inconsistent for the state to be required to assign counsel in all misdemeanor trials but not in felony cases.

The Kentucky legislature in 1962 extensively revised the existing statutes and enacted the Kentucky Rules of Criminal Procedure, abolishing the Code of Practice in Criminal Cases. The Rules, effective January 1, 1963, simplified the previous procedure and added certain safeguards of individual rights pertinent to the right of counsel. It is unfortunate that such a recent major change fails to adequately protect the rights of indigent defendants.

The right to contact an attorney is now guaranteed by the following rule:

(1) A person arrested and in jail shall have the right to make immediate communications for the purpose of securing the services of an attorney.

(2) Any attorney-at-law entitled to practice in the courts of this Commonwealth shall, at the request of the person arrested, or of some one acting in his behalf, be permitted to visit the person arrested.

This section recognizes that the accused needs counsel and assistance from the beginning. In guaranteeing the right to legal advice from the time of arrest, Kentucky has emphasized the unfairness of the rule in Crooker v. California and Cicenia v. Lagay.

Once the person is arrested, he must be taken without unnecessary delay before a magistrate who proceeds with the trial or with a preliminary hearing or who transfers the case to a court of competent jurisdiction. The magistrate is required to "inform the defendant of the charge against him and of his right to have preliminary hearing or a trial," and to allow the defendant "reasonable time and opportunity to consult counsel."

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128 McIntosh v. Commonwealth, 363 S.W.2d 331 (Ky. 1963); Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537 (1948).
131 357 U.S. 433 (1958); see text accompanying note 74.
132 357 U.S. 504 (1958); see text accompanying note 75.
134 Ky. R. Crim. P. 3.08.
This rule is based on Federal Rule 5(b), but it inadequately protects the accused because it fails to require the magistrate to inform the accused of his right to counsel. It violates the spirit of the provision allowing the accused to contact an attorney immediately after arrest by failing to assure that the accused will know of that right immediately after arrest. It would not be unreasonable to require the magistrate to inform the defendant of this basic right at this time.

Rule 8.04, with which we are primarily concerned, guarantees the right to assigned counsel in these words:

If on arraignment or thereafter, in felony cases, the defendant appears in court without counsel, the court shall advise him of his right to counsel, and shall assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to retain counsel. Essentially the same as Federal Rule 44, this rule is a codification of the common law. It was intended to satisfy both Section 11 of the Kentucky Constitution and the prevailing interpretation of the Fourteenth Amendment. Prior to Gideon v. Wainwright, the latter purpose was fulfilled; however, it is not clear that this rule satisfies the Fourteenth Amendment standard after Gideon. As was discussed above, the Gideon rule certainly applies to felonies, but it is unlikely that its application will be limited to felony cases. Restricting the right to assigned counsel to felonies is unfair to misdemeanants and establishes a distinction lacking substantive merit.

Furthermore, another of the Kentucky Rules is inconsistent with this restriction. Rule 7.16 reads:

Upon the application for taking depositions if a defendant is without counsel, the court shall advise him of his right thereto and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to retain counsel.

135 Ibid.
137 Ky. R. Crim. P. 8.04. Felony is defined as an offense punishable with death or confinement in the penitentiary. KRS 431.060 (1963).
138 Wade v. Commonwealth, 303 S.W.2d 903 (Ky. 1957); Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537 (1948).
141 See text accompanying notes 40-44 supra.
This is identical with the first sentence of Federal Rule 15(c), which is not necessarily restricted to felony cases.\textsuperscript{142} Certainly the Kentucky Rule itself contains no language limiting it to felonies and the use of depositions is not limited to felony cases.\textsuperscript{143} Perhaps the limitation to felonies of Rule 8.04 is to be read into Rule 7.16, but there is no indication of this except by implication from Rule 8.04 itself.

As has been previously discussed,\textsuperscript{144} failure to appoint counsel prior to arraignment, as in Rule 8.04, is unfair to the accused vis-a-vis the accusor and makes a distinction concerning opportunity for adequate preparation of a defense based solely on the amount of money a defendant has. It is suggested that the appointment of counsel be made at the preliminary hearing in order to provide both the accused and accusor, as well as all defendants \emph{inter se}, substantially equal opportunities to prepare for trial.

The function of the preliminary hearing in Kentucky makes it inconsistent to appoint counsel in a proper case only at arraignment or later and not at the preliminary hearing. The preliminary examination is considered an alternative to an immediate trial, so its proceedings are basically implemental of and subject to the constitutional guarantees of the rights to be heard and to be represented by counsel.\textsuperscript{145} Therefore, it is inconsistent for the state to appoint counsel for a trial but to refuse to appoint counsel for the same offense for a proceeding that is limited by the identical constitutional requirements. This result can be supported on the theory that a finding of probable cause at the hearing is not a verdict of guilty and thus cannot, in itself, result in a sentence being imposed on the defendant. But this argument disregards the indigent's deprivation of liberty in the interim between the preliminary hearing and trial, caused by his incarceration in default of bail.

\textsuperscript{142} Fed. Rule 15(c) incorporates the right to assigned counsel of Fed. Rule 44, a codification of the common law established in Johnson v. Zerbst, 304 U.S. 458 (1938); Walker v. Johnson, 312 U.S. 272 (1941); Glasser v. United States, 315 U.S. 60 (1942). Though not a Supreme Court decision, the right to assigned counsel was extended to a misdemeanor in Evans v. Rives, 128 F.2d 639 (D.C. Cir. 1942); thus the felony limitation is not an iron clad restriction.

\textsuperscript{143} Ky. R. Civ. P. 26.01 provides that "any party may take the testimony of any person . . . by deposition . . ." The Rules of Civil Procedure, unless otherwise provided for by law, apply as well to criminal cases. Gholson v. Commonwealth, 212 S.W.2d 537, 539 (Ky., 1948).

\textsuperscript{144} See text accompanying notes 69-72, \textit{supra}.

\textsuperscript{145} General Comment (1962), Ky. R. Crim. P., Part III.
Failure to grant an appeal has been traditionally held not to be a denial of a constitutional right in Kentucky on the basis that the appeal is a privilege entirely within the province of the legislature and not an inherent right. 146 The right to appointed counsel on appeal was not settled until 1963 in the case of McIntosh v. Commonwealth. 147 After approving prior thought that "appellate review, as such, in criminal cases is not a constitutional right," 148 the court adopted the rule in Douglas v. California 149 to the effect that "when a statute authorizes an original appeal as a matter of right, the Equal Protection Clause of the Fourteenth Amendment guarantees an indigent defendant the assistance of counsel in prosecuting it." 150 The court said further that due process compels the court to inform the defendant of his right to appointed counsel at the trial, but that equal protection placed no such burden on the court regarding an appeal; rather, equal protection guarantees the defendant a right to counsel and to a transcript only if he requests it. 151 It would seem more consistent with the spirit of the Douglas case to establish that where a defendant can appeal as a matter of right, he should be informed of this right to appeal by the court, just as he must be informed of his right to counsel, and that counsel must be provided if he then indicates an intention or desire to appeal. The burden should not be put on the defendant to request appointment of counsel at any stage at which he may have assigned counsel as a matter of right. In other words, whether the right is given by the due process or the equal protection clause, it should invoke upon the court an affirmative duty to make that right effective.

It is conceded that there is a need for the states to avoid wasting public funds by subsidizing frivolous appeals. But when the appeal of right is granted only when the sentence imposed is substantial, as in Kentucky, 152 it is not unreasonable to require

147 368 S.W.2d 331 (Ky. 1963).
148 Id. at 335.
150 368 S.W.2d at 335.
151 Id. at 331, 336.
152 KRS 21.140(1) provides an appeal as a matter of right from a circuit court judgment imposing a sentence of confinement or imprisonment of 12 months or more. However, since the moral condemnation attaches to the convic-
the state to provide counsel in all these cases. Discretionary appeals from less severe sentences do not fall within the mandate of *Douglas v. California*. It is with regard to appeals of this nature that the state should be allowed to retain a procedure designed to protect public funds and the appellate court from frivolous appeals.

A significant omission in the statutes and rules is the failure to provide for reimbursement of reasonable and necessary expenses in preparing the defense or for compensation for the assigned lawyer. Though an adequate defense may depend upon an expensive investigation or test, they are unavailable to the indigent unless his assigned counsel pays for them. Until such necessary elements of an adequate defense are provided by some means other than the indigent or his assigned counsel, the indigent defendants cannot have the full benefit of an adversary system.

C. Procedure Followed in Kentucky

Regardless of the adequacy of the constitutional and statutory provisions, a more significant indication of the protection afforded indigents is found in the procedure actually followed by the trial courts. For this purpose a brief questionnaire was sent to judges of both county and circuit courts selected from various parts of the state. No attempt was made to cover all the courts in the state, but the replies appear sufficiently consistent to indicate the procedure generally followed. It should be kept in mind that all but one of the replies were from circuit courts where the ratio of felonies to misdemeanors is high. The following discussion, except where indicated, is based on the replies to the questionnaire.

*Conditions Under Which Counsel Is Assigned*

There is no set standard used to determine indigency, but the need for appointed counsel is determined by the accused’s assertion of financial inability and his responses to general ques-

(Footnote continued from preceding page)

tion of the crime charged and not merely to the sentence imposed, it is submitted that the appeal of right should be granted on the basis of the maximum punishment permissible.

153 The questionnaire is set forth in Appendix A.
tions by the court concerning ownership of real and personal property and earning ability.

The accused is not required to make a formal request for assigned counsel. In general, if he appears without counsel and the reason is financial inability, the court asks whether he desires to have an attorney appointed and appoints one if the answer is affirmative.

The circuit courts in general make no substantial distinction between appointing counsel in ordinary felonies and misdemeanors, though they do attempt to assign more experienced counsel in the "more serious felonies" and usually appoint two attorneys in a capital case. The relatively small number of misdemeanors actually tried in the circuit courts is probably a major factor in explaining the uniform treatment of felonies and misdemeanors. However, in a few of the circuit courts, no attorneys are appointed in misdemeanor cases unless there are unusual circumstances, such as a substantial penalty or a defendant's incompetence. Though this latter practice is in accord with the statutory standards, the lack of uniformity among the circuit courts is undesirable.

It was pointed out that the county courts are under no obligation to assign counsel since they do not try felonies and that assignment of counsel in those courts generally depends on a specific request by the defendant coupled with unusual circumstances. The norm, then, is inconsistent treatment of the same offense between the county and circuit courts where they have concurrent jurisdiction. If the indigent is tried in the circuit court, he may receive assigned counsel as a matter of course; but if he is tried in a county court within the same judicial circuit, he would be denied assigned counsel, absent unusual circumstances. The assignment of counsel for a given offense should not depend on the fortuity of the particular court in which a person is tried.

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155 Jurisdiction of county courts extends at most to penal and misdemeanor cases punishable by a maximum fine of $500 or imprisonment for not more than 12 months, or both. KRS 25.010.
156 County and circuit courts have concurrent jurisdiction of all penal and misdemeanor cases where punishment is limited to a fine of not more than $500 or imprisonment for not more than 12 months, or both. KRS 25.010.
Time at Which Counsel Is Assigned

The defendant first appears in the circuit court to be arraigned upon the charge, and the uniform practice in the circuit courts is to assign counsel at this time. All prior stages in the proceedings have taken place in the lower courts. If the defendant specifically demands counsel in the preliminary proceedings, he may be so provided, but it is an exception rather than the rule. Through this practice complies with the statutory requirement, the lack of assistance of assigned counsel prior to arraignment, except in special cases, is inherently unfair.

Percentage of Cases with Assigned Counsel

The estimates of the percentage of all criminal cases in the circuit courts in which the defendant is indigent range from 40 per cent to 50 per cent for most of the state to 75 per cent in the eastern part. Several of the judges thought the percentage was on the increase. Though no estimates on the percentages in the lower courts were received, there is no reason to expect it to be significantly different. Very few of the indigents make an intelligent waiver of the right to counsel; but even if they do, the judges tend to refuse to accept a plea of guilty until after the accused consults with an attorney. This implies that the judges do not regard these waivers as being "intelligently, competently, understandingly and voluntarily" made.

Selection of Counsel

There is no inflexible limitation of assignments to a specific segment of the Bar, though as a practical matter the newly admitted members of the Bar receive the bulk of the assignments. Some local Bar associations include all lawyers under a given age, regardless of specialty, in the group from which appointments are made. Those attorneys with considerable criminal experience tend to receive most of the appointments to the more serious felonies and capital offenses.

Generally the judge makes his own selection, but the method used varies from straight rotation to selection from appropriate
lawyers present in the courtroom on the day of arraignment. When an appointment is made in a lower court, the judge normally selects some attorney who happens to be in the courtroom or calls an attorney at random.\textsuperscript{160}

The frequency of assignments per attorney ranges from one in three years to twelve to twenty per year, depending on the system used to select the lawyers.

Ordinarily the lawyer who was appointed for the trial handles the case on appeal, if an appeal is taken; but the judges point out that fewer appeals are taken from cases with assigned counsel. One judge, while noting that the practice in his court was the same as the rest, expressed doubt whether the court could require such an attorney or anyone else to take the appeal. This is unexplainable in view of the recent Kentucky case of McIntosh v. Commonwealth.\textsuperscript{161}

D. \emph{Summary and Conclusions}

It is clear that a substantial and increasing need for assigned counsel exists in Kentucky. The state crime rate has increased more rapidly than the national average, and both the level of the crime rate and the rate of increase are especially alarming for a state with Kentucky's population distribution. The adverse economic conditions prevalent in a large part of the state, contributing to the increase in the crime rate, have drastically increased the need for assigned counsel. Yet Kentucky has failed to make any changes in its traditional assigned counsel system to provide for this increased need within its communities, preferring instead to rely on assigning more and more cases to the newly admitted members of the Bar. In doing so, the state imposes an unfair burden on these young attorneys; and in refusing to change its statutory structure in accord with the spirit of \textit{Gideon v. Wainwright}, it fails to discharge its responsibility to its indigent citizens. A disparity exists between the representation provided indigent defendants in Kentucky and that contemplated by the due process and equal protection clauses of the federal Constitution. The reason lies not in a moral failure of the

\textsuperscript{160} Several of the circuit judges commented on this practice in the county courts in addition to the one reply from a county judge.

\textsuperscript{161} 368 S.W.2d 331 (Ky. 1963). See text accompanying note 147.
people responsible but simply in a failure to deal with the problem in realistic, twentieth-century terms.

Kentucky's system for providing counsel for indigent accused has not successfully met the challenge posed by the change from the traditional idea that legal aid is a charity to the concept that it is a political and social right, a change accompanying the increased emphasis in national thought on human rights. Under the old philosophy it was felt that legal aid in criminal cases was a matter within the discretion of the courts and the members of the legal profession and that when it was provided it should be given free. The current thought that it is a social right demands that all who need it should get it and those who render it should receive adequate compensation.

The representation given in Kentucky, being guaranteed only in felony cases, fails to provide the necessary assistance to all who need it. In actual practice, the courts appoint counsel more than is required by statute since indigent misdemeanants in the circuit courts are often assigned counsel as a matter of course and some misdemeanants in the lower courts receive assigned counsel under unusual circumstances. But the need of all those accused of crime who are unable to pay for an adequate defense cannot be satisfied by relying on such fortuitous circumstances. In addition, when assistance is provided, it is rarely provided early enough to adequately protect the accused's rights since counsel is not assigned prior to arraignment except in unusual situations.

The inability of assigned counsel in Kentucky to spend a cent on the defense except out of his own pocket is a further indication of the failure of the system to keep pace with the changing philosophy. If the indigent's right to the assistance of counsel is indeed a social right, then it is incumbent upon society as a whole to bear the economic burden of providing that assistance. Certainly lawyers must be the ones to render the service, but there is no logical reason to impose the expense of fulfilling society's responsibility on those members of the Bar who perform the work, especially on the newest members who can least afford such expense. In this respect Kentucky's system fails to enlist the community participation and responsibility thought to be

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103 Ibid.
essential to an adequate system.\textsuperscript{164} Furthermore, this failure to provide for any compensation or reimbursement may deprive defendants of the benefits of a full investigation if the assigned counsel is unestablished and cannot bear the full cost himself. Until the system provides facilities that are readily available to an assigned attorney or at least compensates him for his expenses, the system cannot provide the equal protection that is intended by the substantive law.

It has long been assumed that the traditional assigned counsel system adequately meets the needs of indigent defendants in rural areas and small towns.\textsuperscript{165} It might seem that Kentucky as a whole is the type of state suitable for such a system. But such an assumption overlooks the increasing proportion of Kentucky's population found in metropolitan areas;\textsuperscript{166} the state has not developed a system adequately protecting indigent accuseds in these areas. For example, as of January, 1961, Jefferson County, Kentucky, was one of only thirty-two counties in the United States with a population of more than four hundred thousand in which there was no organized defender office.\textsuperscript{167} Other communities such as Lexington and Owensboro are anything but rural in nature, and the Kentucky suburbs across the river from Cincinnati, Ohio, are typically metropolitan in composition. Certainly the neighborliness and personal contact between accuseds and local lawyers, thought to provide adequate representation in rural areas, do not exist in these communities. Here again Kentucky has failed to meet the challenge posed by the change of modern times.

Even in rural areas it is doubtful that the traditional neighborliness of the small town lawyer exists today to the same extent as formerly.\textsuperscript{168} Though the small town indeed is a more leisurely environment, both small town and big city lawyers must make a living from their practice. Lawyers' motivations are many and

\textsuperscript{164} Equal Justice, supra note 5, at 61-62.
\textsuperscript{165} E.g. Beaney, The Right to Counsel in American Courts 213 (1955); Brownell, Legal Aid in the United States 136 (1951); Equal Justice, supra note 5, at 80.
\textsuperscript{167} Brownell, Supplement to Legal Aid in the United States 71 (1961).
\textsuperscript{168} Willcox and Bloustein, Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime, 59 Colum. L. Rev. 551, 567 (1959).
are not limited to their professional duties as officers of the court. Though the neighborliness traditionally relied on to adequately protect indigents under the assigned counsel system may actually be found in certain areas of Kentucky, the assumption that it does exist should not be blindly accepted.

The quality of the defense provided by Kentucky's assigned counsel system is also subject to criticism. The primary objection is the widespread practice of assigning the bulk of the cases to the newly-admitted members of the Bar, those with the least experience and the still undeveloped skill. Though the Kentucky judges responding to the questionnaire for this study generally feel the defense is adequate, other studies indicate widespread skepticism of the ability of raw young attorneys to handle adequately any but the simplest case.\(^{169}\) Though it is generally agreed that these young lawyers have the desired zeal and loyalty, it is emphasized that ability in criminal matters is largely a result of judgment and wisdom acquired through experience and not from books.\(^{170}\) The practice of concentrating the assignments on the younger members of the Bar may be rationalized by the need to provide for the young members the accompanying experience and education that is not otherwise available.\(^{171}\) Though the desire to educate the young lawyers is laudable, there is no sufficient reason for doing so at the expense of indigent accuseds. This educational function could be much more effectively served if the young lawyers were under the supervision of experienced counsel, but opportunity for such supervision is lacking in the Kentucky system.

The assigned counsel system also denies the indigent the benefits of specialization in the defense, except in those unusual cases where an experienced criminal lawyer is appointed. For example, an experienced criminal lawyer is more efficient in the preparation of the case, is familiar with the tactics of certain prosecutors and is more apt to be aware of possible defenses not apparent to the novice.

The prevailing arguments against the assigned counsel system

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\(^{169}\) Brownell, \textit{op. cit. supra}, note 165 at 138-143 (1951); Wilcox and Bloustein, \textit{supra} note 163 at 563; Equal Justice, \textit{supra} note 5 at 64-66.

\(^{170}\) Wilcox and Bloustein, \textit{supra} note 163 at 563.

\(^{171}\) \textit{Id.} at 569; Equal Justice, \textit{supra} note 5 at 65-66.
were aptly summarized in an address by Judge Augustus Hand to the Judicial Conference of the United States in these words:172

It is clear that when cases of poor persons needing defense become numerous and occur repeatedly, the voluntary and uncompensated services of counsel are not an adequate means of providing representation. To call on lawyers constantly for unpaid service is unfair to them and any attempt to do so is almost bound to break down after a time. To distribute such assignments among a large number of attorneys in order to reduce the burden upon anyone, is to entrust the representation of the defendants to attorneys who in many cases are not proficient in criminal trials, whatever their general ability, and who for one reason or another cannot be depended upon for an adequate defense. Too often under such circumstances the representation becomes little more than a form.

These words are directly applicable to the Kentucky situation.

PART III: COMPARISON WITH ALTERNATIVE SYSTEMS

Primarily there is one alternative system for protecting the right to assigned counsel—the organized defender office, whether it be a voluntary defender organization, a public defender office or a combination. These types of offices differ principally in administrative and financial respects, while performing essentially the same services. A detailed presentation of the operations of these groups is not intended;173 instead we will consider the benefits available under them and the consequent advantages over the assigned counsel system.

A. The Public Defender System

The public defender is a public official whose duty it is to see that all defendants, regardless of means, obtain due process and equal protection under law in criminal prosecutions.174 The office may be composed of several defenders in the large metropolitan areas, or it may be staffed by one man on a part-time basis in smaller communities.175 In addition to the defenders

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172 Comm. to Consider the Adequacy of Existing Provisions for the Protection of the Rights of Indigent Litigants in the Federal Courts, Report, as quoted in Brownell, op. cit. supra note 165 at 138-139.
173 For a fuller discussion of these organizations see Brownell, Legal Aid in the United States 125-135, 194-207 (1951); Equal Justice, supra note 5, at 50-53, 68-75.
174 Equal Justice, supra note 5, at 51.
175 Id. at 52.
themselves, the larger offices may have full-time, experienced investigators as well as funds for specialized tests and examinations and other expenses incurred in unusual circumstances. Accordingly, a large suite of offices and library may be provided where needed, or the part-time defender may operate from his private law office. The public defender may be appointed by the local courts or local officials, selected by a competitive civil-service process or occasionally elected. An essential characteristic is the financing of the public defender office from public funds.

The scope of the representation by a public defender is practically unlimited provided the statute creating it does not restrict it. Because of this, the office can provide representation to all indigents who need assistance in all courts if it is adequately staffed. Furthermore, the organizational aspects of the office make it feasible for the defenders to interview prisoners on a regular basis soon after arrest and well before arraignment. This early assistance is not available under the assigned counsel system. With no restrictions on the scope of the defenders' power, this organization can continue with a case and prosecute an appeal when the office feels there is any purpose to be served by doing so. The prosecution of these appeals does not impose an additional uncompensated burden on the attorney as is done under the assigned counsel system.

The quality of the defense provided by a public defender office is undoubtedly better than that of an assigned counsel program. The quality is, of course, dependent on the defender himself, but the system assures the benefits of experienced, competent counsel to all indigents. In a multi-defender office, even if a relatively inexperienced attorney is selected, the supervision needed to train him without committing costly errors is available. Again, this is lacking with the assigned counsel system. As a consequence, this system can utilize volunteers, such as law students, much more effectively than the assigned

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177 Equal Justice, supra note 5 at 52.
178 Ibid.
179 Ibid.
180 Ibid. 72-73; Brownell, op. cit. supra note 173, at 130-131.
181 Equal Justice, supra note 5, at 74.
182 An Interview with Herman Pollock, 22 Legal Aid Brief Case 143 (1964).
The quality of the defense is further improved by the opportunity for specialization and its advantage of more deeply developed skill and efficiency. This system can also provide the investigatory facilities needed for a thorough preparation of both the law and the facts.\textsuperscript{184}

Advantages of another nature also accrue under the public defender system. Because of the defender's opportunity to devote full time to the work and the greater efficiency possible in an organized office devoted to this work, there is a definite saving of time for everyone involved. Fewer continuances are necessary since the defense has not been interrupted by other matters preventing timely preparation and the defense may begin early enough to make a continuance at arraignment unnecessary.\textsuperscript{185} In this respect, the opportunity for more complete investigation may enable the defender to secure proper disposition of the case by negotiation and thus avoid unnecessary trials. This saving of time also results in a saving of money. The cost per defense is much less than under an assigned counsel system, if the volume of cases is high enough to merit a defender system,\textsuperscript{186} and the time saved in the judicial proceedings reduce the administrative expense of the courts allocable to these cases.

Although many advantages of the public defender system are readily apparent, the plan has been strenuously opposed by some. The criticism generally revolve about certain possibilities for abuse. Foremost among these objections is the charge that the system is susceptible to political manipulation and domination by the court.\textsuperscript{187} It is conceded that where political considerations prevail or where the defender is subservient to the judge, the representation can be as bad or worse than that of the least able assigned counsel. But these objections are related only to the administration of the system and not to any incurable defect. It is suggested that where such objections are a reality, the defect lies in the organization responsible for administering the program and not in the system itself.

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\textsuperscript{183} Ibid. \\
\textsuperscript{184} Equal Justice, supra note 5, at 52. \\
\textsuperscript{185} Brownell, \textit{op. cit. supra} note 173, at 145. \\
\textsuperscript{186} Id. at 144-145; Equal Justice, \textit{supra} note 5, at 81. \\
\end{flushright}
Judge Dimock has said the public defender system is an undesirable departure from our adversary system in that it forces the accused to accept a lawyer appointed and paid by his opponent.\(^{188}\) Such an argument quickly breaks down. To maintain it, he must equate the prosecution with either the government or the judiciary. If he chooses the latter comparison, he is in effect saying the judiciary is the defendant's opponent, yet it is the judiciary which is considered to have the duty of protecting the defendant's rights if he has no counsel. If he makes the first comparison, he is defeated by the fact that the judges and jury are paid by the alleged opponent, yet they are sworn to impartial performance of their roles and no one contends that this prevents them from achieving substantial justice in criminal trials. A related argument is that establishing public defenders is equivalent to socializing the legal profession.\(^ {189}\) This emotional proposition has little to support it in fact. It implies government control and direction, which is not inherent in a public defender system to any greater extent than in the judiciary; yet the judiciary is by purpose and function free from government control. The argument has no meaning unless socialism encompasses every device through which the community discharges its responsibilities.\(^{190}\)

In considering attacks against the public defender system on the basis of position, source of income or relation to those who select the defender, it must be remembered that the defenders are members of the Bar of the state and have taken the oath of admission to the Bar and probably an oath of office. To condemn the public defender system on these grounds is to say that the oath is taken lightly.\(^ {191}\) These charges against the system are related only to potential abuses, dependent on the character of the defender and those who administer the system, and not to the unalterable nature of the system itself. Where the selection is based on merit, tenure is independent of politics, and the


\(^{189}\) Id. at 37-41.

\(^{190}\) Equal Justice, supra note 5, at 45.

defender maintains the loyalty to his client demanded by the profession, these potential abuses are eliminated.

B. The Voluntary Defender System

The voluntary defender organization is a privately controlled, non-governmental organization dependent for support on charitable donations—either directly to the organization or indirectly through contributions to cooperative charity funds. This system enlists the enthusiasm and efforts of the more idealistic members of the Bar, both those who are selected as the defenders and those who take it upon themselves to administer the program.

The scope and quality of the defense possible under this system are the same as under the public defender system. An added advantage is the opportunity to enlist community participation and responsibilities by including community leaders from outside the legal profession in the administrative group. This opportunity does not exist in the assigned counsel system. While the public defender system is susceptible to political manipulation and domination by the court in some circumstances, the voluntary defender organization is completely independent and not subject to political pressures. Furthermore, there is no need to worry about restrictive statutory provisions which could reduce the effectiveness of the public defender. In other words, the advantages of the public defender system are available through the voluntary defender system, but the potential disadvantages of the public defender office are not applicable to the voluntary organization.

The main drawback to this system is the uncertainty of financial support which could result in a curtailment of services, especially during a depression when the need is greatest.

C. The Public-Private Defender System

This type of organization is essentially a voluntary defender organization, in terms of control, that is supported by public funds. It combines the freedom from political pressures of
the voluntary organization with the security of financial support of the public defender office. Though apparently not as numerous,† it can be utilized just as effectively as either of the other defender systems.

D. Summary

A comparison of Kentucky's assigned counsel system with the defender organizations indicates that the deficiencies of the Kentucky system are not insoluble. The defender organizations are clearly able to provide representation that is broader in scope, is more complete in investigation and preparation, is effective at an earlier state in the proceedings, is uniformly more competent and experienced, and is less of a financial burden on the attorneys than that which is provided by Kentucky's system. Furthermore, these benefits are accompanied by a distinct saving of time and money. The availability of such substantial improvement demands action by Kentucky in improving the administration of justice to the indigent accused. Regardless of the final solution adopted, the need for intelligent action is urgent.

PART IV: RECOMMENDATIONS

It is urged that Kentucky initiate changes that will provide effective representation for indigent accuseds in a much wider variety of criminal cases than is now available. Only those offenses falling within the limits of the petty offense concept should be excluded. The system should provide for representation at the earliest practical point following arrest, certainly at or before the preliminary examination in cases where one is conducted. The method to be adopted will depend on the size and nature of the community, the percentage of defendants who are unable to pay for an adequate defense, the conditions within the local Bar association (e.g., extent of specialization), the prevailing community attitude, the probable cost of the program and the public and private resources available to meet this cost.‡

This proposal raises two main problems—the determination of the relevant conditions and the implementation of the system

† Ibid.
‡ Equal Justice, supra note 5, at 79-82.
selected. It is recommended that an extensive survey of the existing conditions in the various areas and communities in the state be conducted. The survey must go beyond the inquiries of similar studies elsewhere, which make no attempt to investigate the attitude of the community outside of the legal profession, the probable cost of adequate representation or the availability of public or private resources needed to meet the cost.

Either the Kentucky State Bar Association, the Judicial Council or the Committee on the Administration of Justice could conduct the study. Though the Bar traditionally is concerned with problems of the legal profession, the research organization needed to carry out this project is not immediately available.

The Judicial Council has the responsibility to make investigations and recommendations for improvements in the administration of justice. The Director of the Administrative Office of the Courts, with his duty to collect and compile statistical and other data concerning the operation of the court, would be of great assistance if the survey were to be conducted by the judiciary. But the data collected by the Director deals only with the scope of the need for assigned counsel and does not extend to the other relevant conditions of the communities. A disadvantage in choosing either the Bar Association or the Judicial Council is the allocation of this work to a particular segment of the judicial system, which is responsible as a whole for administering justice. A more diversified group, representing all areas of the legal profession, would be preferable.

The ideal organization for this task is Kentucky’s Committee on the Administration of Justice. Formed in 1961 by the Board of Bar Examiners of the Kentucky State Bar Association as an ad hoc committee “for the purpose of establishing a closer

200 Established by KRS 22.050 (1963).
203 KRS 22.110, 22.120 (1963).
204 The Director may require all necessary reports from the courts and clerks regarding rules, dockets and business dispatched or pending before the courts. KRS 22.120.
205 Six months after formation, the committee dropped “ad hoc” from its name, recognizing that it would be a permanent and continuing body. Breckinridge, supra note 310, at 147.
working relationship for the bench, the bar and the office of the
attorney general in the administration of justice, and to recom-
mend the enactment of such legislation as may be appropriate
to facilitate the discharge of the duties of these offices,"205 this
committee provides the coordination between the various branches
of the legal profession needed to make such investigations and
recommendations feasible.207

Regardless of the plan adopted, it is recommended that an
advisory and administrative group be established for each local
representation program.208 Such an organization, if composed of
persons from the general public as well as the Bar, can form a link
between the general public and the system and enlist com-
munity participation. The board offers an ideal way to assure
the independence and freedom from political pressures needed
for the operation of any system. Though this organization seems
most clearly applicable to the voluntary defender system, it is
feasible for the other systems. Such a board could be of special
value when a new system (other than assigned counsel) is being
established, allowing the defenders themselves to concentrate
on the principal activities of the program instead of administrative
details.

It is doubtful that the public defender and voluntary defender
organizations are applicable in Kentucky except for a few cities
and areas such as Louisville, Lexington, Covington (and adjacent
communities in the Cincinnati area), and Owensboro. Even in
some of these areas, the large voluntary financial outlay needed
to support a voluntary defender program may be unavailable,
further restricting the usefulness of this type of program for
Kentucky. On the other hand, the combined population of the
above named cities is one-third of the state's total population.209
If the doubts expressed in the study of the assigned counsel
system in Tompkins County, New York,210 are representative of

205 Ibid.
207 The membership included the chief justice and the administrative director
of the Court of Appeals, the president and secretary of the State Bar Association,
a bar commissioner, the deans of the state's two law schools, the president of the
Commonwealth Attorneys Ass'n, a representative of the Ky. Municipal League,
a representative of the circuit judges, the Governor's administrative assistant and
special assistant in charge of reorganization, and the Attorney General.
208 The content of this paragraph is drawn primarily from Equal Justice,
supra note 5, at 83-85.
210 Wilcox and Bloustein, supra note 168.
the assigned counsel system in general when used in communities of more than 30,000 population, this one-third of Kentucky's population cannot adequately be protected by the assigned counsel system.

Thus it is apparent that whatever overall program is developed, it must be flexible. Many areas which can now be served by the assigned counsel system will become large enough to warrant establishing an organized defender office, and the means of making the change when needed must be readily available. In this respect, it is recommended that Kentucky enact a comprehensive legislative program modeled primarily on the plan set forth in S. 1057, of the Criminal Justice Act of 1963. The main advantage of this plan over its sister plan, S. 63, is the flexibility requisite to a comprehensive program for a jurisdiction containing diverse types of communities.

On August 20, 1964, the Criminal Justice Act of 1964 was passed. The Act is S. 1057 as amended. However, the only significant amendment deleted all authority to establish public defender systems for the Federal courts. In thus amending, Congress deplorably rejected both an opportunity and a responsibility to provide for the true administration of justice in criminal matters before the Federal courts. Although the Act does indeed "promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States" it does not authorize the use of the system proved most effective in providing an "adequate defense." Neither political nor administrative convenience excuses this failure.

Regardless of the Congressional passage of S. 1057 as amended, the original plan embodied by S. 1057 is recommended without reservation for Kentucky. There is no need to go into a detailed discussion of S. 1057 before amendment; it is sufficient to point out its main characteristics. The plan provides for the assignment of private attorneys, establishment of full-time or part-time public defenders and assistants, utilization of existing defender organizations or a combination of these. The decision as to the

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213 Id., Preamble (emphasis added).
plan to be used in a specific area is left to the Federal District Judge, under the jurisdiction of the Judicial Council. The scope of the representation includes all criminal offenses (felonies and misdemeanors) and begins at the preliminary hearing. Furthermore, adequate provision is made for compensation of attorneys as well as for the facilities needed for a full investigation. The quality of the defense provided by public defenders is safeguarded by requiring substantial legal experience as a prerequisite to appointment. Such a plan provides the flexibility needed to provide for future growth and development.

There is no reason why this plan, in essence, cannot be adopted with appropriate modifications in Kentucky. The program could be organized either on a county system or by Judicial Circuits. The former has the advantage of fitting the plan to the specific conditions of a relatively small, homogeneous group in most cases. However, this would probably result in few public defender offices being established. Organization on a Judicial Circuit basis would not change the effect of the plan in those counties that are now large enough to warrant considering an organized defender office as these counties currently comprise one Judicial Circuit each. Since the Circuit Courts, through their jurisdiction over felonies, presently account for a large majority of the appointments, it is essential that whatever local plans are adopted be designed to cope with the needs of these courts.

It is possible that placing the responsibility on the circuit courts to devise the appropriate plan will result in full-time or part-time public defender offices being established to serve a three- or four-county circuit, while the counties individually would not recognize the need for such services or the possibility of providing these on a joint basis. Such a plan would be feasible even if occasional conflicts in trial dates develop since the court could assign a private attorney in such cases.

A minor problem involved in implementing a plan similar to that of S. 1057 is the need to make the services available in both county and circuit courts, rather than in just one trial court as in the federal plan. However, there is no need for conflict here,

214 Petty offenses are not considered crimes. Schick v. United States, 195 U.S. 65 (1904).
215 The Ky. Judicial Council, Biennial Report, Table 1, B-1 (1962).
and an adequately staffed defender office can handle the case load of several courts.\textsuperscript{216}

Though there are currently no voluntary defender organizations in Kentucky, the provision allowing utilization of such in the plan adopted should not be eliminated. It is possible that the most practical way to solve the problem in Louisville, for example, is by a criminal division of the existing legal aid society.\textsuperscript{217} Moreover, the law schools of the University of Kentucky and University of Louisville may establish student voluntary defender organizations that can be of invaluable assistance in such a program.\textsuperscript{*}

In addition, the investigating facilities provided by a full defender office should be made available for the benefit of defendants who can afford to retain a lawyer but who can't afford to bear the cost of an adequate investigation. The cost of such supplementary service should be borne by the state and is feasible under this flexible plan.

Whatever program is selected for a given area would be subject to the approval and supervision of the state Judicial Council. This group, because of its duty to investigate and recommend changes for the administration of justice and because of its state-wide jurisdiction, should be able to make appropriate recommendations to various areas based on observation of other areas in the state.

The quality of representation provided is, in the long run, the key to the success of any system. This depends primarily on the character and ability of the attorney and the degree of independence from political pressure and obligations he is able to maintain. This latter point is one of the chief advantages of establishing an advisory group. Where an advisory group exists, composed of leaders of the Bar, judges, and members from the general public, it should be vested with the responsibility of selecting the defender and his assistants. Where such a group is not established, it is recommended that the defender be selected

\textsuperscript{216} See Brownell, Legal Aid in the United States 130-131 (1951).

\textsuperscript{217} This is probably the only significant opportunity for a voluntary defender office in Kentucky. It is supported entirely by charitable funds and private sources. \textit{Id.} at 232; Brownell, Supplement to Legal Aid in the United States (1961).

\textsuperscript{*} Ed. note: Such a program was implemented at the University of Kentucky in 1963.
by county and city officials and judges on the basis of a competitive exam. The term of the appointment should be indefinite, providing a reasonable amount of security to the defender contingent upon fulfilling his responsibilities. A prerequisite for appointment as a defender should be a minimum of five years legal practice with at least a moderate amount of criminal work included.

Assuming the assigned counsel system will be retained in large areas of the state, even if the suggested comprehensive system is initiated, certain changes in the existing system are essential. Of primary importance here is the need to provide reasonable compensation for time necessarily spent by appointed attorneys. A study of local fees and practices will indicate the requisite amount. The importance of this provision in improving the quality of the representation cannot be overemphasized. It would tend to decrease the judges' reluctance to appoint experienced lawyers in any but unusual cases, and it would decrease the tendency to enter a plea of guilty in doubtful cases.

In order to avoid possible accusations of favoritism, the attorneys should be appointed on a straight rotation basis from a list of qualified attorneys, preferably by a centralized administrative unit.

The provision of compensation makes it possible to limit the appointments to qualified attorneys, thus elevating the representation of indigents to a truly professional responsibility and preventing it from being an educational experience and chore for the least experienced men. Under this system, it is possible to train the younger men by appointing them under the supervision of experienced counsel. The training provided would be superior to that gained from the current assigned counsel system.

An additional element necessary for an adequate assigned counsel system is making the investigative facilities of the state available to the indigent defendant. If necessary expenses are allowed, there is less need for this than otherwise, but it is still essential in regard to crime laboratories and similar facilities.

A requirement of an adequate system is that it provide the necessary representation for all those who need it. The indigent accused of a serious misdemeanor needs legal assistance but is generally denied it in Kentucky today. Therefore, where the
assigned counsel system is retained, it should be expanded to provide representation in all but petty offenses. Furthermore, this representation should be extended in time, becoming effective where the accused is first brought before the magistrate.

Our judicial system can do no more than provide a fair administration of justice and provide equal protection under the law. The former cannot be done without the latter. It is clear that in many respects indigents in Kentucky are denied that equal protection. The problem has no easy solution and the proposed program is not perfect. Until major changes are made and the state fulfills its purpose of serving the individual, equal justice for all will not be realized.

APPENDIX A

QUESTIONNAIRE

Conditions Under Which Counsel Is Assigned
1. What standard is used to determine indigency?
2. What investigation beyond questioning by the court is involved in this determination?
3. Must the accused request assigned counsel?
4. Is counsel assigned to indigents in all criminal cases?
5. Is any distinction made between felony and misdemeanor cases?
   a. Is the standard of indigency different? If so, how?
   b. Must the accused request counsel in one but not both? If so, which?
   c. Is an attempt made to assign more experienced counsel in felony cases?
   d. Is there any other distinction? (Please specify)
6. Are any of the above distinctions made between capital and non-capital cases? If so, which ones?
7. If counsel is assigned in some but not all misdemeanor cases, where is the line drawn?

Time at Which Counsel Is Assigned
1. At what stage in the proceedings is counsel normally assigned?
2. If time of assignment varies, what factors account for the difference?

Percentage of Cases with Assigned Counsel
1. In what percentage of all criminal cases is the accused indigent?
2. In what percentage of cases with an indigent accused is there an intelligent waiver of the right to have counsel assigned?
3. In what percentage of all criminal cases is counsel assigned?

**Selection of Counsel**

1. To what segment, if any, of the Bar are the assignments limited?
2. What method is used to select counsel? (E.g., rotation on list, random selection from list, counsel known to judge, etc.)
3. Does each judge make his own assignments, or is there an administrative unit for this purpose?
4. How often does each lawyer receive an assignment?
5. If an appeal is taken, does the same lawyer represent the accused on appeal? If not, how is the new counsel selected?

**Comments on Effectiveness of System**

1. Does the system provide adequate counsel for every indigent person faced with possible deprivation of liberty or other serious criminal sanction?
2. Does the system provide representation which is experienced, competent and zealous?
3. Does the system provide investigatory and other facilities necessary for a complete defense?
4. Does the system come into operation sufficiently early so the accused can be fully advised and his rights protected?
5. Does the system assure undivided loyalty by defense counsel to the accused?

**Any Further Comments or Explanations**

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**APPENDIX B**


<table>
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<tr>
<th>Year</th>
<th>Region</th>
<th>Population</th>
<th>Total Offenses</th>
<th>Crime Indexa</th>
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*a Crime Index—Number of offenses per 100,000 population
*b S.M.S.A.—Standard Metropolitan Statistical Areas

Explanatory Note: The Crime Index is a computation used to indicate the probable extent, fluctuation and distribution of crime for the U.S. as a whole, various geographical and population areas and states. The Crime Index consists of seven important offenses counted as they become known to law enforcement officers. Crime classifications used are: murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary (breaking and entering), larceny of $50 and over, and auto theft. The Index is expressed as the number of crimes occurring per 100,000 population. The total number of crimes occurring is unknown. Not all crimes become known to the police, not all are of sufficient importance to be significant in an index and not all important crimes occur with enough regularity to be meaningful in an index. With these considerations in mind, the above crimes are selected as a group to furnish an abbreviated and convenient measure of the crime problem. Uniform Crime Reports for the United States, Dept. of Justice, F.B.I., p. 34 (1962).

Source of Data: Uniform Crime Reports, supra., Table 3 (1958), Table 1 (1959-1962); also p. 36 (1958-1961) and p. 38 (1962).