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Gideon and Beyond: Achieving an Adequate Defense for the Indigent

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tantly accepted by the motorist as a socially beneficial device.

The great number of speed violation cases proceed in the manner just described. However, the fact that some state statutes[172] make the results of a radar apprehension only *prima facie* evidence of speeding, shows that theoretically the evidence is not conclusive. Moreover, there is a "presumption of innocence" in speeding violation cases, which requires "direct evidence proving beyond reasonable doubt all the essential elements of the crime charged" [173] to overcome it. One case which considered the evidentiary weight to be accorded speed devices involved the use of the photo-traffic camera. The results of the speed test were admitted, but found inconclusive on the issue of guilt.[174] The relevance of this case to the weight to be accorded radar evidence however, is minimal. The case did not involve apprehension of the speeding vehicle, since the device took pictures of the car and its license plates, thus leaving in doubt the identity of the driver. This problem is not encountered in radar cases which include positive evidence of the driver's identity through immediate apprehension of the speeding vehicle.[175]

The weight accorded the radar speedmeter is less when proper testing is not required for admissibility.[176] In such situations, the defendant can rebut the prosecution's presumption of speeding by attacking the accuracy and reliability of the radar device used in his case. However, with proper testing and judicial notice of radar principles, the radar speedmeter proves to be a powerful weapon which "standing alone, furnishes sufficient evidence for the conviction of the defendant." [177] Nevertheless, the prosecution should be prepared to present corroborative evidence, such as records of the event and the experience of the operator in spotting speeders, to support its case.

[172] Maryland and Virginia have statutes which provide that the results of such tests shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceeding where the speed is at issue. *See also* discussion at n.75–78, *supra*, and specifically n.76, *supra*.

[173] *See* Gillies, *supra* n.167 at 65.

[174] People v. Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377 (1955).

[175] The reader must note that the comment assumes that traffic cases are criminal proceedings when discussing constitutional prohibitions.

[176] *See* discussion in text at n.78–80, *supra*.

CONCLUSION

The monotonous regularity with which highway deaths occur seldom arouses the average citizen to care for his own safety. The maintenance of safe streets has therefore become the special concern of law enforcement agencies. Scientific evidence in traffic cases is necessary to facilitate the apprehension and ultimate conviction of those who have refused to consider the safety of others.

The increasing slaughter on the streets has now reached figures only previously heard of on the battlefield. The interests of society in scientific methods for crime detection must ordinarily, therefore, be raised above the inviolability of the person of the individual. "A proper balance between freedom and order must always be at least slightly colored by the exigencies of the moment which may make the peril of the one seem greater and the security of the other therefore preferable." [178] Scientific evidence in traffic cases helps to establish some semblance of order in an area requiring tighter controls with each passing day.

[177] State v. Moffitt, 48 Del. 211, 214, 100 A.2d 778, 780 (1953).

[178] NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS 78 (1944).

GIDEON AND BEYOND: ACHIEVING AN ADEQUATE DEFENSE FOR THE INDIGENT

BARRY SIEGAL

OBLIGATION OF EQUAL JUSTICE FOR ALL

Throughout our country's history one of the primary goals of our government, much sought after but sometimes not achieved, has been the equal administration of criminal justice. The reasons for this policy are two-fold. On the one hand there is a desire to protect the interests of those persons confronted with the judicial process. Our sense of decency and fair-play, in this respect, dictate that rich and poor alike should receive, so

far as possible, equal treatment for like violations of the criminal law. As announced by the Supreme Court, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1]

More broadly speaking, however, equal treatment of all defendants, both the wealthy and the indigent, can be thought of as accomplishing numerous societal interests. First, the vitality of the adversary system itself requires it.[2] This objective can be achieved only by the proper performance of the defense function. Any artificial distinctions, therefore, which impede the workings of this function should be avoided. From a more practical viewpoint it might be noted that equal administration of the criminal laws will inevitably result in an image of fair treatment from which our society can clearly profit.

Recognizing the goals to be reached in this area how have the courts and the legislatures gone about achieving them? Where have they gone wrong and what remains to be done?

Present Constitutional Requirements

The right to counsel in criminal proceedings in federal courts is compelled by the Sixth Amendment.[3] The Supreme Court, however, did not turn to this provision for guidance until recently. It was not relied upon until 1938, in *Johnson v. Zerbst*,[4] where it was declared that the federal courts have no jurisdiction to try a defendant who is unable to employ an attorney unless one is appointed or the right to counsel is waived. The extension of this right to state proceedings was a slow evolutionary process, culminating in the landmark case of *Gideon v. Wainwright.*[5] There the right of the accused to counsel in the state courts in all felony cases was expressly held to be a part of the due process. Other cases have indicated that counsel must be provided at the arraignment, since it is usually such a critical stage of the proceedings that a defendant without funds would stand unequal before the bar of justice as compared to the defendant with means;[6] at the preliminary hearing where the defendant entered a plea of guilty which was later introduced at trial;[7] and at the time of arrest when the accused is subjected to interrogation.[8]

[1] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[2] Attorney General's Committee, Poverty and the Administration of Federal Criminal Justice 10 (1963). One author expressed the belief that "the survival of our system of criminal justice and the values which it advances depends upon a constant searching and creative questioning of official decisions and assertions of authority at all stages of the process." Moore, *The Right to Counsel for Indigents in Oregon*, 44 Ore. L. Rev. 255 (1965).

[3] U.S. Const. amend. VI. Prior to this the right to counsel was not fully recognized. At common law defense counsels were denied full participation in the criminal trial. *See*, Attorney General's Committee, *op. cit. supra* note 2, at 49–50.

[4] 304 U.S. 458 (1938).

[5] 372 U.S. 335 (1963). This case involved an indigent defendant convicted of breaking and entering with intent to commit a misdemeanor, which was a felony. He was denied appointment of counsel when he asked the court for one. Defendant filed a writ of habeas corpus which was dismissed in the state courts. The Supreme Court reversed holding first, that the provisions of the Bill of Rights which are fundamental and essential to a fair trial are made obligatory on the states by the Fourteenth Amendment. The right to counsel is one of these rights. Further, the court felt that ordinary notions of justice and decency required the result here. Lawyers are deemed an essential part of the judicial machinery. They are supplied both for the prosecution and those defendants who can afford them. This seems to indicate that counsel is a necessity rather than a luxury and should be supplied to all regardless of means.

Prior to *Gideon* the prevailing test was laid down in Hamilton v. Alabama, 368 U.S. 52 (1961), where the court found that whether lack of counsel resulted in a denial of due process depended upon the facts in each case. Where, after investigating the mental capacity of the defendant and judging the complexity of the legal problems involved, it was found to be beyond the ability of the defendant to defend himself, then counsel must be supplied. This test was found to be unworkable since practically every criminal case involves some issues beyond the "ken of the layman," and this was recognized in *Gideon*.

[6] Hamilton v. Alabama, 368 U.S. 52 (1961).

[7] White v. Maryland, 373 U.S. 59 (1963). Under the facts of this case the preliminary hearing appears to be equivalent in purpose to the arraignment and, therefore, the holding may not go far beyond *Hamilton*. One author finds to the contrary, that as a result of the holding in *White*, it becomes difficult to justify withholding an attorney at any preliminary hearing since it may be a critical stage in the proceedings in that it is the last opportunity for the accused to obtain discovery of the prosecution's case. Segal, *Some Procedural and Strategic Inequities in Defending the Indigent*, 51 A.B.A.J. 1165, 1166 (1965). See also, Harris v. Wilson, 239 F. Supp. 204 (N.D. Calif., 1965). There the court held that due process required that counsel be appointed for all preliminary hearings. The bases for its decision were: 1) that counsel must be assigned when he can be helpful to the defendant's case and it "could hardly be denied that it is vital to any defendant's interest to have some information about the strength of his case before he makes up his mind how to plead;" 2) that the preliminary hearing, being the initial judicial confrontation, if defendant wins here, the rest of the proceedings can be avoided; and 3) that the preliminary hearing constitutes a stage "where counsel is most helpful since . . . 'incompetent evidence received without objection may be given its full probative effect . . .' [and] prosecution witnesses may be cross-examined and the defense may proffer its own witnesses."

[8] Escobedo v. Illinois, 378 U.S. 478 (1964). On its facts this case merely held that under some circum-

Another significant phase of criminal proceedings are the post-conviction remedies. The leading cases in this area are *Griffin v. Illinois*[9] and *Douglas v. California*.[10] In Illinois, prior to *Griffin*, every criminal defendant could appeal a conviction once as a matter of right, but *full* appellate review could not be obtained unless the defendant supplied the appellate court with a record of the trial proceedings which had to be paid for. In *Griffin*, however, the Supreme Court reversed a conviction where the defendant could not appeal because of his inability to pay for the transcript. It held that the Fourteenth Amendent prohibits inequality of treatment which results from the inability of an indigent to purchase adequate trial records. Subsequent cases have held that it is unconstitutional to make indigents pay docketing fees in order to have his appeal heard,[11] and, in *Smith v. Bennet*,[12] that a free transcript must be provided for other post-conviction remedies.

Undoubtedly, the most significant decision applying the right to counsel to appeals is *Douglas v. California*.[13] There the Supreme Court ruled that counsel must be provided for the first appeal that is allowed as a matter of right. As a result of *Griffin* and *Douglas*, the question has been raised as to what qualifications may constitutionally limit the indigent's right to appeal. The answer is by no means clear. In *Eskridge v. Washington*,[14] the Court held that it was unconstitutional to give the trial judge authority to decide whether an appeal should be prosecuted. In a subsequent case a procedure which intrusted to Defense Counsel discretion to request a transcript and then bring the appeal was struck down.[15]

The recent case of *Anders v. California*[16] seems to clarify the area considerably and lay down the minimum requirements of due process with regard to the prosecution of indigent appeals. The defendant there was convicted of possession of marijuana. After the trial he asked the court to appoint a lawyer to bring an appeal. The appointed attorney, after studying the record and consulting with his client, concluded there would be no merit in an appeal and so notified the court in the form of a "no-merit" letter. The defendant filed a brief *pro se* and lost. On review of a petition for a writ of *habeas corpus*, however, the conviction was invalidated by the Supreme Court. The majority held that the procedure followed in this case did not comport with the minimum requirements of due process; that the Constitution demands that appointed counsel make a conscientious examination of the record, and if he then wishes to withdraw, accompany his request with a *brief* referring to any arguments which might support an appeal. The court of appeals can then make an educated decision as to whether the appeal is frivolous. In *Anders* all the appellate court had was the bare record to consider in a non-adversial context.

The underlying rationale for the *Anders* decision was that the Constitution requires that an indigent be put in as nearly the same position as the defendant with means with regard to an appeal. As the *Douglas* court stated, the Supreme Court

stances a person placed under arrest has a constitutional right to consult retained counsel before police can interrogate him as a suspect. A recent Supreme Court case has applied this decision to an indigent person in a similar position. Miranda v. United States, 384 U.S. 436 (1966).

[9] 351 U.S. 12 (1956).

[10] 372 U.S. 353 (1963).

[11] Burns v. Ohio, 360 U.S. 252 (1959). The Court concluded that such fee requirements were based on the irrational assumption that the motion of an indigent is less meritorious than that of any other defendant. See also, Hardy v. United States, 375 U.S. 277 (1964) which held that, although prior cases indicate that the furnishing of a transcript relevant to the points of error assigned is a minimum requirement, where the defendant is represented by a different counsel on appeal, no less than the full record suffices.

[12] 365 U.S. 708 (1961).

[13] 372 U.S. 353 (1963).

[14] 357 U.S. 214 (1958). The statute involved in that case authorized the trial judge to have the transcript of the trial furnished to an indigent if in his opinion "justice would be promoted." But *cf.* Draper v. Washington, 372 U.S. 487 (1963), where a similar procedure was upheld where the trial judge's determination of frivolity was reviewable by the state supreme court after reviewing the hearing at which the transcript was requested. Compare *Draper* with Coppedge v. United States, 369 U.S. 438 (1962). That case involved a federal statute which disallowed in forma pauperis appeals when the trial court certifies that they aren't taken in good faith, which the Court here interpreted to mean not clearly frivolous. The saving feature of this provision was the alternative right of the defendant to seek in forma pauperis relief directly from the court of appeals.

[15] Lane v. Brown, 372 U.S. 477 (1963); *cf.* Johnson v. United States, 360 F.2d 844 (D.C. Cir. 1966). There the court determined that the right of appointed counsel to withdraw from the case was dependent upon whether he had filed a fully documented memorandum supporting his contention that the appeal was frivolous. The concurrence felt that even though the normal practice in cases where the appointed attorney feels the cause is not meritorious is to allow the defendant to proceed *pro se*, this is unrealistic since no one can completely act as his own advocate. *Contra*, Speers v. Gladden, 237 Ore. 100, 390 P.2d 635 (1964), where appointed counsel was allowed to withdraw from the case upon an independent decision that the appeal was frivolous if the defendant has a right to appeal *pro se*.

[16] 386 U.S. 738 (1967).

has consistently held invalid those procedures "where the rich man who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit is forced to shift for himself." [17] It appears, therefore, that unless there is a process of review whereby the defendant's right to appeal is adequately protected or unless that decision is left to the defendant, there is an infringement of his Fourteenth Amendment rights.

After viewing the constitutional requirements with regard to defense of the indigent, it will be profitable to reflect on those areas where legislation seems desirable. First, although *Gideon* held that counsel must be provided for the indigent, it did not say whether he must be assigned private counsel or a defender. Also, the question of whether an attorney should be provided at the preliminary hearing or even sooner remains unanswered. Standards of eligibility must be set up by statute, as well as some indication of how defendants of *moderate* means should be handled. Provisions for appointment of counsel at appeals and collateral proceedings have to be considered. Finally, there is a problem of compensating the court-appointed attorney and reimbursing him for out-of-pocket expenses. In this Comment an attempt is made to deal with these questions, especially in light of the Criminal Justice Act of 1964.

Types of Systems for Providing Counsel

There are essentially two methods by which counsel can be supplied to the indigent: the defender system, which may be either publicly or privately operated; or the various systems of appointing private counsel in individual cases.

Under the appointed counsel systems, when the defendant appears in court without a lawyer and without funds to retain one, the court will appoint a practicing lawyer to defend his case for him. In effect the system differs, depending on the jurisdiction, as to the time of appointment, method of offering counsel to the accused, amount of compensation, if any, and financial criteria for eligibility.

Normally the appointed counsel is chosen from a list of attorneys maintained by the court with names supplied by the local bar association, although at other times a lawyer is picked from among those present in court.[18] The quality of the lawyer appointed in this manner varies, but in about twenty five percent of the jurisdictions, there is a conscious preference for young, inexperienced lawyers. The reasons for this are, first, that courts feel that these cases offer valuable experience for younger members of the bar and, second, those lawyers "that know their way around" have an easier time being excused from such assignments.[19] With regard to compensation, a majority of the states pay the appointed counsel a modest fee, whereas others compensate him only in capital cases. Furthermore, there is a great divergence among the states regarding reimbursement for expenses.[20]

The primary advantage which the assigned counsel system is said to afford is the wide participation of the bar in the administration of criminal justice.[21] The difficulty with the system is that in order to achieve a greater amount of criminal law experience for more members of the bar we may be jeopardizing an adequate defense for the accused. Even if a true cross-section of the profession can be utilized, there will still be a certain number which will not have the competency in the criminal law area that a specialist, such as a public defender, has. It is true that there are inexperienced public defenders, but in most cases they are under the supervision of a more qualified attorney. In any case, in most large counties it is questionable whether there is, in fact, a wide participation of lawyers in an assigned counsel program.[22]

The assigned counsel system has been criticized by attorneys who feel that it is unfair to them. It has been alleged that some lawyers have been called on to participate too frequently, and that older, more experienced lawyers have been excused on request, thus putting the burden on the younger lawyers.[23] Arguments have been advanced that under the assigned counsel system the attorney is

[17] 372 U.S. 353, 358 (1963).

[18] *See* L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 16 (1965).

[19] *Id.* at 32.

[20] *Id.* p. 32–33.

[21] Attorney General's Committee, *op. cit. supra* note 2, at 34, where the authors assert: "An almost indispensible condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the bar as a whole. There is no better way to develop such interest and awareness than to provide wider opportunities for lawyers to participate in criminal litigation at reasonable rates of compensation.

[22] Silverstein, *op. cit. supra* note 16, at 19.

[23] *Id.* at 32.

frequently not compensated, or, if he is, at an insufficient rate. Also, appointment may be made too late in the proceedings, thus infringing the rights of the accused. These arguments, however, are directed not so much at the system but at the peculiarities of various jurisdictions. It seems, on the whole, that the assigned counsel method can indeed be a valuable alternative when properly administered, especially in smaller communities where a greater percentage of the lawyers can take part in the program.

A defender system is one where salaried lawyers devote all or a substantial part of their time to the defense of indigents within the jurisdiction. There are three types of defender systems: the public defender office, supported by public funds; the private defender system, supported by private gifts; and the private-public defender office, which is a private organization dependent on both public and private funds. The public defender may be selected by judicial appointment, popular election or appointment by the county board.

The defender system, as opposed to appointed counsel, seems to offer the distinct advantage of allowing the imprisoned indigent to be represented from the earliest possible moment after arrest through trial and appeal without any break in the proceedings for the purpose of bringing in another counsel.[24] Since the defender usually has a complete office staff at his disposal, including investigators, and a file of prior cases, there is a possibility of a more complete defense under the circumstances. In addition, a recent survey has concluded that the defender may provide for more experienced, competent counsel, especially in larger cities.[25]

The public defender office has been subject to attack primarily on the theory that the defense attorney cannot be completely independent and free from political influence when he is part of the same machinery, and responsible to the same appointing or electing agency, as the prosecutor.[26] It seems, however, that there is nothing inherent in the public defender system which should limit the independence or zeal of the defender, even conceding that the way it is administered could result in such abuses. If the defender is given a long term, if his appointment is controlled by the judiciary rather than the politically-oriented bodies of the county, then it is hard to see where the defendant's rights would in any way be infringed, especially in view of the fact that the defender is a member of a highly respected profession where vigorous defense of one's clients is a requirement under its code of ethics. Furthermore, it has rarely been advanced that popular election of judges has affected their independence; similarly, these arguments appear frivolous with regard to the defender.

One author feels that even assuming the actual independence of the defender, there is still a problem of convincing the public of it since the public defender is "an institutional and ideological break from the traditional notion of the private lawyer serving his individual client."[27] This problem is particularly acute if it affects the defendant when he makes his decision whether to accept counsel or not. Furthermore, if the indigent feels that it is useless to contest his guilt he may waive counsel even though counsel could be useful in affecting the length or type of sentence imposed.

The solution is two-pronged. First, the public must be informed of the importance of the defender in our system of jurisprudence and his freedom from outside pressures; and, second, the significance of a proper defense must be brought to bear on the indigent before he is allowed to waive counsel.

The appointment of counsel in the federal courts is now governed by the Criminal Justice Act of 1964.[28] This Act has been called "the most far-reaching present day statute, state or federal, dealing with the resourceless criminal defendant."[29] In response to it, many states have recently proposed extensive defense-of-the-indigent legislation.

Section (a) of the Criminal Justice Act allows

[24] *See* Bird, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 Ky. L.J. 478, 517 (1965). It is alleged that the organization of the defender system allows for full representation to all defendants in all courts. The defender is, also, not limited on appeal by lack of funds. Whereas, an appointed counsel is usually not assigned to a particular case until the defendant's first appearance in court, it is more feasible in the case of a defendant to have representation immediately upon imprisonment.

[25] Silverstein, *op. cit. supra* note 18, at 45. Other arguments advanced favoring the defender system are: that it allows for greater continuity and consistency in the defense of the poor, which seems to be true only where an appointed counsel is not available for preliminary matters, in addition to the trial and appeal, and other post-conviction remedies; that the defender system is more economical especially in more populous communities; and that in many places the defender enjoys a more advantageous position because of his close relationship with the prosecutor.

[26] Bird, *op. cit. supra* note 24, at 518.

[27] Silverstein, *op. cit. supra* note 16, at 52.

[28] 18 U.S.C.A. §3006A (1964) (hereafter referred to as *Criminal Justice Act*).

[29] *Symposium: Justice and the Poor*, 41 Notre Dame Lawyer 843, 996 (1966).

each district court to provide counsel either by appointment of an individual attorney or of attorneys furnished by a bar association or legal aid society. In either case the lawyer chosen is picked by the judge from a panel of attorneys designated or approved by him. Since the time of the Act's taking effect, the courts have initiated detailed screening processes for supplying these panels with lawyers.[30] One of the main deficiencies which is immediately noted, however, is that there is no option for the courts to utilize the services of a defender. Considering the other provisions of the Act allowing for reimbursement of expenses, continuous representation through appeal, and the fact that the panels of lawyers have consisted of a true cross-section of the bar which have shown great enthusiasm toward the plan,[31] the lack of defender option should not prove detrimental. It is evident, though, that if a defender program were among the options offered the district courts, greater flexibility would thereby be achieved. Those districts with larger populations would have substantial cost savings as well as more adequate representation of the defendant.

At present, defense of the indigent in criminal cases in Illinois is governed by the Code of Criminal Procedure.[32] Under section 113-3, if the defendant is determined to be an indigent and he desires counsel, the public defender is to be appointed to his case, or if there is no defender in the county or the defendant requests another attorney then the court may appoint one. In view of deficiencies in the present legislation, and with the Criminal Justice Act before them, a joint committee of the Chicago and Illinois Bar Associations has recently drafted a comprehensive report on the subject.[33] Under this proposed legislation a public defender would be appointed in every county with more than a million inhabitants, while other contiguous counties could combine and share a joint defender.[34] When a defendant appears in court, financially unable to obtain counsel, a public defender would be appointed to represent him. The proposed statute further provides: "In its discretion the court may, or at the request of the defendant for good cause shall, appoint counsel other than the Public Defender."[35] This report, it appears, recognizes the value of a public defender, especially in larger communities. It, therefore, places a burden on the defendant who desires a court-appointed counsel other than the defender to demonstrate the validity of his request.

Illinois, then, would rely to a large extent on a public defender, whereas under the Criminal Justice Act this option is completely discarded. Why the disparity? The answer is essentially because of the different conditions existing in each jurisdiction. It seems that in larger jurisdictions, where it can be guaranteed that a public defender would be free from political influence; where there are adequate funds to give any indigent proper representation, the public defender system may more adequately protect the rights of the accused. If these are, in fact, the circumstances, it is probably better to place a heavy burden on any defendant who seeks appointed counsel to give sound reasons, since most will not fully appreciate the value of the defender. On the other hand, in smaller communities, where a substantial proportion of the bar can participate in an appointed counsel program; where the defendants right not to have an incompetent, inexperienced counsel can be protected; and where the lawyers themselves can realize the importance of protecting the rights of the indigent to the same extent as in the case of the defendant with means, then assigned counsel may be the proper solution.

When is Counsel First Provided?

As previously pointed out, counsel must be provided for the indigent defendant at the arraignment, and at the preliminary hearing when it may constitute a critical stage in the proceedings.[36] How far the Supreme Court will carry the "critical stage" test is difficult to foresee, but one authority holds that it is possible that the test may allow the court to extend the due process requirement to the earliest possible stage after arrest.[37]

Apart from constitutional requirements, it is evident that fairness in the judicial process de-

[30] *Id.* at 1000.

[31] Timbers, *The Criminal Justice Act: A Lawyers Call to Duty*, 39 Conn. B.J. 427, 431 (1965).

[32] Ill. Rev. Stat. ch. 38 (1965).

[33] *Final Report of the Joint Committee of the Chicago and Illinois Bar Associations to Draft Indigent Defense Legislation* (hereafter referred to as *Report*).

[34] *Report*, §5601.

[35] *Report*, §5604.

[36] See notes 9 and 10 and accompanying text.

[37] Silverstein, *op. cit. supra* note 18, at 76. A court of appeals case held that there was no right to counsel at a preliminary hearing in a state court in a capital case, Latham v. Crouse, 320 F.2d 120 (10th Cir. 1963). The court went on to say that refusal to appoint counsel did not prejudice the defendant, implying that lack of assigned counsel at the hearing would be a violation of due process if prejudice occurred.

mands that counsel be appointed no later than the defendant's first appearance in court. A lawyer is essential at the preliminary hearing stage in order to give the indigent defendant the same opportunities as the non-indigent. It is here that probable cause is to be established and cross-examination of witnesses may be deemed necessary by competent counsel. Furthermore, where there is a question of the legality of a search, it is imperative to obtain, at the earliest possible time, testimony showing the reasons for the search. The indigent is also at a distinct disadvantage if his attorney has to prepare his defense from the time of arraignment rather than earlier. The court, it is true, can grant a continuance but, unless prejudice is fairly obvious, it may be reluctant to do so.

In order to truly afford equal opportunity to the indigent it may be thought necessary to appoint counsel immediately upon arrest.[33] This position appears untenable, however, since, in most cases, the police could not have a lawyer riding in the car with them. It is probably even impractical to have an attorney appointed as soon as the accused is brought to jail since the cost may be prohibitive. Also, since not every person brought in is eventually charged, arraigned or brought to trial, there would be a tremendous waste of resources if an attorney was assigned to every person arrested. Finally, since the time between arrest and arraignment is usually minimal, no attorney need be appointed until defendant's initial court appearance except where he is interrogated.

The Criminal Justice Act can again be cited as presenting the modern point of view on the subject. Section (c) requires that the defendant be represented from his initial court appearance. From a cursory reading of the Connecticut Plan for implementing the Criminal Justice Act in the Connecticut District Court, it seems that the defendant's rights are extended considerably. It states that if it is determined that the defendant is unable to obtain counsel, this information must be promptly brought to the attention of a magistrate who will appoint an attorney.[39] Considering the difficulties inherent in the appointment of counsel to everyone arrested, a logical interpretation of the Plan would be that the accused should be arraigned as soon as possible after arrest and an attorney would then be appointed if the defendant was unable to retain one.

By way of comparison, the Illinois Criminal Code provides for appointment of a defender or other counsel before pleading to the charge. If the defendant has not been able to obtain counsel before pleading, then, after one is appointed a continuance is to be allowed to enable the defendant to consult with him.[40] This provision should put the indigent on as equal footing with the defendant with means as is practicable.

A third approach to the problem, and the most liberal of all, was adopted by the drafters of the proposed legislation in South Carolina. This legislation requires that any defendant charged with a crime must be told of his right to counsel. Under South Carolina law the defendant is charged with a crime at the time of arrest. One authority, therefore, assumes that the new legislation means that the accused must be supplied with counsel within a reasonable time after arrest.[41] Here, again, the provision may be read to allow for counsel at the arraignment if this stage comes within a reasonable time after arrest.

Methods of Determining Eligibility

At present eligibility of the defendant for appointed counsel is determined either by his response to the simple question of a court whether he can "afford counsel", or by the answers to various forms concerning employment, ownership of an automobile or other property.[42] Courts have also regarded the ability to secure release on bail as some indication that the defendant can afford his

[33] *See* Bird, *supra* note 24, at 493–94. "A need for assistance of counsel is by no means limited to the confines of the courtroom or the time actually spent in the courtroom proceedings. Rather, the need exists whenever '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." Bird, *supra* at 491.

[39] Timbers, *supra* note 31, 430.

[40] Ill. Rev. Stat. ch. 38, §113-3(a) (1965).

[41] *Proposed Defense of the Indigent Legislation in South Carolina*, 18 S. Car. L. Rev. 380 (1966).

[42] Silverstein, *op. cit. supra* note 16, at 106. The author raises the interesting question of whether the requirement that the defendant must file a sworn statement regarding his assets may be a violation of his privilege against self incrimination since the statement might subsequently be used against him. If the statements were taken by the defender then the answer is that they are protected by the attorney-client privilege. Furthermore, even if this statement were submitted to the court, the defendant could always be granted immunity. Finally, if failure to have defendant submit such a statement would effectively deprive him of the right to counsel, then it may be that such statements could not be constitutionally used against him.

own attorney. Gross inequities will appear if this is accepted as a test by itself, however. What if the defendant receives the money for bail from a relative? What if he has spent the last of his money for release so that he could retain employment? Unless the circumstances surrounding release or bail are examined the defendant may be greatly prejudiced. As to other criteria for elibigility there will be different results in different cases. Where the community is small and the judge knows the defendant, then no detailed forms are required. However, in larger cities, where the defendant is not known, a written questionnaire should be filled out, unless there is a defender who has investigators on his staff with the ability to make at least a preliminary determination of eligibility. The final conclusion seems to be that the less investigation necessary the better off we are from a point of view of expense and time allotment, which could be used by the defense attorney in preparing his case. But, on the other hand, before assignment is made the court should be satisfied that the defendant cannot afford his own attorney.

What about the defendant with some available funds but not enough to pay for a lawyer? What if the defendant can afford a lawyer but not investigative services or expert witnesses? According to the Attorney General's Committee report, total lack of funds should not be the criterion for eligibility.[43] Furthermore, if, during the trial, the defendant becomes financially incapable of paying for his lawyer because of the length of the proceedings or other reasons, the government should step in to see that he gets adequate representation. This conclusion rests on the theory that "whenever financial incapacity prevents the defense from providing active and creative challenges to assertions of governmental power in the criminal area, the adversary system, and the public interest dependent upon it, are placed in jeopardy." [44]

The Criminal Justice Act provides for substantial flexibility in this situation. It states merely that unless the defendant waives counsel one shall be appointed for him, if after "appropriate inquiry" the defendant is found financially unable to obtain counsel.[45] The establishment of standards for determining the extent of inquiry is left to the districts, although forms have been issued by the government to be completed by the defendant showing assets, employment, compensation, and dependents. This flexibility seems to be a recognition of the fact that the complexity and number of questions to be asked is dependent on such factors as size of the district, severity of the crime, and whether bail has been provided.

To encompass defendants with some means, the Act purposely avoids use to the term indigent. Rather, it uses the standard "financially unable to obtain counsel," [46] since the constitutional right to an attorney is not based on destitution but on lack of sufficient resources to retain counsel. Section (c) further allows for termination of appointed counsel if it is later found defendant has sufficient means to retain one, or authorizes contribution by the defendant.[47] The Act is noticeably silent with regard to the defendant who can afford counsel but not other necessary services, with the exception of expert witnesses.

The present Illinois Criminal Code also fails to provide standards for the determination of indigency. It states that if the Court determines that the defendant is in need of a lawyer and is indigent a defender is to be appointed.[48] What "indigent" means under particular facts is apparently left to the courts. The proposed legislation in Illinois recognizes this deficiency in the Code and provides for a hearing to determine whether the defendant is "financially unable to obtain competent counsel." [49] Assuming that the criteria of "financially unable to obtain competent counsel" will receive the same interpretation as under the Criminal Justice Act, the problems under both will be identical. There still remains the questions of what happens to the defendant who can not afford a complete defense or who becomes indigent at some point in the proceedings against him.

[43] ATTORNEY GENERAL'S COMMITTEE, *op. cit. supra* note 2, at 7. The Committee concluded that poverty does not mean total lack of resources, but rather a lack of sufficient means to permit the accused to hire competent counsel or to obtain necessary services. "Poverty must be viewed as a relative to the particular need or service under consideration."

[44] *Id.* at 40.

[45] *Criminal Justice Act*, §(b).

[46] *Id.*

[47] Section (c) also provides that if a defendant who has retained counsel later becomes unable to pay him, the court may appoint counsel for him.

[48] ILL. REV. STAT. ch. 38, §113-3(b) (1965). Among the individual counties, the standard in Cook County generally is if the defendant can't post bail then he is asked whether he has a lawyer; if not, whether he has funds to hire one. Some judges consider other factors such as employment and ownership of assets. See Dowling & Yantis, *Defense of the Poor in Criminal Cases in Illinois*, 47 CHICAGO BAR RECORD 216, 219 (1966).

[49] *Report*, §5604.

The proposed South Carolina legislation is again more precise in this area than any of the other statutes heretofore encountered. This act applies to any defendant who is "financially unable to obtain an adequate defense." [50] Furthermore, four other standards are set up to determine whether the defendant is eligible under the act to have a counsel appointed for his case. He must be financially unable to (1) obtain representation; (2) obtain counsel; (3) pay counsel whom he has retained; or (4) obtain investigative, expert or other services necessary for an adequate defense. Even though the Act has been criticized as being too inflexible and not giving enough discretion to the administrator,[51] clearly, without some guidance there might be arbitrary results.

COUNSEL FOR MISDEMEANORS

The decision in *Gideon* was limited on its facts to felony cases, but the Supreme Court could easily use the same reasoning in extending the Sixth Amendment protection to defendant accused of misdemeanors. Such a result has been accomplished in a number of court of Appeals decisions[52] and in New York both by judicial decision and by statute.[53] At present only about 25% of the counties in the country provide counsel for misdemeanors,[54] a situation praised by many prominent jurists.[55] It can not be denied that an indigent who must face the trial of a misdemeanor charge may—depending upon the complexity of the case—be as handicapped as the felony defendant who was not provided counsel before *Gideon.* Misdemeanor cases, for example, may involve motions to suppress confessions or physical evidence, or may call into play technical rules of evidence.[56]

Under the Criminal Justice Act a lawyer is to be appointed to the indigent in cases where he is charged with a felony or misdemeanor, other than a "petty offense." [57] Flexibility is maintained in the proposed South Carolina statute which requires the appointment of counsel in cases where the crime charged carries a penalty of six months or more and in other cases if warranted.[58] The proposed Illinois legislation merely authorizes appointment in every case where a person is charged with any criminal offense.[59] This goes too far. It forces the state to supply counsel to the

[50] See *Proposed Defense of the Indigent Act in South Carolina, supra* note 41, at 397. The wording here is a vast improvement over other legislation since "adequate defense" clearly implies that if the defendant doesn't have the means for a complete defense including investigative devices, expert witnesses, as well as an attorney, they will be provided.

[51] *Id.* at 406.

[52] In Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965), the Fifth Circuit applied the *Gideon* decision to a case of unlawful possession of whiskey where the defendant was sentenced to 90 days in jail and fined $500. In McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965), the court held it unconstitutional not to supply an indigent with counsel where he was arrested for unlawful possession and sale of whiskey with a penalty of six months in jail and a $250 fine. The court also pointed out that the *Gideon* rule should not be extended to "a person in a municipal court charged with being drunk and disorderly" or a person given a traffic ticket. *See also* Winters v. Beck, 385 U.S. 907 (1966) (dissenting memorandum to denial of certiorari), where Justice Stewart pointed out that the court in *Gideon* made no distinction between felonies and misdemeanors. "Any person," the Court had said in *Gideon*, "hauled into court who is too poor to hire a lawyer can not be assured a fair trial unless counsel is provided for him."

[53] People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358 (1965). N.Y. COUNTY LAW, §722e (1965), where sentence is more than six months or fine is more than $500.

[54] SILVERSTEIN, *op. cit. supra*, at 125. The author notes that counsel is usually not provided for indigents in misdemeanors except 1) in cases of high misdemeanors, 2) where tried by a court of general jurisdiction, 3) where counsel is provided for trial only, or 4) where specifically requested.

[55] *See, e.g.*, Traynor's concurring opinion in People v. Brown, 55 Cal. 2d 64, 70, 357 P.2d 1072, 1076 (1960), where he digresses from the point of the case to indicate that appointment of counsel should be limited to felonies and not misdemeanors. He feels that misdemeanors are circumstantially less serious than felonies; that the defendant has an absolute right to bail; his incarceration will be brief; and the judge may allow him to serve his time outside working hours, so that he can retain counsel.

[56] *cf.* Justice Clark's concurring opinion in *Gideon v. Wainwright* where it was stated that since prior decisions had found it unconstitutional not to provide counsel in capital cases, it was said to be equally unconstitutional not to supply an attorney in a noncapital case. The Fourteenth Amendment makes no distinction between being deprived of "life or liberty without due process of law." Similarly, there is no logical distinction between one year's liberty and nine months. *See also* Bird, *supra* note 24 at 488-90, here the author reasons that the 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. He concedes, however, that it is impractical to extend *Gideon* to such minor offenses as traffic violations, vagrancy, drunkenness, etc. One attorney, interviewed in a recent survey, answered that, "Experience has shown that there is greater possibility of miscarriage of justice at the misdemeanor level" than in situations involving the commission of a felony. This is due, in part, to the fact that before a trial and conviction or acquittal in a felony case there must have been a preliminary screening of evidence before a grand jury or committing magistrate. SILVERSTEIN, *op. cit. supra* note 16, at 132.

[57] *Criminal Justice Act*, §(b).

[58] *Proposed Defense of the Indigent Legislation in South Carolina, supra* note 41, at 407.

[59] *Report*, §5604.

indigent at substantial expense where even the defendant with means might not, as a practical matter, be represented.

COUNSEL FOR POST-TRIAL PROCEEDINGS

The law is settled that counsel must be provided the indigent at the first appeal which he is afforded as of right, and, further, a transcript of the trial record must also be supplied.[60] Questions persist as to the requirement of counsel at other post-trial proceedings. What about subsequent appeals, habeas corpus proceedings, and probation or parole revocation hearings?

As to subsequent appeals, no distinction is made between the first and second appeals in any of the legislation heretofore considered. The Criminal Justice Act, for example, authorizes the appointment of counsel to continue through appeal. Considering the liberality of the act and its broad concern with the rights of criminal defendants, it should be interpreted to require the appointed attorney to prosecute any claims the defendant might have beyond the appeal which he has as a matter of right, unless clearly frivolous.

As to subsequent collateral proceedings, the Supreme Court appears reluctant to require counsel for all such matters, but it has laid down the rule that where a substantial claim is presented requiring a full evidentiary hearing "the sentencing court might find it useful to appoint counsel." [61] Even absent a judicial mandate, however, this does not seem to be a problem area, since about 76% of the states provide counsel for post-conviction remedies to some extent.[62]

There have been two lines of argument with regard to the desirability of providing counsel at habeas corpus proceedings. One view holds that these are merely civil proceedings and counsel is therefore not required under the Sixth Amendment.[63] With equal force it can be pointed out that regardless of history, habeas corpus proceedings are now considered as extended appeals and, since the defendant could not be expected to handle the complex issues involved in an appeal, he should not be forced to make a choice whether to argue his own case for habeas corpus or avoid it altogether. As the proponents of extending *Gideon* to these cases argue, in habeas corpus proceedings federal courts are under an obligation to provide a fair hearing. When this requires representation of a petitioner by counsel, and the petitioner lacks adequate means to hire one, then counsel should be appointed.[64] It may be a more stable foundation to rest the government's obligation on the equal protection clause since, unless counsel is provided, the indigent will surely be in a less advantageous position than other defendants. In any case, in order to be consistent with our modern concepts of fairness, the defendant who cannot afford one should have a lawyer appointed for habeas corpus proceedings, at least absent a showing of frivolity. It is difficult to justify the absence of a provision for counsel at these hearings under the Criminal Justice Act. Recognizing this deficiency both the proposed South Carolina and Illinois statutes provide for counsel at habeas corpus proceedings.[65]

Provision for appointed counsel at parole revocation hearings has been required in at least one state by judicial decision.[66] This has not been generally accepted and at present there is no similar provision in the federal courts.[67] Here, again, the argument persists that parole revocation hearings are merely administrative proceedings. Furthermore, since parole and conditional release are matters of grace they can be terminated at will without following procedural requirements. It should be recognized, however, that the defendant has been released, even though conditionally and not as a matter of right. Still, fairness in our criminal system demands that the decision of parole revocation should be made with a knowledge of all the facts, which necessitates cross examination of witnesses, presentation of opposing viewpoints, and a general knowledge of the law. Absence of counsel, therefore, under these circumstances can not be justified, and, as previously mentioned, an

[60] *See* text accompanying footnotes 11–15.
[61] Sanders v. United States, 373 U.S. 1, 21 (1963).
[62] SILVERSTEIN, *op. cit. supra* note 25, at 141. *But see* Whitney v. Florida, 389 U. S. 138 (1967) (dissenting opinion).
[63] *Id.* at 142.

[64] ATTORNEY GENERAL'S COMMITTEE, *op. cit. supra* note 2, at 45.
[65] *Report*, §5614, and *Proposed Defense of the Indigent Legislation in South Carolina*, *supra* note 41, at 400.
[66] Commonwealth *ex. rel.* Remeriez v. Maroney, 415 Pa. 534, 204 A.2d 451 (1964).
[67] The regulations of the Federal Board of Parole require that every alleged parole violator be informed that he may be represented by counsel and voluntary witnesses will be allowed to testify on his behalf, but counsel is only authorized where it can be arranged by the prisoner. There is no provision for appointment of counsel for an indigent prisoner. *See* F.R. (August 24, 1962) 8487–8491, §§2.40 and 2.41, cited in ATTORNEY GENERAL'S COMMITTEE, *op. cit. supra* note 2, at 46–7. The Supreme Court has recently held that due process requires the appointment of counsel at probation revocation hearings. Mempa V. Rhay, 389 U.S. 128 (1967).

attorney must be appointed in Illinois and South Carolina under the proposed statutes.

Compensation, Reimbursement for Investigative Expenses and Expert Witnesses

Prior to the Criminal Justice Act the Federal courts and a substantial minority of the state courts did not authorize compensation of appointed counsel in criminal cases. This practice was strongly criticized as being prejudicial to both the defendant and the legal profession.[68] Since providing equal justice to all by supplying competent counsel to the indigent is a function of the society as a whole, the burden of paying for defending the indigent should be on it rather than the legal profession.[69]

From the defendant's viewpoint it is obvious that he will not be getting the protection that the Fourteenth Amendment requires unless the attorney appointed to defend him is able to advance his cause with as much determination and zeal as a retained counsel in a similar case. But if the appointed counsel is forced to make a choice whether to devote certain time to a fee-paying client or to an indigent, it is inevitable that the indigent's defense will suffer. It has been pointed out, too, that an appointed counsel may unconsciously weigh the vigor which he pursues the defendant's cause against his concern that he may incur the enmity of the court and the prosecution on behalf of a client who can not even pay for his services.[70] Finally, appointed counsel will rarely be able to afford investigative and other essential services unless he is reimbursed for them.

The Criminal Justice Act, in recognition of the plight of the uncompensated attorney, allows for payment at $15 an hour for in-court time and $10 per hour outside of court, with a maximum of $500 for felonies and $300 for a misdemeanor.[71] It authorizes reimbursement of out-of-pocket expenses to assigned counsel and to those who render investigative, expert or other services with a limit of $300 for each person. The ceilings placed on the hourly compensation of appointed counsel are extremely low when compared to the rates of retained lawyers. They may be justified, however, on the theory that the Act balances the need for compensating the attorney with his duty as an officer of the court. In any case, the absolute maximum on compensation and expenses is grossly unfair since the trial court should be able to determine whether a requested amount is reasonable or not. Under the South Carolina statute no limit is placed on the expenses incurred except that they must be reasonable.

Conclusions

Equal protection of the laws guarantees that there be no arbitrary classification of persons in the administration of the criminal laws. Since the normal defendant cannot be expected to understand the technicalities of the judicial proceedings and therefore present his own defense, can it honestly be stated that if an indigent is not supplied with counsel to represent him, he is being treated the same as the defendant with counsel? Should he be penalized because of his inability to point to the law clearly in his favor which would allow him to earn his freedom? Obviously not. Where, then, do we draw the line? The Supreme Court has, first of all, interpreted the Constitution to require counsel for the indigent at a felony trial, at the first appeal which the defendant has as a matter of right, at the arraignment, and at all other critical stages in the proceedings. Whether the "critical stage" test will be extended to the preliminary hearing or before, to the second appeal, and to all collateral proceedings is in doubt but from the point of view of equal treatment counsel should be provided at all of these.

As to the type of system which should be used there is a substantial divergence of opinion but the answer must depend on the circumstances. The defender system seems best adapted to larger jurisdictions where economies can be attained; where a competent, more experienced attorney can aid the defendant in getting treatment equal to that of other defendants; and where extensive files, investigative, clerical, and other services can

[68] There is also a question of whether forcing a lawyer to serve without compensation is taking his property; i.e., services, without due process of law. One court of appeals case was decided against the lawyer on this point. United States v. Dillon, 346 F.2d 633 (9th Cir. 1965). A Kentucky court reaching the same result said that the traditional concept of the lawyer as an officer of the court still has some validity. Warner v. Commonwealth, 400 S.W.2d 209 (Ky. 1966). A New Jersey court finding for the attorney concluded, "The crucial question is whether this court should continue to require the members of the bar to absorb the full cost of the defense of the indigent.... This court is satisfied that the present day burden is more than the profession alone should shoulder and hence is compelled to relieve the profession of it." State v. Rush, 46 N.J. 399, 217 A.2d 441, 448-49 (1966).

[69] *See, e.g.*, Silverstein, *Defense of the Poor—A National Dilemma*, 14 La. B.J. 103 (1966).

[70] Segal, *The Indigent Defendant and the Defense Counsel*, 45 Prison Journal 16 (1965).

[71] *Criminal Justice Act*, §§(d) and (e).