Kentucky Law Journal

Volume 54 | Issue 3 Article 7

1966

Gideon's Trumpet: Taps for an Antiquated System? A Proposal for Kentucky

Daniel G. Grove

GIDEON'S TRUMPET: TAPS FOR AN ANTIQUATED SYSTEM? A PROPOSAL FOR KENTUCKY

By DANIEL G. GROVE*

I. INTRODUCTION

The plight of the indigent criminal defendant was dramatically thrust into public view by the United States Supreme Court's decision in *Gideon v. Wainwright.*[1] Since that opinion was handed down legal scholars, judges and legislators have seized upon the increased interest of the layman in the problem to constructively evaluate and criticize the existing systems and lack thereof for providing legal representation to indigents. This article is designed to survey and analyze the indigent's right to counsel in Kentucky and to propose legislation intended to remedy the deficiencies presently existing in that system.[2]

The survey of the actual practice in Kentucky is based upon the results of a questionnaire submitted to the circuit judges of the Commonwealth. The analysis stems from the comments of the answering judges, the theories of commentators and the constitutional guarantees propounded by several courts. Finally the legislative proposal was drafted after consideration of the practical difficulties existing in installing a workable system in a large, predominantly rural state such as Kentucky. It is by no means the only answer to the present problems, indeed, other acceptable solutions are also suggested and discussed. However, in view of

---

* LL.B., University of Virginia; member, Virginia Bar.

1 372 U.S. 335 (1963). The Court held for the first time that indigent criminal defendants were entitled to have counsel represent them in any criminal proceeding involving the charge of a serious crime in a state court. Many articles have been written concerning the meaning and application of this case, some of which are relied upon here. For an interesting and entertaining explanation of the entire case, see Lewis, Gideon's Trumpet (1964).

2 This article and the proposed statute are the product of a project carried out by the author under the auspices of the Attorney General's office during the summer of 1964 as a legal aide. Though it is highly probable that some type of legislation concerning counsel for the indigent will be offered to the next session of the General Assembly, the exact form and content of such legislation is unknown to the author. This article is then, merely a suggestion without the official endorsement of the Attorney General's office or any other state agency.

recent Court opinions redefining the "right to counsel" and "equal protection of the laws" in state court proceedings, it is quite possible that the present standards will be broadened in subsequent opinions, and so any system adopted should be capable of meeting the challenge of the future. Even if the prediction concerning the broadening of constitutional guarantees is not realized, Kentucky should attempt to enact a system that will afford a maximum of represenation, not limited to minimal constitutional rights, in a manner best designed to facilitate a fair and efficient administration of criminal justice for the accused as well as the Commonwealth.

II. THE PRESENT SYSTEM

A. *Legislation*

Kentucky Constitution section 11 provides, *inter alia,* "in all criminal prosecutions the accused has the right to be heard by himself and counsel. . . ." This provision has long been interpreted to afford an indigent accused of a felony the right to have effective counsel appointed to represent him.[3] This right is more broadly granted by a statute[4] which has been interpreted as giving the court discretion to appoint counsel in civil as well as criminal cases.[5] The right to counsel in criminal cases is more specifically granted by rules 2.14 and 8.04 of the recently revised Kentucky Rules of Criminal Procedure, Rule 2.14 provides:

> (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.

Although this particular rule has never been tested in court, the annotator suggests that its purpose is to reverse the results of

---

[3] See McDaniel v. Commonwealth, 181 Ky. 766, 205 S.W. 915 (1918). Because Kentucky has long recognized this right, Gideon v. Wainwright, 372 U.S. 335 (1963) did not force any change in order to meet constitutional guarantees.

[4] Ky. Rev. Stat. 453.190 (1963) [heeinafter cited as KRS] which states "[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 and shall have from all officers all needful services without any fees. . . ."

[5] Wilson v. Melcroft Coal Co., 226 Ky. 744, 11 S.W.2d 932 (1928).

Crooker v. California,[6] which upheld the admissibility of admissions made by the defendant after arrest and subsequent to the denial of his request for counsel. Rule 8.04 provides:

> If on arraignment or thereafter, in felony cases, the defendant appears in court without counsel, the court shall assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel.

Although the rule makes no mention of indigency that is the criteria for appointment of counsel under it.[7] Rule 2.14 was obviously intended to permit representation by *retained* counsel after arrest, while rule 8.04 was designed to appoint counsel for *indigents* at arraignment.[8] If the rules are so interpreted and put into practice on this basis it is likely that constitutional objections will arise.[9]

Assuming that these rules are to be interpreted in order to withstand attack on constitutional grounds, there are other features of the Kentucky system that should be analyzed. The present system makes no provision for compensating the appointed counsel for his services or for the expenses of an independent investigation.[10] Most states do have some provision for compensating assigned counsel.[11]

The statutory scheme in Kentucky, regarding assigned counsel, presents somewhat of an anomaly when one considers another statute[12] which provides for court appointed counsel to represent persons at mental restoration proceedings. That statute[13] provides for a ten dollar fee to be paid by the county to appointed counsel. Thus the defense attorney appointed on behalf of an indigent accused of rape or murder receives nothing but the thanks of the court for five days in court and hours of outside preparation while this same lawyer receives a fee, though nominal, for his appointment in a relatively simple restoration hearing.

---

[6] 357 U.S. 433 (1958). See Cicenia v. Legay, 357 U.S. 504 (1958).

[7] Except possibly in cases in which the defendant can afford counsel but for some reason has been unable to obtain one.

[8] See Carson v. Commonwealth, 382 S.W.2d 85, 94 (Ky. 1964), *cert. denied*, 280 U.S. 938 (1965).

[9] See discussion pp. 533-39, *infra*.

[10] See Calhoun v. Commonwealth, 301 Ky. 789, 193 S.W.2d 420, 421 (1946).

[11] See note 59 *infra* and accompanying text.

[12] KRS 202.295 (1963).

[13] *Ibid.*

The rest of the appointed counsel system is not specifically governed by legislation, but is set forth below under the general heading of "Practice."

B. *Practice*

The results of the survey[14] reveal that the judges answering make the most of the present system, but are in agreement that *some* change is necessary.

Over half of the judges reporting estimate that between forty and eighty per cent of the criminal defendants in their circuit claim indigency and request the court to appoint counsel. More than one-third of these judges will not permit an accused felon to waive counsel. Those judges that permit waiver report that between zero and twenty per cent of the criminal defendants who come before them waive counsel. Almost all of those permitting waiver admit that it later seemed that some (between one and five per cent) of these unrepresented defendants could have presented a worthy defense with the help of counsel. One judge placed the figure at ten per cent.

Counsel is appointed for all accused felons and a majority of the judges also honor requests for those accused of more serious misdemeanors. Appointment is generally made at arraignment or after indictment, although several judges indicated that a request would be complied with at any time after arrest. These judges added that such early appointment is generally impossible due to the fact that the judge is usually not apprised of the situation until arraignment. One judge answered that he provides counsel before the examining trial although he did not elaborate upon the mechanics of this early appointment.

When assignment is made at arraignment most courts are liberal in granting the lawyer and defendant time to talk over the case before a plea is entered. Sixty-five cent of the judges grant whatever time is necessary before asking for a plea, although one answered that generally ten minutes is sufficient. One judge grants twenty-four hours on request while two others permit a week's

[14] Most of the information in this section was gathered from a compilation of the answers of circuit judges to a questionnaire prepared and distributed by the Attorney General's office during June of 1964. For the complete tabulation of the results of the questionnaire see the appendix following this article.

continuance. The two courts that grant no time for consultation make it a practice to enter a not guilty plea or permit a later change of plea.

The methods of selecting counsel are diverse. About one-quarter appoint any available attorney while approximately the same number choose in order from a list of the entire bar. About twenty per cent pick either at random or in order from a list of criminal lawyers. Ten per cent choose mainly from the younger members of the bar and a like amount claim to have no system.

Another part of the questionnaire reveals that sixty per cent of the judges choose only lawyers with prior criminal trial experience while eighty per cent limit their selection to those with trial experience. This sixty per cent also replied that their appointments are not limited to any segment of the bar. Therefore, it seems likely that many appointed lawyers are general practitioners who probably do little criminal work aside from defending indigents. Although only a small percentage answered that selection was generally from the younger members of the bar, sixty per cent admitted that lawyers assigned are *often* younger and less experienced than the prosecutor. Nevertheless, ninety per cent felt that in general the experience of assigned counsel is adequate.

Capital cases are the occasion for appointing either more experienced counsel or two attorneys, according to thirty per cent of the answers. Another fifty per cent replied that this is the practice in all serious felony cases.

Most judges reported little or no difficulty in obtaining counsel for all indigent defendants. Only about ten per cent claimed it to be a substantial difficulty. Likewise approximately eighty per cent claimed that the lawyers appointed exhibited no displeasure as a result of the assignment. However, almost one-quarter regarded the segment of the bar from which they appoint so small as to place a serious burden on those appointed. The number of times a man is appointed yearly is relative to the size of the bar and the amount of criminal work in the county. One county has only one man who is appointed to every case. Other estimates range from "once a term for trial" to "four times yearly." Half of the judges feel the out of pocket expenses borne by assigned counsel to be burdensome while the rest said it is a trivial burden.

While only ten per cent feel that assigned counsel's preparation

is inadequate, those judges answering another question estimate that almost ninety per cent of indigency cases they hear are disposed of with twelve hours or less outside preparation by appointed counsel. It is also estimated that over fifty per cent spend between zero and three hours in out of court preparation.

The general quality of assigned counsel was described as everything from "excellent" to "the poorest. . . ." About half of those replying thought that assigned counsel is on par with retained counsel, although some of the replies were prefaced by the comment that since assignment is by rotation and the entire bar is engaged in general practice it could not vary much. About fifty per cent registered some criticism of counsel; this criticism ranged from inconsistent quality to inexperience and lack of funds to investigate.

A more specific question comparing the performance of assigned counsel to that of retained counsel revealed a more critical attitude. Sixty-five per cent of the replies stated that assigned counsel enter more guilty pleas. Eighty per cent felt that assigned counsel is equal to retained counsel in challenging the admissibility of objectionable evidence. Thirty-five per cent replied that assigned counsel is less proficient in protecting the record for appeal. And fifty per cent are of the opinion that the assistance of assigned counsel is achieving the proper disposition of the case after conviction (motion for new trial, appeal and collateral attack) is inferior to that of retained counsel.

One of the major objections to the present system is the defense's lack of funds for independent investigation. Although almost all answered that the prosecutor made records available to the appointed attorney, forty per cent replied that the lack of funds *substantially hampers the defense.*[15]

Methods employed in determining the truth of an indigency claim vary from acceptance of the claim in open court to a hearing and even limited extra-judicial investigation. About ninety per cent thought that the system is being abused by persons who could afford counsel. Even so only a few thought it is a common practice or a serious problem.

---

[15] See the appendix for a tabulation of the questions and answers.

III. OBJECTIONS TO THE SYSTEM[16]

Evaluation of the current system of representation for indigents reveals an urgent need for substantial change. This conclusion is based on a comparison of the Kentucky system with the present standards of "due process" and fundamental fairness as well as the practices in other jurisdictions. Comparing the Kentucky system, even in its best light, to these standards leads one to the inescapable conclusion that reform is necessary. The result is even clearer after a review of the unanimous criticism of the bench and bar of the state.

A. *Stage of Proceedings at Which Counsel is Provided*

Though some judges are willing to appoint counsel at anytime subsequent to arrest this is not the practice: primarily because state law does not require it;[17] secondarily because the judge is not usually cognizant of the request for appointment until arraignment. It is submitted that this practice is unsatisfactory. This is especially true in light of several recent Supreme Court holdings concerning the right to counsel and equal protection of the law. The present practice in Kentucky is constitutionally suspect in both respects.

(1) Right to Counsel.

As thus far interpreted, rule 8.04[18] grants an indigent the right to representation upon arraignment.[19] Such a rule becomes constitutionally questionable upon consideration of several cases. These cases, beginning with *Lisenba v. California*,[20] and ending with *Escobedo v. Illinois*,[21] stand for the broad proposition that the denial of counsel before trial is often the ground for reversing a conviction on constitutional grounds. Two of these cases, *Hamil-*

---

[16] This part will analyze some of the salient weaknesses and strengths of the present system with reference to the information supplied by the circuit judges, as well as studies in jurisdictions with comparable problems. See appendix for the complete tabulation of answers to the questionnaire.

[17] Ky. Rules Crim. Proc. 2.14, 8.03 [hereinafter cited as RCr]. See notes 7-9 *supra* and accompanying text for their meaning.

[18] RCr 8.04.

[19] See note 9 *supra* and accompanying text.

[20] 314 U.S. 219 (1941) where denial of counsel at a pre-trial stage so "prejudiced" the defendant that his subsequent trial was held to be fundamentally unfair.

[21] 378 U.S. 478 (1964).

ton v. Alabama[22] and *White v. Maryland*,[23] unequivocally state that the denial of counsel during a "critical stage" of the criminal proceedings regardless of whether prejudice results from this denial is unconstitutional and the basis for reversal.[24] It should be pointed out that in each of these cases the Court did find some prejudice resulting from the denial. In *Hamilton* arraignment was held to be a "critical stage" because it was the only time certain defenses could be raised.[25] In *White* the preliminary hearing on probable cause was held to be a "critical stage" since in that particular case, evidence was offered and a plea was entered at the proceeding.[26] The Court did not use "critical stage" language in *Escobedo*, but still reversed the murder conviction because of the admission into evidence of damaging admissions made by the defendant immediately after arrest and subsequent to the time defendant asked to see his lawyer and was refused. The majority

---

[22] 368 U.S. 52 (1961).

[23] 373 U.S. 59 (1963) (*per curiam*).

[24] When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. In this case . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently. Hamilton v. Alabama, 368 U.S. 52, 55 (1961). See also, White v. Maryland, 373 U.S. 59, 60 (1963).

[25] 368 U.S. at 53-54. However, it is never claimed that the petitioner, Hamilton, desired to avail himself of these defenses either before or after counsel was appointed. Taking this omission from the opinion as controlling could lead to the conclusion that in fact no prejudice existed in the denial.

[26] One way to distinguish between the *White* and *Hamilton* cases which lends credence to the pronouncement that no prejudice is necessary if counsel is denied at a "critical stage" is given in Enker & Elsen, *Counsel for the Suspect*, 49 Minn. L. Rev. 47, at 50-51 (1964) where it is pointed out that in *Hamilton* counsel was necesary at arraignment to perform duties traditionally within his purview, *e.g.*, making motions and preserving defenses. It is suggested that in *White*, "the question concerned the evidentiary use at trial of White's uncounseled plea of guilty entered at that arraignment, a problem not greatly different from the use at trial of an uncounseled confession given to police rather than a judge. The use of this plea did not create a possibility that White might be wrongly or illegally convicted. The absence of counsel created, rather, a situation where a defendant was convicted who might otherwise have been acquitted for lack of sufficient evidence. Still the Court reversed the conviction on the ground that White was denied his sixth amendment right to counsel." *Id.* at 51. This suggests the problem that confronts many in such cases. That is whether the *Escobedo* type situation is really a problem of coerced confession and the holding there of a lefthanded attempt by the Court to extend the *McNabb-Mallory* doctrine of the federal courts to the states. *Cf.*, Spano v. New York, 360 U.S. 315 (1959) where the majority reversed on the basis of coerced confession and the four concurrers held the case was actually a right to counsel problem. Perhaps the problem is merely one of which type of prophylactic rule is best suited to the states. See, Enker & Elsen, *supra* at 53. This same problem has been presented in federal cases. See, Massiah v. United States, 377 U.S. 201 (1964), although Gideon v. Wainwright, 372 U.S. 335 (1963), has destroyed any distinction between the two as far as sixth amendment rights are concerned.

held that the right to counsel attached as soon as the proceedings switched from inquisitorial to accusatorial in nature.[27] The majority, in peculiar limiting language at the end of the opinion,[28] refused to reverse the prior decisions in *Crooker v. California*[29] and *Cicenia v. Legay*,[30] both of which contained strikingly similar fact situations and both of which resulted in refusals to reverse the state conviction. In all three cases the defendant asked for a lawyer, was refused and later made prejudicial statements which were subsequently used as evidence against him at trial. In light of the similarity, the majority's refusal to categorize the right to counsel at arrest as an absolute rule, or put another way its refusal to promote the period immediately following arrest to the status of a "critical stage" leads to diverse opinion as to what the present rule is.[31] Justice White, dissenting in *Escobedo* was of the opinion that the majority opinion would have to be applied to indigents without retained counsel regardless of whether they made a request that counsel be appointed.[32] The Kentucky Court of Appeals has not ruled upon the application of *Escobedo* to indigents, but seems to have assumed sub silentio that it did so apply in one case holding that a request of counsel is necessary before denial is found at the post arrest stage.[33]

---

[27] "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 485.

[28] *Id.* at 491-92. See Lockhart, Kamisar & Choper, Constitutional Law 39-40 (Supp. 1964).

[29] 357 U.S. 433 (1958).

[30] 357 U.S. 504 (1958).

[31] The potential extensions of the decision are discussed in Enker & Elsen, *supra* note 26, at 70-84.

[32] 378 U.S. 478, at 495.

[33] Carson v. Commonwealth, 382 S.W.2d 85 (Ky. 1964), *cert. denied*, 380 U.S. 938 (1965). In *Carson*, the court ruled on a wide variety of issues concerning appointed counsel. Carson was an indigent arrested for murder. About an hour after he was arrested he signed a statement without counsel, admitting being present at the scene of the crime, but claiming that his cohort, Boyd, did the fatal shooting. Carson later waived examining trial, still without counsel, and was indicted in less than a week. While in jail awaiting indictment Carson made another damaging admission to the murder victim's father who was visiting him in jail. Counsel had not been appointed to represent Carson at this time. Both statements were admitted against Carson at trial. The facts are clear that both statements were freely made after Carson had been advised of his right to remain silent. On direct appeal the court held that no error was committed in admitting these statements. In its opinion the court distinguished the *Massiah* case because there the statement came after indictment. *White* and *Hamilton* were dismissed as not in point because no "critical stage" had been reached at the time of the statements. *Id.* at 92-94. *Escobedo* was found inapplicable because:

(Continued on next page)

A more recent case, not involving indigents, seems to qualify the court's holding in *Carson* regarding the necessity that counsel be requested.[34] Though the foregoing survey of the Kentucky cases interpreting *Escobedo* leaves something to be desired as far as setting down a concrete rule, it should be noted that other courts are not unanimous in their application of that case especially in deciding whether or not counsel must be requested in order to invoke the rule.[34a] It would be mere speculation to predict the

---

(Footnotes continued from preceding page)
Here it is to be recalled that appellant was affirmatively advised of his right to remain silent; he was cautioned that any given statement could be used against him in subsequent prosecution. We have no evidence of appellant's request for counsel; neither is there evidence that counsel was refused. On the other hand there is affirmative undisputed evidence that appellant did not request counsel. We consider these basic factual differences as clearly distinguishing the present case from *Escobedo*. *Id.* at 96.

[34] See Scamahorne v. Commonwealth, 394 S.W.2d 113, 33 U.S.L.W. 2632 (Ky. May 28, 1965). Here two men suspected of breaking into an office building were arrested at 1:30 a.m. They were held in jail cells until 7:30 a.m. at which time they were brought out for questioning by two policeman. Apparently they were not informed of their right to counsel or their right to remain silent. Brief for Appellant, p. 3. Neither man had counsel at this time yet they admitted the attempted break-in and the possession of burglary tools to the police; however, they refused to reduce the statements to writing when requested and *then* asked to see a lawyer and apparently were refused. They made no further statements but the voluntary admissions made prior to the request for counsel were entered into evidence against them. On appeal the court affirmed, after a finding that the statement was made before the request and that any right to counsel was waived because anyone intelligent enough to plot a crime in the manner they did was aware of his right to counsel. Any denial occurring after the statement was of no moment because nothing prejudicial occurred subsequent to the request for counsel. It would seem the court should have relied on the fact that appellants did request counsel without being informed of their rights to find that counsel was waived during the making of the pre-request statement. Looking at *Carson* and *Scamahorne* together we find the rule to be that if the right to remain silent is made known to the defendant he is held accountable for all damaging statements he may thereafter make without the benefit of counsel. Moreover, if the court, by some miraculous process known only to itself, determines that the accused is of a cerain intelligence he will be held to know of his right to counsel and to remain mute and that any statements made by the accused will be admissible. Judging from the language in *Scamahorne* the Commonwealth will not have too much of a burden in showing sufficient intelligence on the part of the accused. Still unanswered of course, is the problem presented in *Escobedo, i.e.* when one of sufficient intelligence is denied counsel and thereafter confesses.

[34(a)] Although there is probably not much doubt that the principle applies to indigents as well as those who have retained counsel, controversy rages over the ingredients necessary to rule out a confession made without the benefit of counsel. Some courts seem inclined to limit the holding in *Escobedo* strictly to the facts of the case. This would require the following in order to strike a confession: (1) the investigation must have become accusatory; (2) the suspect must be in police custody; (3) the police continue interrogation that lends itself to eliciting incriminating statements; (4) the suspect requests and is denied his opportunity to consult with counsel; (5) the police have not effectively warned him of his absolute right to remain silent; (6) the suspect makes an incriminating statement to the police that is subsequently admitted into evidence against him.
(Continued on next page)

answer to the two questions left unanswered by a solid holding in these cases. Only time will reveal whether denial of counsel without resulting prejudice at a "critical stage" of the proceedings is the basis for reversal, and whether the right to counsel attaches upon arrest in every case making this a "critical stage" in which denial of counsel would be grounds for exclusion of statements made by the defendant during the limbo period before counsel is appointed.

(2) Equal Protection.

The principles announced in *Douglas v. California*[35] and *Griffin v. Illinois*[36] may also operate to strike down the Kentucky practice on the basis of discrimination between the rich and the poor criminal defendant. As presently interpreted rule 2.14[37] grants an accused the right to consult with retained counsel as soon as arrested, while rule 8.04[38] as interpreted withholds the indigent's right to consult with counsel until arraignment.[39] On its face this difference seems to justify the cynical observation of

---

(Footnotes continued from preceding page)

This seems to be the feeling of many courts especially with respect to the requirement that counsel be requested or that as in *Escobedo* there is some doubt as to the voluntariness of the statement. See United States v. Childress, 347 F.2d 448 (7th Cir. 1965); Cephus v. United States, 352 F.2d 633, 33 U.S.L.W. 2674 (D.C. Cir. 1965); Stovall v. Denno, 355 F2d 731 (2d Cir. 1965); United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965) (dictum); Thomas v. Peyton, 240 F. Supp. 749 (E.D. Va. 1965); Swartz v. State, 237 Md. 263, 205 A.2d 803 (1965); Sturgis v. State, 235 Md. 343, 201 A.2d 681 (1965); Commonwealth v. Tracy, 207 N.E.2d 16 (Mass. 1965); Bean v. State, 398 P.2d 251 (Nev. 1965); State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (1964); State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964); Commonwealth *ex rel.* Linde v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965); Commonwealth ex rel. Storch v. Maroney, 416 Pa. 55, 204 A.2d 263 (1964); Commonwealth v. Coyle v. Maroney, 416 Pa. 55, 204 A.2d 263; Commonwealth v. Coyle, 415 Pa. 379, 203 A.2d 782 (1964); Commonwealth v. Patrick, 416 Pa. 437, 206 A.2d 295 (1965); State v. Fox, 131 N.W.2d 684 (Iowa 1964); Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1964). A smaller number of courts have taken a broader, less literal view of the case, especially concerning the necessity of requesting counsel. See Russo v. New Jersey, 351 F.2d 429, 33 U.S.L.W 2621 (3rd Cir. 1965); United States *ex rel.* Rivers v. Myers, 240 F. Supp. 39 (E.D. Pa. 1965); People v. Schrader P.2d 361 (1965); State v. Mendes, 210 A. 50 (R.I. 1965). Still other courts while considering the question have not made their interpretation clear. See Wright v. Dickinson, 336 F.2d 878 (9th Cir. 1964) (dictum); Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1965); People v. Donavan, 13 N.Y.2d 148, 243 N.Y.S.2d 841 193, N.E.2d 628 (1965); Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1965).

[35] 372 U.S. 353 (1963).

[36] 351 U.S. 12 (1956).

[37] RCr. 2.14.

[38] RCr 8.04.

[39] See *supra* note 17 and accompanying text.

Anatole France that "the law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[40]

Both *Griffin* and *Douglas,* while admitting the impossibility of complete equality of rich and poor,[41] held that discriminations based upon the ability to pay for a trial transcript[42] and for counsel[43] were such onerous burdens that they made the right of an accused to appeal his case meaningless. Rules 3.02[44] and 3.08[45] require that an arrestee be taken before a committing magistrate without delay and there be advised of his rights to consult with counsel. Such pious pronouncements of procedural safeguards must sound hollow to a person who cannot afford counsel. Whether or not the "equal protection" principle will ever be extended to strike down the inequality which the Kentucky practice fosters is subject to debate.[45a] However, in view of the other reasons given for early representation it would seem wise to eliminate the possibility of such an occurrence.

Constitutional arguments notwithstanding, there are many practical reasons for demanding representation immediately after arrest. Although it is true that in some cases delay in appointment of counsel does not harm the cause of the accused, in many situations the lack of counsel in earlier phases of the proceedings operates to prejudice the defendant's rights.[46] One circuit judge made this comment: "I think every man should have the assistance of counsel from the moment of his arrest. . . . The Defender must

---

[40] Cournos, A Modern Plutarch 27.
[41] 372 U.S. 353, at 356.
[42] 351 U.S. 12, at 12-13.
[43] 372 U.S. 353, at 355-58.
[44] RCr 3.02.
[45] RCr 3.08.
[45a] *Compare* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations,* 48 Minn. L. Rev. 1, 59-61 (1963), *with* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 Minn. L. Rev. 1054, 1067-70 (1963). See also Douglas v. California, 372 U.S. 353, 360 (Harlan, J., dissenting). This reasoning does not support an argument that because some defendants, by virtue of their wealth or experience, are able to avoid legal and just convictions, all defendants, including the indigent and ignorant, must be given a like opportunity. Such would be a new concept and an extreme extension of *Griffin* and *Douglas,* truly without definable limits. Enker & Elsen, *supra* note 26, at 65. *But see,* Comment, *An Historical Argument for the Right to Counsel During Police Interrogation,* 73 Yale L.J. 1000, 1034 (1964) where it is suggested that the inequality is that existing between the defendant and the state; this seems better classified as a due process argument.
[46] See *e.g.,* Report of the Atty. Gen'l's Comm. on Poverty & the Administration of Federal Justice at 24 (1963).

be a definite person, immediately available, and not gotten from some list. Justice is equality, not preference."

Not only are damaging admissions and confessions often made during this stage, but also the search for evidence and witnesses becomes more difficult with the passage of time. Even liberal grants of continuance fail to compensate for this handicap because the defense attorney is still brought in after the prosecutor has nearly completed his case and evidence is less accessible.[47]

No matter when the *constitutional right* to appointed counsel attaches, it would seem desirable to furnish counsel *at least* as early as the preliminary hearing before a committing magistrate. Though the hearing is often waived, evidence can be taken at this time and so counsel is necessary. He would also be able to advise the accused on the pros and cons of waiving the examining trial. Moreover, counsel may be helpful in lowering the amount of bail demanded as well as in bringing special circumstances to the attention of the prosecutor and the magistrate. Nor would early representation at either arrest or examining trial necessarily impose an onerous burden on law enforcement officials. California permits representation by the public defender before the preliminary hearing and this has: "in no way disrupted or adversely affected the orderly prosecution of criminal cases in that state."[48]

Neither the good intentions of certain circuit judges nor universal acceptance of the foregoing argument will result in an appreciable improvement under the present statutes and rules. This is because there is no procedure for informing the circuit judge prior to arraignment. Nor is the power of appointment vested in anyone else. Moreover, there is no machinery for expediting the process of contacting an attorney to represent the indigent accused.

B. *Inadequate Representation*

Generalizations as to the competency of court appointed attorneys in the forty-nine circuits would be fallacious. Different judges have expressed various views and no doubt some have tended to gloss over any inadequancies of counsel in order not to criticize generally good bars which willingly provide free time. One judge even expressed his misgivings as to the necessity of

[47] See *e.g.*, Association of the Bar of the City of N.Y. & N.L.A.D.A., *Equal Justice for the Accused* at 60 (1959).

[48] Report, *supra* note 46, at 38.

counsel: "My grand juries so carefully screen the defendants they investigate, that there is no real defense to be made." Notwithstanding this evaluation, it seems that most judges realized the existence of a problem even though many revealed it only in answers to specific questions dealing with experience, preparation or performance in comparison to retained counsel. Generally evaluations have been more favorable than critical and there is no reason to doubt that this is the case in a significant number of instances.

(1) Experience.

Some replies reveal that young and inexperienced counsel are often appointed in all but the most serious cases. Some observers criticize this because the lack of maturity and experience may result in failure to adequately protect the interests of their clients.[49] One circuit judge said: "Some attorneys have had very little or no experience in criminal cases, but without exception *they do the best they can* and I feel sure that most of the defendants, if not all, so represented were guilty." (Emphasis added.)

The use of young attorneys is an almost inevitable by-product of the non-compensatory system. Over half of the judges answering admitted that assigned counsel is often younger and less experienced than the prosecutor. In forty per cent of the districts previous criminal experience is not a prerequisite to appointment nor is previous trial experience necessary in thirty per cent. Even if many inexperienced lawyers compensate for this by zeal and willingness to work, the observation that "whether an indigent under the present conditions receives excellent or mediocre representation is largely fortuitous,"[50] seems to apply to Kentucky.

(2) Preparation.

Only fifteen per cent of the judges rated counsel's preparation inadequate. However, the opinion of a large majority is that assigned counsel spends less than three hours time preparing in fifty-six per cent of the cases they handle. It was also estimated that only fifteen per cent of such cases received more than twelve hours of outside preparation. The situation is aptly summed up

[49] See *e.g.*, Note, *The Representation of Indigent Criminal Defendants in Federal District Courts*, 76 Harv. L. Rev. 579, 596 (1963).
[50] *Id.* at 613.

by one judge who answered: "Assigned counsel do as good a job during trial as employed counsel *but don't spend as much time, ordinarily, preparing the case for trial.*" (Emphasis added.)

Although this is understandable in many instances it is not a desirable result. Most lawyers realize that results are directly proportional to the amount of time spent in preparing a case.

This defect is made more evident by the fact that assigned counsel enter more guilty pleas than retained counsel. Although one judge was of the opinion that any defendant who had a worthwhile defense would somehow manage to hire a lawyer it does not seem that an orderly system of criminal justice should be based upon this assumption. Nor does it seem that the rule of "innocent until proven guilty," is paid much more than lip service when courts begin to lump all indigents into a category of guilt and then assume that a guilty plea should necessarily follow.

(3) Post Conviction Representation.

The main complaint made by the judges comparing assigned counsel to retained counsel concerns the former's performance in assisting the defendant in achieving the proper disposition of a case after conviction. One judge said: "If there is weakness in the present system, it stems from general reluctance, on the part of assigned counsel, to expend the time and effort to prosecute appeals to the Court of Appeals."

A recent United States Supreme Court decision held: "Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[51]

This decision definitely establishes the right to counsel on appeal in Kentucky. Although this was technically the practice even before *Douglas,* it seems that counsel often advises against appeal or in some way discourages his indigent client from seeking further redress. The most logical reason for this is lack of compensation.

C. *Lack of Independent Investigation*

Perhaps the main contributing factor to the high number of guilty pleas and minimal preparation by appointed counsel is the failure to provide assigned counsel with resources to contest the

[51] Douglas v. California, 372 U.S. 353, 357 (1963).

guilt of the defendant or violations of his constitutional rights. This was the main objection to the federal court practice which was analagous in that respect to the practice in Kentucky.[52] More specifically this criticism is based on the total lack of funds available to assigned counsel to carry on an independent investigation, hire expert witnesses or utilize modern crime detection resources. Over one-third of the circuit judges replied that this "substantially" hampers the defense.

This is true even though many prosecutors make records available to assigned counsel and some also permit the defense to use their investigatory facilities to some extent. Although it is impossible to estimate the number of defendants materially injured each of independent investigation, it is evident that the effect on an individual defendant is devastating when it does take place.

D. *Unfairness to the Bar*

Aside from the foregoing objections to the Kentucky system it should be noted that the practice of not compensating assigned counsel is often onerous burden on the members of the bar and considered by many to be basically unfair. One judge's comment summed up the almost unanimous complaint of his brethren, when he replied: "It is not "justice" to require an attorney to spend his own time, talents, and often expenses to represent a person without compensation. In addition he will probably receive the ire of the opposing parties. In small counties especially this is important in building a practice." United States Senator Sam J. Ervin, Jr. of North Carolina echoed these sentiments recently when he said: "The lawyer himself should not fear indigency while defending the indigent. This unfairness to the accused and hardship on the Bar are intolerable. They are not at all conducive to the effective administration of justice."[53]

Moreover, the legality of the uncompensated system has been placed in issue recently. In *Dillon v. United States*,[54] the lower court applied the theory of a governmental taking of the attorney's services for public use within the meaning of fifth amendment

[52] Report, *supra* note 46, at 26.
[53] Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435 (1963).
[54] 230 F. Supp. 487 (D. Ore. 1964) rev'd, 346 F.2d 633 (9th Cir. 1965).

"due process" and awarded the attorney 3,804.54 dollars as just compensation for his services in representing a prisoner in proceedings under 28 U.S.C. section 2255. This is not the first time such a question has arisen. In *Knox County Council v. State ex. rel. McCormick*,[55] a state constitutional provision, "No man's particular service shall be demanded, without just compensation . . . ."[55a] was interpreted. The court held that the state had no right to assign counsel without payment and upheld an order directing the county to pay for respondent's services in defending an indigent accused of a felony. The court quoted at length from an earlier opinion.[56]

E. *Conclusion*

Nearly all of the deficiencies of the present system stem primarily from the total lack of funds to administer it. Judges are often reluctant to appoint more experienced members of the bar without compensation. Investigations must be financed out of the pocket of the appointed counsel and are therefore sketchy, if conducted at all. Because of lack of compensation, an indigent's attorney may often spend little time on his client's case. Therefore, guilty pleas result more often in the case of assigned counsel. Moreover, the *ad hoc* method of appointment which introduces a heavy element of chance in the type of representation afforded an

---

[55] 217 Ind. 493, 29 N.E.2d 405 (1940).

[55(a)] Ind. Const. art. I, § 21.

[56] Webb v. Baird, 6 Ind. 13 (1854) which said *inter alia*: The gratuitous defence of a pauper is placed upon two grounds, viz., as an honorary duty, even as far back as the civil law; and as a statutory requirement. Honorary duties are hardly susceptible of enforcement in a court of law. . . . Under our present constitution, it [the legal profession] is reduced to where it always should have been, a common level with all other professions and pursuits. . . . The practitioner, therefore owes no honorary services to any other citizen, or to the public. . . . The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.

The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens. *Id* at 16-17.

indigent would be unnecessary if a system of payment were approved.[57]

IV. ALTERNATIVES TO THE PRESENT SYSTEM

All of the suggested alternatives to the present system provide for compensation of an indigent defendant's attorney. While these would remedy the main defect of the Kentucky system other deficiences exist and should, if possible, be likewise eliminated. Each system in some way, provides for the other problems. It is suggested that certain guidelines should be set down before adopting any system.[58]

Each of the following systems will be analyzed with A.B.A. principles in mind.

A. *Payment of Assigned Counsel*

Forty states have statutory provisions for payment of court appointed private counsel in criminal cases.[59] Although five of these

---

[57] See Beaney, *The Right to Counsel: Past, Present & Future,* 49 Va. L. Rev. 1150 (1963).

[58] The National Legal Aid and Defender Association and the American Bar Association have adopted a set of principles which described these guidelines:

> 1. Provide counsel for every indigent person unable to employ counsel who faces the possibility of deprivation of his liberty or other serious criminal sanction;
> 2. Afford representation which is experienced, competent and zealous;
> 3. Provide the investigatory and other facilties necessary for a complete defense;
> 4. Come into operation at a sufficiently early stage of the proceedings so as to fully advise and protect the defendant;
> 5. Assure undivided loyalty of defense counsel to the client;
> 6. Include the taking of appeals and the prosecuting of other remedies, before or after conviction, considered by the defending counsel to be in the interest of justice;
> 7. Maintain in each county in which the volume of criminal cases requiring assignment of counsel is such as to justify the employment of at least one full-time lawyer to handle the work effectively, a defender office, either as a public office or as a quasi-public or private organization;
> 8. Enlist community participation and responsibility and encourage the continuing cooperation of the organized bar. N.L.A.D.A., *Guidelines for Adequate Defense Systems* 8 (1964).

[59] Ala. Code tit. 15, § 318 (1958); Alaska Crim. R. 39 (b) (1963); Ariz. Rev. Stat. Ann. § 13-1673 (1956); Ark. Stat. Ann. § 43-2415 (Repl. vol. 1964) (at the discretion of any county with less than 100,000 population); Calif. Penal Code § 987; Colo. Rev. Stat. Ann. § 39-31-9 (1963); Ga. Code Ann. § 27-3001 (Supp. 1963); Hawaii Rev. Laws § 253-5 (Supp. 1963); Idaho Code Ann. § 19-1513 (1947); Ill. Ann. Stat., ch. 38, § 113-3 (Smith-Hurd 1964); Ind. Stat. Ann. § 9-1314 - 2409 (Supp. 1964); Iowa Code Ann. § 775.5 (Supp. 1964); Kan. Stat. Ann. § 62-1304 (1964); Me. Rev. Stat Ann., ch. 15, § 810 (1964); Md. Rule of Ct. 719 (1963); Mass. Gen. Laws Ann. ch. 276, § 37A (Supp. 1964); Mich. Comp. Laws § 775.16-18 (Supp. 1963); Minn. Stat. Ann. § 611.07 (1964); Miss. Code

(Continued on next page)

statutes apply only to capital cases,[60] the rest also apply to less serious crimes.[60a]

These statutes are by no means uniform except to the extent that the manner of choosing the appointee is within the sole discretion of the trial judge.[61] While on its face such discretion seems necessary, it is suggested that a more specific statutory method is desirable for two reasons: (1) the present practice is too haphazard, and for that reason the appointee is often no match for the prosecutor; (2) the recent decision in *Escobedo v. Illinois*,[62] discussed in part I may demand that counsel be appointed immediately after arrest and the present system seems inadequate to process such appointments.

(1) The first objection is based on the possibility that the practice resulting therefrom will permit retention of some of the objectional features of uncompensated appointment. For example, younger, less experienced attorneys will still be the logical choice

---

(Footnotes continued from preceding page)

Ann. § 2505 (1957); Mont. Rev. Codes Ann. § 94-6513 (Supp. 1963); Neb. Rev. Stat. § 29-1803 (Cum. supp. 1963); Nev. Rev. Stat. § 7.206 (1963); N. H. Rev. Stat. Ann. § 604:3 (Supp. 1963); N.J. Rev. Stat. Ann. § 2 A:163-1 (1953); N.M. Stat. Ann § 41-11-3 (Repl. vol. 1964) N.Y. Code Crim Proc.§308; N.C. Gen. Stat. § 15-4.1 (Supp. 1963); N. D. Cent. Code § 29-01-27 (1960); Ohio Rev. Code Ann. § 2941.51 (Page supp. 1964); Okla. Stat. Ann. tit. 22 § 1271 (1958); Ore. Rev. Stat. § § 133.635, 135.330 (1953); Pa Stat. Ann. tit. 19 § 784-784.5 (1964); S. D. Code § 34.1901 (1939); Tex. Code Crim. Proc. art. 484 (a) (Supp. 1964); Vt. Stat. Ann. tit. 13, § 6503 (Supp. 1963), tit. 2 App. II Rule 45 (1958); Va. Code Ann. § 14.1-184 (Supp. 1964); Wash. Rev. Code Ann § 10.01.110 (1961); W. Va. Code Ann. § 6190 (1961); Wis. Stat. Ann. § 957.26 (Supp. 1965); Wyo. Stat. Ann. § 7-9 (1957). This list does not include those states having a mandatory public defender system which also have statutes providing for compensation to assigned counsel in special cases. See *e.g.*, Conn. Gen. Stat. Ann. § 54-81 (Supp. 1963).

[60] Ga. Code Ann. § 27-3001 (Supp. 1963); Mass. Gen. Laws Ann. ch. 276 § 37A (Supp. 1963); Miss Code Ann. § 2505 (1957); N.J. Rev. Stat. Ann 2A:163-1 (1953); N. Y. Code Crim. Proc. § 308.

[60(a)] The remaining statutes apply to "serious non-capital crimes." Ala. Code tit. 15, § 318 (1958) (felonies); Ariz. Rev. Stat. Ann. § 13-1073 (1956) (misdemeanors); Calif. Pen. Code § 987; Minn. Stat. Ann. § 611.07 (1964) (crimes and insanity proceedings); Neb. Rev. Stat. § 29-1803 (Cum. supp. 1963) (felonies and gross misdemeanors); N. D. Cent. Code § 29-01-27 (1960) (any offense punishable by imprisonment); N.H. Rev. Stat. Ann. § 604:3 (Supp. 1963) (all criminal actions); W. Va. Code Ann. § 6190 (1961) (juvenile court proceedings).

[61] See, *e.g.*, Ohio Rev. Code Ann § 2941.50 (Page supp. 1964): [T]he accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the prosecution. A partner of the atorney having charge of the prosecution shall not be employed by or conduct the defense of the person so prosecuted.

[62] 378 U.S. 478 (1964). See also notes 21-34 *supra* and accompanying text.

of the trial judge in many instances. Even if older, more experienced members of the bar are appointed there is no guarantee that these men will be experienced in criminal proceedings.[63] The presumption that all persons licensed to practice are competent to handle all legal matters is refuted every day.[64]

This criticism does not assume that inexperience in criminal work is an automatic indicia of incompetency. Indeed many instances of exceptional service by young lawyers and men who rarely practice criminal law can be pointed out. Young attorneys are often more enthusiastic than their more experienced brethren. Futhermore, the actual practice in many courts might assure effective counsel for each case. Nevertheless, the problem under consideration is how to best establish a *systematic* and consistent guarantee of effective counsel and the present system often fails in this respect. Studies of compensated assigned counsel systems in two states support this criticism.[65]

(2) Depending upon future interpretations of the federal constitution the precedent of *Escobedo v. Illinois*,[66] may well mean that counsel must be provided upon arrest whether or not it is specifically requested. Moreover, denial of an indigent's request for counsel at this time is very possibly a violation of "equal protection of the law" because of rule 2.14.[67]

In any event the standards of the A.B.A. demand early representation for indigents.[68]

Another advantage of early representation is the chance it gives

---

[63] See Cuff, *Public Defender System: The Los Angeles Story*, 45 Minn. L. Rev. 715, 723 (1961).

[64] David, *Institutional or Private Counsel*, 45 Minn. L. Rev. 753, 760 (1961).

[65] See Kamisar & Choper, *supra* note 45a, at 107. Two of the seven district judges in this group (a representative interview) emphatically reported that appointed lawyers compare unfavorably with retained lawyers. One said flatly that 'many indigents do not receive adequate representation.' Both maintained that, with some exceptions, the appointed lawyers don't put as much into investigation. . . . A third district judge acknowledged that appointed lawyers were generally less experienced than retained counsel.

A California study of counties with a paid assigned counsel system revealed similar results: Young attorneys comprise a large percentage of assigned counsel. . . . However, young attorneys are seldom a match for the prosecutor. Their diligence and enthusiasm sometimes lead to unnecessary trials, and they lack knowledge of when it is in the client's best interest to compromise and plead guilty to a lesser included offense. Note, *Representation of Indigents in California*, 13 Stan. L. Rev. 522, at 536 (1961).

[66] 378 U.S. 478 (1964).

[67] RCr. 2.14 (1963). See notes 36-48 *supra* and accompanying text.

[68] See *supra* note 58.

the defendant's attorney to gather evidence while it is still fresh and more accessible. Police often have a distinct advantage in investigation because of their superior facilities. The defendant's added handicap of waiting several days before gathering facts is just one more inequality hampering the realization of a true adversary proceeding.

If earlier representation is to be the law the present system is not adequate to provide for early representation. The trial judge is not always available to receive a plea of indigency before arraignment. Even if he is, indigency would have to be determined and a lawyer contacted following that before representation could begin. Considering the size of and the number of counties in many of the judicial circuits in Kentucky,[69] this would be an entirely unworkable system. It would also increase the burden on the already harried circuit judge.

Since both of these problems stem from the lack of some system of appointment, it would seem that a provision for setting up appointment machinery on the county level would provide an adequate alternative. This system could empower the local bar to compile a list of *qualified* criminal practitioners to represent indigents. One or two of these attorneys could be designated as the appointee for a period of time. It would also be incumbent upon the police to notify the accused of his right to counsel (whenever it may attach) and if he requests representation, but claims indigency, to further notify him of the attorney designated to handle such cases. Of course, this does allow for possible false claims of indigency at the early stage. The local attorney-designate would often be able to determine the verity of the plea. If it were later discovered that the accused was not qualified to claim indigency the court could then order him to reimburse the state or the county for services rendered. A system of choosing only qualified attorneys need not put an end to the obvious practical value of training young lawyers through indigent defense work. Many state statutes allow the appointment of two attorneys in the discretion of the judge.[70] There is no reason why this provision could not be utilized to continue training your attorneys. Perhaps a a distinction could be made to provide for lesser compensation in

[69] See appendix, *infra.*
[70] See, *e.g.*, Ga. Code Ann. § 27-3001 (Supp. 1962).

the younger attorney's case. Another suggestion is that young attorneys seeking criminal experience, volunteer their services as a second attorney. Appointment in the manner suggested, although providing a qualified attorney at an early stage of the proceedings, need not be final. In other words the circuit judge could change the assignment at arraignment or before if he wishes. Should the list drawn by the local bar association prove inadequate the circuit judge could prepare his own list and designate the attorney to be called by the indigent accused for a period of time. Either method would do much to solve the deficiencies of present assigned counsel systems.

With these deficiencies corrected the basically sound system of compensating assigned counsel would do much to improve the Kentucky system. Providing sufficient compensation will make assignment more attractive to members of the bar. Judges will be less reluctant to call upon attorneys experienced in criminal practice. Moreover, independent investigation, within reason, can be made by the appointed defense counsel. Also an appointed attorney will feel obligated to devote more time to preparing the indigent's case when he is paid.

B. *Public Defender System*

Fourteen states have some statutory provision for a public defender system.[71] The establishment of such a system is a more radical departure from the traditional system of appointed counsel than mere compensation, yet the jurisdictions which have adopted the public defender system seem convinced of its superiority.[72]

Public defenders are salaried employees of the state or county whose primary function is to represent indigent persons accused of crimes.[73] Depending upon the number of cases a public defender must handle, the office is either full time or part time.

---

[71] Ariz. Rev. Stat. Ann § 11-581 to 586 (Supp. 1964); Cal. Govt. Code § 2770-27711; Colo. Rev. Stat. Ann. § 39-21-1 to 13 (Supp. 1963); Conn. Gen. Stat. Ann. § § 54-80 to 81a (Supp. 1964); Del. Code Ann. tit. 29, § 2601 (Supp. 1964); Fla. Stat. Ann. § 27.50-.58 (Supp. 1964); Ill. Ann. Stat. ch. 34, § 5601 (Supp. 1964); Ind. Ann. Stat. §§ 9-3501 to 3503, 13-140 to 1406 (1960); Mass. Gen. Laws Ann. ch. 221, § § 34C-D (1960); Minn. Stat. Ann. § 611.13 (Supp. 1964); Neb. Rev. Stat. § 29-1804 (Cum. supp. 1963); Ore. Rev. Stat. § § 138.710 to .790 (Cum. supp. 1963); R.I. Gen. Laws Ann. § § 12-15-1 to 11 (Supp. 1964); Va. Code Ann. § 19.1-13 (Supp. 1964).

[72] See Kamisar & Choper, *supra* note 45a, at 110-17; Note, 13 Stan. L. Rev. 522 (1961).

[73] "The attorney so appointed shall be known as the public defender. He

(Continued on next page)

The principle advantage of a public defender system is that it provides representation by lawyers who have developed substantial experience in criminal work. A full time public defender is more able to concentrate on criminal matters and should be better informed of changes in criminal law than most appointed counsel. It is also suggested that public defenders are better equipped to serve criminal defendants because of their obvious desire to do this type of work. In contrast many lawyers, regardless of their willingness to serve as assigned counsel, are not interested in criminal work. In addition the public defender is likely to be well acquainted with, and respected by, both the judge and the prosecutor, and may therefore be able to obtain more equitable sentences for those defendants who plead guilty. It would also seem that a public defender office should be able to perform investigatory work more efficiently and economically than assigned counsel. Another obvious advantage of the public defender system is that counsel will always be available, thus ensuring early representation for the indigent and eliminating delays which occur when individual private appointments are being worked out. With a public defender, the court need not expend time and effort to obtain counsel, and therefore cases could be more speedily concluded.

The public defender of Los Angeles County, California pointed out that the system gives "increased confidence in, and respect for the law . . . ."[74] This seems true since many persons become bitter upon arrest, with the realization that the vast, seemingly one-sided machinery of the state has been set into motion against them. Mr. Cuff also suggests, in the same article, that the public defender system provides for a speedier and more effective adminstration of justice at a lower cost to the public.

There have been several objections made to the public defender system. These criticisms stem from conceptual as well as practical arguments. One complaint is that the government would be playing inconsistent roles under such a system. This fails to

(Footnotes continued from preceding page)
shall appear for and defend all persons charged with a felony or gross misdemeanors when it shall appear to the court that the person accused is unable, by reason of poverty, to procure counsel." Minn. Stat. Ann. § 611.13(2) (Supp. 1961). Some statutes provide for the defender to handle non criminal matters if he deems it necessary. See, *e.g.*, Cal. Govt. Code § 27706(c) (d) (to collect wages and defend against unjust civil harrassment).

[74] Cuff, *Public Defender System: The Los Angeles Story*, 45 Minn. L. Rev. 712, 721 (1961).

take into consideration the affirmative duty of the state to guarantee "equal protection of the laws . . . ."[75] Indeed the Kentucky Court of Appeals once held that the Attorney General could represent a defendant in a criminal trial.[76] State government is too large and too complex to justify treating all of its employees as members of the same group.[77] Circuit judges and commonwealth attorneys are both state employees yet that does not mean that the connection is sufficient to give them a common interest beyond that of achieving justice.[78]

Other objections raised seem more conjectual than real, yet they deserve consideration. Some critics argue that it would be difficult to obtain able public defenders. In addition, it is said that a public defender would handle too many cases and therefore tend to categorize them; and as a result his work would lack zeal and originality. Opponents also claim that the public defender will become too friendly with the prosecutor and judge and thus manipulate trades whereby the defender might obtain favorable treatment for one defendant at the expense of another.[79] The short answer to these criticisms is that they have not been realized in practice. A critique of the system in Minnesota states:

> [T]he six district judges interviewed . . . as well as the respective county attorneys, unanimously rejected the anti-defender arguments. Their attitude was well summed up by one judge: The public defender *is* zealous. The fact that the defender is paid out of the public treasury is irrelevant. So are judges. That he may deal frequently with the prosecutor has no more significance than the fact that personal injury specialists, who often meet in trial, may be good friends. But this doesn't affect their courtroom performance. In a sense it may make them even more competitive. They want the other fellow's respect.[80]

Another objection is that the office might become too involved in politics. This of course, depends solely upon the method of naming the defender and will be explored in detail below. Suf-

---

[75] U.S. Const. amend. XIV.

[76] Sharp's Adm'x v. Kirkendall, 25 Ky. 150 (1820).

[77] See Note, 76 Harv. L. Rev. 579, 604 (1963) (federal analogy).

[78] See, 42 A.B.A.J. 712 (1956) (federal analogy).

[79] See Stewart, *The Public Defender's System is Unsound in Principle*, 32 J. Am. Jud. Soc'y 115 (1948). *But see*, Baker, *The Public Defender's Work in Cook County*, 25 J. Crim. L.J. 5, 8 (1934).

[80] Kamisar & Choper, *supra* note 45a, at 112 (1963).

fice it to say here that sufficient legislative safeguards can be set up to alleviate most political pressures on the office.

Perhaps the most meaningful problem posed by the objectors is the so-called "impracticality" of establishing public defender offices in many of the state's sparsely populated counties. No doubt it would be financially unfeasible in many instances on a county basis. However, there is no reason why the system must be established on a county basis or that the office need be a full time one. A practical system could be set up by establishing an office for an entire judicial district, in some instances, on a part time basis. A study of such systems under comparative conditions will be presented below.

This brief survey of the pros and cons of the public defender system has not answered all of the questions that might be posed. The system is not perfect. However, the most serious objections to it are theoretical and largely unrealized. Moreover, jurisdictions with the system have found it far superior to other alternatives.[81]

C. *Voluntary Defender System*

This type of system varies from the public defender system by virtue of the fact that it is in no way controlled or supported by state or local government. Voluntary defender offices are found in some of our larger cities and perform services much the same as public defender offices. The lawyers and investigators are paid from charitable contributions. Philadelphia's Voluntary Defender Association is a member of the United Fund. Properly staffed voluntary defender organizations can conceivably provide the same services as their public counterpart, and according to one proponent of the voluntary systems, they are more advantageous:

> I believe that a perfect system of providing representation to indigent persons accused of crime cannot be devised. While the Public Defender system, entirely supported by tax funds, can provide comprehensive coverage and investigation facilities equal to that of the prosecution, the Defender is susceptible to political manipulation and domination by the court. I believe that the voluntary defender system is in the best position to afford independent representation and a 'competent admini-

[81] Trebach, *New England Defender Systems*, 47 J. Am. Jud. Soc'y 170, 174 (1964); Cuff, 45 Minn. L. Rev. 715; David, 45 Minn. L. Rev. 753 (1961).

> stration of justice to the needy' and therefore is preferable to the Public Defender system. A voluntary defender is not hemmed in by statutory limitations and political pressures and is in a better position to stand his ground before a tyrannical judge or an arbitrary public official. One real test of evaluation of any defender system is whether the system protects the legal rights of an unpopular defendant. It seems to me that the vountary defender system supervised by a responsible Board of Directors composed of leading members of the legal profession is better able to meet this test.[82]

The main difficulty of this type of system is the limited funds it has and its absolute reliance upon charity. The Philadelphia Association is admittedly hampered in the depth of coverage it offers for these reasons.[83]

The same writer also agrees that such a system is impractical for sparsely populated areas.[84] It is more suited to large metropolitan areas as evidenced by the fact that voluntary defender organizations are found only in large cities.[85] This, of course, is primarily because of lack of funds. Without public support such a system would be extra-statutory and, therefore, not a subject of legislation, but only of suggestion.

D. *Public-Private Defender System*

This is a hybrid of the public and voluntary defender systems and is in operation in only a few cities. Under this system the control of the defender's office is in the hands of a private board, but supported by an annual governmental appropriation. Such a system supposedly retains the best features of its derivatives while ridding itself of the biggest deficiencies of both. Ideally the pitfalls of political dominance and financial insecurity are avoided while autonomy is attained.

Such systems are in use in Washington, D. C.,[86] Buffalo and Rochester.[87] The District of Columbia's legal aid agency is established by statute, governed by a private board of trustees and sup-

---

[82] Pollack, *Equal Justice in Practice*, 45 Minn. L. Rev. 737, 747-48 (1961). For a comprehensive survey of the voluntary Defender Association of Philadelphia, see Note, 107 U. Pa. L. Rev. 812 (1959).

[83] See Pollack, *supra* note 82, at 748.

[84] *Id.* at 747-49.

[85] *E.g.*, Cleveland, New York and Philadelphia.

[86] D.C. Code Ann. §§ 2-2201-10 (1961).

[87] Note, *supra* note 82, at 820.

ported by federal grants. It is not an all inclusive agency though and private counsel are often asked to volunteer to supplement the existing staff.[88] It is possible that such a system could function as efficiently as any other suggested. However, it would seem desirable only if it is found that governmental control is sufficiently obnoxious to an effective system of representation, and so far no such showing has been made. If installed in Kentucky, control could be placed in a non-governmental board of trustees in each of the 49 judicial districts. Such a diffusion of policy making power would predictably lead to non-uniformity. In the alternative, perhaps policy making power could be placed in a single body on a statewide basis.

V. THE ALTERNATIVES IN PRACTICE[89]

A. *Public Defender Systems*

(1) Methods of Filling the Office.

Twelve of the fourteen state statutes provide for appointment of the public defender. The justices of the superior court of Connecticut appoint the defenders for each county.[90] In Illinois,[91] Indiana[92] and Minnesota[93] the judges of the court of the circuit or district, appoint the defender for that district. Massachusetts[94] and Oregon[95] have created special committees, appointed by the high court, to appoint the public defender and thereby, supposedly take the office out of politics. The governors of Rhode Island and Delaware appoint the public defender with the advice and consent of the senate,[96] while Arizona and Colorado permit

---

[88] Note, *supra* note 49, at 595.

[89] This part is primarily a survey of the various statutory implementations and non-statutory practices of the various systems discussed in part IV, *supra*. Answers to problems peculiar to Kentucky will be suggested by analyses of certain law and practice. The bulk of this part is devoted to the various public defender systems because they are more subject to statutory regulation. Some problems such as determining indigency and the types of cases for which counsel is provided are the same, regardless of the system, and therefore will only be covered in the section on public defenders. The other two sections—compensated assignment and voluntary defenders—will deal only with questions peculiar to that particular mode of representation.

[90] Conn. Gen. Stat. Ann. § 54-80 (Supp. 1963).

[91] Ill. Ann. Stat. ch. 34, § 5602 (Smith-Hurd 1964).

[92] Ind. Ann. Stat. § 9-3501 (Repl. vol. 1963).

[93] Minn. Stat Ann. § 611.13 (Supp. 1964).

[94] Mass. Gen. Laws Ann. ch. 221, §34c (Supp. 1964).

[95] Ore. Rev. Stat. § 138.730 (Cum. supp. 1961).

[96] Del. Code Ann. tit. 29, § 2602 (Supp. 1964); R.I. Gen. Laws Ann. § 12-15-2 (1956).

the local governing body to select the defender.[96a] The California statutes leave the method of choosing the defender up to the county availing itself of the system.[97] Only in Florida[98] and Nebraska[99] is the office filled by popular election.

(2) Requirements.

Most of the statutes are silent on the requirements for the office, although states providing for appointment by a committee or the bench generally provide that the appointing bodies may make appropriate rules and policies concerning the office. Rhode Island has the most stringent prerequisite—ten years practice as an attorney.[100] The Connecticut statute requires five years practice and residence in the state.[101] The statewide defender in Indiana must have practiced for three years[102] while the Illinois law provides only that he be a "duly licensed attorney. . . ."[103]

(3) Term of Office and Replacement.

The states with elective offices (Florida and Nebraska) have four year terms, as does Indiana.[104] Rhode Island's statute provides for a three year term[105] while Connecticut's statute provides for yearly appointment.[106] The Illinois defender holds office at the pleasure of the appointing court.[107] Colorado apparently has given the local government complete discretion with regard to the terms[108] while the Massachusetts committee can remove for cause.[109] Most states do not provide for interim appointment to the office.

(4) Salary.

Salary provisions are likewise not uniform. Connecticut provides that it shall not be less than one-half of the salary of the

---

96(a) Ariz. Rev. Stat. Ann. § 11-582 (Supp. 1964); Colo. Rev. Stat. Ann. § 39-21-1 (Supp. 1964).
97 Cal. Govt. Code § 27701.
98 Fla. Stat. Ann. § 27.50 (Supp. 1963).
99 Neb. Rev. Stat. § 29-1804 (Cum. Supp. 1963).
100 See statutes cited note 96 *supra.*
101 Conn. Gen. Stat. Ann § 54-80 (Supp. 1963).
102 Ind. Ann. Stat. § 13-1401 (Supp. 1963).
103 Ill. Ann. Stat. ch. 34, § 5601 (Smith-Hurd 1964).
104 Ind. Ann. Stat. § 13-1401 (Repl. vol. 1963).
105 See statutes cited note 96 *supra.*
106 Conn. Gen. Stat. Ann. § 54-80 (Supp. 1963).
107 Ill. Ann. Stat. ch. 34, § 5602 (Smith-Hurd 1964).
108 Colo. Rev. Stat. Ann. § 39-21-2 (Supp. 1964).
109 Mass. Gen. Laws Ann. ch. 221, § 34D (Supp. 1964).

county attorney in the same county with the exact amount being set by the county.[110] California permits the county to fix the amount.[111] Illinois has a complex scale to be followed by each county according to population.[112] The Indiana courts fix their defenders' salaries with a ceiling of 10,000 dollars per year.[112a] Minnesota follows the same practice with a maximum of 8,600 dollars per year.[113] The statutory salary in Rhode Island is 6,500 dollars[114] per year while the defender in Oregon is guaranteed a salary between 12,500 dollars and 14,500.[115] These are the only statutory provisions, but additional information is contained in sub-section ten of this section.

(5) Expenses.

Almost all of the public defender legislation provides for reasonable clerical and investigatory expenses to be approved by the court or the county board after an itemized accounting.[115a]

(6) Assistants.

Connecticut and Nebraska provide for assistants to be appointed by the public defender in the more populous counties of the state.[116] The county defenders in Florida, and the state defender in Oregon are empowered by statute to appoint assistants.[117] The Rhode Island statute provides for one assistant to be paid 3,000 dollars a year.[118] In Illinois the court must approve the number of of appointed assistants.[119] The Massachusetts act provides that the appointing committee may employ such professional help as is necessary.[120] Of course, in all of these jurisdictions the appointment of assistants is contingent upon approval of the governmental body which appropriates his salary.

---

[110] Conn. Gen. Stat. Ann. § 54-80 (Supp. 1963).
[111] Cal. Govt. Code § 27711.
[112] Ill. Ann. Stat. ch. 34, § 5605 (Smith-Hurd 1964).
[112a] Ind. Ann. Stat. § 9-3502 (Repl. vol. 1963).
[113] Ore. Rev. Stat. § 138.750 (Cum. supp. 1961).
[114] R.I. Gen. Laws Ann. § 12-15-5 (1956).
[115] Ore. Rev. Stat. § 138.750 (Cum. supp. 1961).
[115a] *E.g.*, R.I. Gen. Laws Ann. § 12-15-7 (1956).
[116] Conn. Gen. Stat. Ann. § 54-80a (Supp. 1963); Neb. Rev. Stat. § 29-1804 (Cum. Supp. 1963).
[117] Fla. Stat. Ann. § 27.53 (Supp. 1963); Ore. Rev. Stat. § 138.760 (Cum. Supp. 1963).
[118] R.I. Gen. Laws Ann. § 12-15-6 (1956).
[119] Ill. Ann. Stat. ch. 34, § 5606 (Smith-Hurd 1964).
[120] Mass. Gen. Laws Ann. ch. 221 § 34D (Supp. 1964).

(7) Duties of Defender.

The different systems make the public defender available for various types of litigation at different stages of the proceedings. Most provide for utilization of the defender at the pre-trial and trial levels while others use the defender only for appeals and post-trial proceedings. The Connecticut statute permits the defender to act on behalf of indigents in any preliminary or committing hearing as well as the trial on criminal charges in either the superior or common pleas courts.[121] Illinois provides for appointment of the public defender before a plea is entered for defendants in any court of record with general criminal jurisdiction.[122] Indiana provides for representation by a public defender at trial and on appeal.[123] The Minnesota statute provides the public defender to all indigents charged with felonies or gross misdemeanors.[124] He may also appear before the pardon and parole boards upon approval of the court.[125] Indigents accused of any crime punishable by a prison term are represented by the public defender in Nebraska.[126] There, however, only in capital cases does the public defender practice on the appellate level.[127] The Rhode Island statute provides defender representation for those cases referred to the defender by the superior court.[128] Massachusetts has a more flexible statute, making the defender available "at any stage of a criminal proceeding, other than capital . . . [in which counsel is required]."[129] The Oregon scheme is quite complex but it appears that *assigned* counsel are used for all trial work as well as automatic appeals, while the public defender is used for other appeals, but not habeas corpus proceedings.[130] California's system calls for representation within forty-eight hours after arrest through appeal.[131]

---

[121] Conn. Gen. Stat. Ann. § 54-80 (Supp. 1963). *Accord,* Ariz. Rev. Stat. Ann. § 11-584 (Supp. 1964).

[122] Ill. Ann. Stat. ch. 34, § 5604.

[123] Ind. Ann. Stat. § § 9-3501, 13-402 (Repl. vol. 1963).

[124] Minn. Stat. Ann. § 611.13 (Supp. 1964).

[125] *Ibid.*

[126] Neb. Rev. Stat. § 29-1804 (Cum. Supp. 1963).

[127] *Ibid.*

[128] R.I. Gen. Laws Ann. § 12-15-3 (1956).

[129] Mass. Gen. Laws Ann. ch. 221, § 34D (Supp. 1964). The Colorado statute is similar. "Counsel and defend him, whether he is held in custody or charged with a criminal offense, at every stage of the proceedings following arrest. . . ." Colo. Rev. Stat. § 39-21-4 (1963). *Accord,* Del. Code Ann. tit. 29, § 2604 (Supp. 1964).

[130] Ore. Rev. Stat. § 138.770 (Cum. supp. 1963).

[131] Cal. Gov't Code § 27706.

It has been suggested that a defender office be established to handle appellate work exclusively while the local defenders handle all of the trial court cases (horizontal structure). Some disagree with this system on the ground that the lawyer at the trial level is more familiar with the case and therefore better equipped to handle an appeal (vertical structure). Neverthless, Indiana has installed the horizontal system on the theory that appellate and trial practice are separate specialties better handled by experts.[132]

California and Nebraska each have statutory provisions permitting the public defender to represent indigents suing to collect wages less than 100 dollars as well as those who are being unduly harrassed in civil litigation.[133] California also provides for representation at all proceedings for pardons and restoration of civil rights.[134]

(8) Determination of Indigency.

The statutory definitions of indigency are very general, and the methods for determination of the status were not drafted with an eye toward mathematical exactness. Rhode Island and Florida have the most stringent provisions for determining indigency although the broad language of the statutes in other jurisdictions seems sufficient to permit adequate investigation into the financial status of the claimant. Rhode Island defines an indigent as, including a person who does not have property or source of income to furnish him a living nor anyone able to support him to whom he is entitled to look for support."[135] The Rhode Island statute[136] calls for a confidential financial affidavit to be submitted to notify the court if he thinks the claimant has failed to qualify as an indigent.[137] Insolvency is the measure of indigency in Florida for purposes of representation by the public defender.[138] It is determined by the court after a hearing. The Florida law further pro-

[132] Ind. Ann. Stat. § § 13-401-402 (Repl. vol. 1963). Other states permit the local defender to prosecute appeals. *E.g.*, Ariz. Rev. Stat. Ann. § 39-21-4 (Supp. 1964).

[133] Cal. Gov't Code § 27706(b); Neb. Rev. Stat § 29-1804 (Cum. supp. 1964).

[134] Cal. Gov't Code § 27706(c). See Colo. Rev. Stat. § 39-21-3 (1963) which permits the defender to act in delinquency cases and misdemeanors as well as municipal code violations.

[135] R.I. Gen. Laws Ann. § 12-15-8 (Supp. 1964).

[136] R.I. Gen. Laws Ann. § 12-15-10 (Supp. 1964).

[137] *Ibid.*

[138] Fla. Stat. Ann. § 27.51 (Supp. 1963).

vides that the court, upon the motion of the state attorney, may, within a year, show that insolvency was wrongly claimed and ask the court to assess the party with the costs of his defense.[139] Anyone defended by a Florida defender has a lien created against him and his estate, by operation of law, for the cost of his defense.[140]

(9) Full or Part Time Defender.

Only three state statutes make any mention of whether the public defender may engage in private practice. It would seem that this would be determined by the number of criminal cases he must handle and the salary he is paid. The Florida statute states that the defender has a primary obligation to fulfill the duties of his office before taking on private cases and that in no instance can he engage in private criminal practice.[141] The California statute makes it a full time job in counties of certain size.[142] Oregon provides that any defender or deputy making more than 10,000 dollars per year cannot engage in private practice.[143]

It is suggested that except in the most populous districts of Kentucky the only practical way to maintain a public defender system would be to create the office on a part time basis, allowing the defender to engage in private practice exclusive of other criminal work, in order to assure that the question of fees is never an issue.

Although fourteen states have statutes providing for public defender offices all of these jurisdictions do not have such offices in every judicial district. California and some other states permit local option, by county or district between paid assigned counsel and public defender systems.[144] Only Connecticut, Delaware, Florida, Massachusetts and Rhode Island have mandatory public defender systems for trial work.[145] The other states have mandatory or optional provisions for areas with a certain population. For in-

---

[139] Fla. Stat. Ann. § 27.52 (Supp. 1963). *Accord,* Ind. Ann. Stat. § 9-3501 (Repl. vol. 1963).

[140] Fla. Stat. Ann. § 27.56 (Supp. 1963).

[141] Fla. Stat. Ann. § 27.51 (Supp. 1963).

[142] Cal. Gov't. Code § 27705. See explanation Note, 13 Stan. L. Rev. 522 (1961).

[143] Ore. Rev. Stat. § 138.740(5) (Cum. supp. 1963).

[144] Cal. Gov't. Code § 27700; Colo. Rev. Stat. § 39-21-2 (1963).

[145] Conn. Gen. Stat. Ann. § 54-80 (Supp. 1963); Del. Code Ann. tit. 29, § 2602 (Supp. 1964); Fla. Stat. Ann. § 27.50 (Supp. 1963); Mass. Gen. Laws Ann. ch. 221, § 34D (Supp. 1964); R.I. Gen. Laws Ann. § 12-15-3 (1956).

stance any county in Illinois with over 35,000 persons has a mandatory public defender.[146] Any Indiana county with a population ranging from 110,000 to 175,000 may establish a public defender office.[147] Only counties with more than 240,000 people are eligible in Minnesota,[147a] while in Nebraska a county with more than 200,000 inhabitants has a mandatory public defender.[148] Less populous Nebraska counties may employ the system.[149] The public defender in Oregon is a statewide officer who does not handle trial work.[150] The Virginia statute provides for a public defender in cities with a population of 100,000 to 160,000 and in any county having between 57,000 and 65,000 population which adjoins a city having a population of 230,000, or in any county with a density of population greater than 4,000 people per square mile.[151] (Virginia's cities are not part of her counties).

A study of the California system reveals that public defenders are employed in extremely rural areas as well as urban centers. The counties of Inyo and Yuba with populations of 11,684 and 33,859, respectively, have part time public defenders.[152] These smaller counties, with part time defenders, face a problem because private practice may vie for their attention. Where his salary is low there is a natural tendency for the defender to slight indigent cases in favor of more lucrative private practice. This need not occur if appropriate salaries are provided and defenders are responsible to some authority, preferably non-political, for their behavior in office.[153]

(10) Cost of Maintaining a System.

Figures are not available for the actual cost of maintaining defender systems in most of the states. This writer has been able to secure a fragmentary financial reports from California, Connecticut, Florida and Massachusetts.

---

146 Ill. Ann. Stat. ch. 34, § 5601 (Smith-Hurd Supp. 1964).
147 Ind. Ann. Stat. § 9-3501 (Repl. vol. 1963).
147a Minn. Stat. Ann. § § 611.12-.13 (Supp. 1964). This includes only two counties.
148 Neb. Rev. Stat. § 29-1804 (Cum. supp. 1963).
149 *Ibid.*
150 Ore. Rev. Stat. § 138.770 (Cum. supp. 1961).
151 Va. Code Ann. § § 19.1-12-13 (Supp. 1964). See, Manson *The Indigent in Virginia*, 51 Va. L. Rev. 163 (1965). Apparently there are no defenders in Virginia.
152 Note, 13 Stan. L. Rev. 522 (1961).
153 Note, 13 Stan. L. Rev. 522 (1961) *passim.*

a. California[154]

Since California has a local (county) option system the figures should prove invaluable in relation to Kentucky because although many of the counties with public defender offices are in huge metropolitan areas, some are in rural counties. Six counteis, fairly representative of the size of Kentucky's judicial districts,[155] are analyzed here. The Stanford study implies that all of these offices, except Sacramento, are part time. It should also be remembered that the average attorney's fee and salary in California is probably higher than in Kentucky.

b. Connecticut

For the fiscal year ending June 30, 1963 public defenders handled 1,310 felony and serious misdemeanor cases in trial court, at a total cost of 63,947 dollars or an average cost of 43.72 dollars per defendant.[156] Public defenders are assigned on a county basis in Connecticut. Three counties with populations of over 650,000 have two public defenders each, with assistants. The remaining five counties, including three with populations of between 68,000 and 88,000, have one public defender, probably a part time officer.

c. Massachusetts

The total budget for all of the activites of the Massachusetts Defender Committee during the 1962-63 fiscal year was 87,742 dollars.[157] This is remarkably low for a commonwealth of over 5,000,000 people. The sum represents the full time salaries of the chief counsel for the entire system, seven attorneys in the Boston office, six part time public defenders operating outside of metropolitan Boston as well as other expenses.[158]

It should be remembered that both Connecticut and Massachusetts are densley populated and small in area as compared to Kentucky.[159]

---

154 The data presented here is taken from a survey published in Note, 13 Stan. L. Rev. 522 (1961).

155 See appednix, table C.

156 Trebach, 47 Am. Jud. Soc'y 170, 175 (1964).

157 Because Massachusetts also permtis assigned counsel it is probable that they are often utilized.

158 Trebach, *supra* note 156, at 174.

159 Florida appropriated $186,250 for the first year of its statewide defender program. Fla. Acts ch. 63-110 (1963).

B. *Compensated Assigned Counsel*

(1) Method of Appointment.

Almost no pertinent state statute prescribes a system of appointing counsel, rather they leave the matter to the discretion of the trial judge wih the resulting unfavorable features suggested in part IV-A. New Jersey, which provides compensation only in capital cases, has a systematic method of naming counsel. Assignment there is made in rotation from an alphabetical list of all the attorneys in the county.[160] With local variations, this is also the *"practice"* in some other jurisdictions.[161] The "New Jersey system" has two possible advantages; equal distribution of the case load and the establishment of machinery to implement early representation. However, if adequate compensation is provided assignment will no longer be a burden on members of the bar. Moreover, the second advantage of the system has not generally been utilized. Furthermore, the disadvantage of appointment from the whole bar has already been pointed out in part IV-A. That is, many lawyers are no match for a skilled prosecutor. On the other hand selective appointment, when compensation is adequate, could be subject to political abuse, especially where judges are elected.[162]

On the positive side, it is true that some judges often appoint the lawyer requested by the indigent defendant. Others often change counsel if the accused is dissatisfied with the first appointee. Also some state statutes provide for the appointment of two lawyers at the discretion of the court.[163] While all of these practices do much to alleviate injustice inherent in such a loose system there is still no written guarantee of *consistent* adequate representation.

The most plausible solution is a selective list of *qualified criminal lawyers* to be called upon in rotation and compensated fairly. Junior members of the bar who are willing could be ap-

[160] Trebach, *A Modern Defender System for New Jersey*, 12 Rutgers L. Rev. 289, 290 (1957).

[161] Kamisar & Choper, 48 Minn. L. Rev. 1, 103 (1963).

[162] The methods of appointment and their usual results have been strongly criticized by several leading commentators. See Beaney, The Right to Counsel in American Courts 200-20 (1955); Brownell, Legal Aid in the United States (1951); Kadish & Kimball, *The Representation of the Indigent in Criminal Cases in Utah*, 4 Utah L. Rev. 198 (1954).

[163] *E.g.*, Ala. Code tit. 15, § 18 (1958).

pointed to aid the chief counsel. Such a system is approved by one commentator, who cautioned that: "it would appear unfair to those few qualified attorneys unless compensation were provided at *a level comparable to fees obtained in private practice.*"[164] (Empahis added.)

Such a system, if properly set up, could also be utilized to provide counsel early in the proceedings.[165]

The possible deficiencies of such a system are twofold: (1) a dearth of competent criminal lawyers in a particular county or judicial district and (2) a lack of qualified lawyers willing to serve as assigned counsel. The latter contingency is not insuperable while the former would doom any system except *possibly* the public defender.

(2) Fees.

The statutory provisions for payment of counsel range from general rules to specific prescriptions covering a multitude of situations. Several states such as Colorado leave the amount of compensation up to the court to set and are otherwise silent except some provide that counsel must present an estimate of his fee.[166] In Vermont the state auditor sets the fee.[167] Other states permit the court to set the fee but provide certain maximum and/or minimum amounts. These amounts vary from 25 dollars to 50 dollars for any case in Arkansas[168] to 1500 dollars for the defense of a capital case in New York.[169] Besides differentiating between the type of case such as Virginia's maximum of 150 dollars in capital cases and serious felonies and 50 dollars for other felonies,[170] some statutes also set different pay scales for work in court and out of court.[171] Oregon varies the fee with the plea or the court in which the case is being heard.[172]

Some state's fees are totally inadequate[173] while others are

---

[164] Note, 107 U. Pa. L. Rev. 812, at 834 (1959).
[165] See part IV-A, *supra.*
[166] Colo. Rev. Stat. Ann. § 39-21-9 (1963).
[167] Vt. Stat. Ann. tit. 13, § 6505 (1958).
[168] Ark. Stat. Ann. § 43-2415 (Repl. vol. 1964).
[169] N.Y. Code Crim. Proc. § 308.
[170] Va. Code Ann. § 14.1-184 (Supp. 1964).
[171] *E.g.,* Minnesota pays a maximum of $50 per day while in court and $25 per day before trial; the court is not limited in amount for appeals. Minn. Stat. Ann. § 611.07 (1964).
[172] Ore. Rev. Stat. § 138.770 (Cum. supp. 1961).
[173] N.D. Cent. Code § 29-01-27 (1960) ($50 maximum per case).

fair.[174] Several of the statutory schemes in this area are subject to criticism. Some provide for little more than nominal payment and so do little to remedy the ills of the uncompensated system. Statutes which fail to differentiate between the lawyer who spends one day on a felony case and pleads his client guilty from an attorney who goes to trial and appeals are likewise subject to abuse, especially if the maximum fee is too low. Certainly some discretion should be given the payor in order to provide for flexibility to meet varying situations, but, the trial judge, the logical payor, is subject to political pressures where elected. If the judge is given discretion to set a fee within statutory limits it is probable that the practice of granting the maximum regardless of performance, will evolve in some districts. It is also possible that when specific provisions are made for payment; per day, in and out of court, at trial and on appeal; the appointee may take advantage of the system and go to trial when his best action would be a compromise with the prosecutor.

The basic criticism of all these statutory provisions is that each is subject to some type of abuse. These suggestions are not a wholesale indictment of the integrity of the bench and bar. No doubt, a statute providing for fair fees within certain limits will be equitably administered within the court's discretion. Nevertheless, one purpose of compensation is adequate representation and any possible abuses of the system which endanger the realization of this purpose should be closely scrutinized.

Those statutes which do not set specific amounts but instead permit the trial court to grant a "reasonable" fee are not perfect either. Three recent cases contesting the amount allowed by the trial court reveal that "reasonable" compensation apparently does not mean "full" compensation. One court summed up the philosophy often attached to compensated assigned counsel systems:

> However, the very fact that our scheme of compensation is couched in indefinite terms rather than precise monetary figures leads us to find an intent that the amount awarded should be somewhat more than a mere token or *honorarium* appearing to be the result in many states, *even though the recompense must be* considerably less than what would be con-

[174] *E.g.*, Ohio Rev. Code Ann § 2941.51 (Page supp. 1964) (no limit in any homicide case; all other felonies $300 maximum).

sidered *full compensation were the accused able to pay.* (Emphasis added.)[175]

It also appears that the courts are permitted to rule whether or not time expended by counsel was necessary.[176] All three of these cases involved counsel appointed to defend indigents accused of murder. In *Conway* counsel spent over 800 hours in out of court preparation and thirty-nine days at trial before submitting a bill for 18,486.55 dollars which the trial court disallowed and instead granted 6,500 dollars. On appeal it appeared that appeallant had charged according to a rate one-third less than the standard set by the Wisconsin State Bar Association. The appellate court modified the verdict and allowed 7,620 dollars applying a hindsight test as to what a reasonable amount of time is, as well as rejecting the argument that the fee schedule of the bar association was in anyway determinative of a reasonable fee. The courts in both *Horton* and *Hill* also rejected the fee schedule argument.

Although it is possible that these three opinions, in view of the high amounts requested, are based upon necessity rather than principle, it seems that a double standard such as this is a threat to any system designed to cure the ills of uncompensated assignment. The *Conway* opinion has been criticized as endangering the type of representation an indigent receives.[177] As pointed out before, failure to grant adequate compensation perpetuates the appointment of inexperienced and less competent attorneys as well as frustrating adequate preparation.[178]

(3) Expenses.

Some states specifically permit remuneration of counsel for the expenses he suffers in presenting a defense.[179] In addition many other states provide for fees without statutory limit, and presumably such statutes can be interpreted to allow reimbursement of reasonable out of pocket expenses.[180] Georgia and New York allow expenses only in capital cases.[181] The New York statute speci-

---

[175] State v. Horton, 34 N.J. 518, 170 A.2d 1, at 8 (1961). *Accord,* Hill v. Superior Court, 46 Cal. 2d 169, 293 P.2d 10 (1956).

[176] See Conway v. Saulk County, 19 Wis. 2d 599, 120 N.W.2d 671 (1963).

[177] 1964 Wis. L. Rev. 507 (1964).

[178] See *e.g.,* Mass, *Public Defenders,* 46 J. Crim. L. C. & P. S. 199 (1955).

[179] *E.g.,* Kans. Stat. Ann. § 62-1304 (1964). See also statutes referred to in note 59 *supra* for Minnesota, New Hampshire, Ohio and Wisconsin.

[180] *E.g.,* Mont. Rev. Codes Ann. § 94-6513 (Supp. 1963).

[181] Ga. Code Ann. § 27-3002 (Supp. 1963); N.Y. Code Crim. Proc. § 308.

fically allows fees for expert witnesses.[182] It is possible that statutes providing only for "expenses" could be read to include experts' fees. Other states make no provision beyond the limited fees prescribed by statute, and in general these are not adequate to cover a thorough independent investigation or to hire an expert witness.

The importance of financial resources available to assigned counsel for pre-trial investigation were underscored in parts III and IV-A. Any system omitting a provision for this is incomplete.[183]

---

[182] N.Y. Code Crim. Proc. § 308.

[183] It would seem that the recent cases involving "right to counsel" and and "equal protection of the laws" could logically be extended to encompass things other than counsel necessary to a defendant to get a complete hearing. Such things as scientific evidence; handwriting experts; medical experts; psychiatric experts; ballistic experts, etc., may be used to the advantage of the accused as well as the state. See Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L. Rev. 1054 (1963). The new Federal Criminal Justice Act states that an indigent criminal defendant "unable to obtain investigative, expert or other services necessary to an adequate defense in his case may request them in an ex parte application." 18 U.S.C. § 3006(A)(Supp. 1964). Although the extreme view that places this type of aid in the category of a constitutional guarantee has never specifically received endorsement by the courts one state official has recognized the right. 1958-59 Va. Op. Atty. Gen. 97 (Nov. 3, 1958); 1963 Va. Op. Atty. Gen. 93 (June 30, 1964). The Supreme Court declined to rule on the question in 1963 when the Texas Assistant Attorney-General conceded on oral argument that denying the indigent petitioner the right to an independent psychiatrist provided by the state, was possibly prejudicial. The Court remanded in light of this concession without deciding the issue. Bush v. Texas, 372 U.S. 586 (1963). One commentator thinks that our legal system "simply hasn't evolved" far enough to make this a constitutional right. The Rationing of Justice 137 (1964). Although the question may remain open for years the recent decision of the Court in Draper v. Washington, 372 U.S. 487 (1963), while dealing only with the narrower question of an indigent's right to a free transcript, could be read to imply such a broad constitutional right as suggested here exists. Two earlier federal cases refused appointment of a psychiatrist and a tax accountant to aid an indigent defendant. United States v. Brodson, 241 F.2d 107 (7th Cir. 1957); United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951). However, on a later habeas corpus petition the *Bush* case held that the denial of any psychiatric testimony (either for or against the defendant) is a denial of counsel and fair trial when sanity is an issue. Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964). Of course these three cases can be squared by saying that as long as an impartial expert testifies on an issue substantially determinative of the case constitutional guarantees have been met. However, United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963) stands for a broader interpretation of the right to "effective assistance of counsel." "An essential ingredient to an attorney effectively representing a defendant in a criminal case . . . is the funds to pay necessary and essential expenses of interviewing the material witnesses and in viewing the scene of the alleged crime." *Id.* at 423. Even accepting the principle espoused by those who seek to include "extras" as part of the sixth amendment right to counsel it is difficult to ascertain just how far this right will extend. *Compare*, Washington v. Clemmer, 339 F.2d 715, *with*, Adams v. United States, 337 F.2d 549 (D.C. Cir. 1964). These cases, heard by the same court in the same year, involved the right to aid in addition of counsel. In the *Washington* case a person placed in jail after a preliminary hearing found "probable cause" to hold him was ordered released because the committing magistrate denied his request for a court appointed stenographer to

(Continued on next page)

Generally statutes providing for payment of expenses set up a procedure of application to the court for payment in accordance with an itemized statement of costs. Usually the only limit is "reasonable expenses" although two states set a maximum.[184]

(4) Cost.

The California system provides a good yardstick to compare the costs of public defender and compensated assigned counsel systems. California leaves the choice of system and amount of compensation to each county. Solano County, population 143,597, has an assigned counsel system while Marin County, population 146,820, has a public defender office. During the 1959-60 fiscal year 134 felonies were committed in Solano and 133 in Marin. The budgets of the counties for their respective systems were; Solano—16,000 dollars, Marin—13,528 dollars.[185] While these figures do not reveal the actual cost per case tried or appealed they at least indicate that a public defender office can be operated more cheaply than an assigned counsel system.

C. *Private Defenders*

The experience in the District of Columbia in which a system of public defenders supplemented by assigned counsel has

---

(Footnote continued from preceding page)

record the testimony at the preliminary hearing. In the *Adams* case petitioner was seeking review of the district court's denial of his request for postconviction relief based on the trial court's refusal to either appoint an independent psychiatrist or to have him committed for observation in order to effectively urge his defense of insanity. The majority refused to even hear the case on appeal. However, Chief Judge Bazelon registered a dissent stating, "There is increasing recognition that distinctions worked by wealth have no place in the administration of justice. It may be, of course, that at some point the Government may refuse further assistance to an indigent making claims on its resources, as, perhaps, when his claim is patently frivolous, or is revealed to be without substantial merit after preliminary relevant inquiry. But . . . judicial failure to order an adequate inquiry into Adams' mental condition may have been as serious a denial of constitutional rights as a refusal to appoint counsel." 337 F.2d at 549 (footnotes omitted. See generally Simone & Richardson, *The Indigent and His Right to Legal Assistance in Criminal Cases*, 8 St. Louis U.L.J. 15 (1963); Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U.Pa.L.Rev. 1061 (1962); Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93 (1953); Cross, *The Assistance of Counsel for His Defense: Is this Becoming a Meaningless Guarantee*, 38 A.B.A.J. 995 (1952); Note, *Aid for Indigent Defendant's in Federal Courts*, 52 Calif. L. Rev. 832 (1958). In conclusion it is suggested that aid in addition to counsel is not only desirable but possibly a constitutional requirement and should be provided for in any new comprehensive legislation dealing with the right to counsel for indigent defendants.

[184] Ga. Code Ann. § 27-3001 (Supp. 1963) ($500); Kan. Stat. Ann. § 62-1304 (1964) ($300 including fee).

[185] Note, 13 Stan. L. Rev. 522, 563 (1961).

> been in operation for four years has been good. Our public defender organization is not responsible either to the office of the Attorney General or to the courts. The judges choose eight trustees from the private bar. These trustees supervise the operation of the Agency and report annually to the Congress, to the Department of Justice and to Criminal Courts. The Agency handles approximately 50% of the criminals represented by assigned counsel. The expenses by the assigned counsel are reimbursed by the agency. The agency maintains investigators for the use of the assigned counsel. Thus far the system has worked very well.[186]

The unique system in Washington, D. C. is financed by the federal government, yet it still relies to a great extent on assigned counsel. Voluntary defender organizations financed through charity generally afford less than comprehensive representation and are not suited to rural areas.[187]

VI. CONCLUSION: A PROPOSAL

The foregoing survey and analysis lead to two inescapable conclusions: (1) the right to counsel area is a burgeoning field of constitutional law; (2) the systems implemented elsewhere to meet constitutional minimums as well as practical difficulties are diverse. With this in mind a comprehensive system to meet the challenge is suggested for Kentucky. This proposal is an attempt to borrow the best parts of other systems and suggestions and to apply them to the particular problems posed in Kentucky.[188]

The proposed legislation fits the mold of neither the public or private defender. It rejects paid assigned counsel programs as inadequate stop-gaps.

The system would be set up by statute in broad terms which would leave most of the policy and rule making to a private com-

---

[186] Letter from A. Kenneth Pye, Associate Dean, Georgetown University Law Center to George T. Rabe, Assistant Attorney General of Kentucky, July 9, 1964.

[187] Pollack, 45 Minn. L. Rev. 737 (1961).

[188] It should be noted that the following proposal was conceived by the author with much assistance and encouragement from the Attorney General and members of his staff. A somewhat similar proposal by Arnold Trebach, one of the most respected authorities in this area, later came to the author's attention. Trebach, *A Proposed Defender System for New Jersey*, 12 Rutgers L. Rev. 289 (1957). The two proposals, aside from differences dictated by the problems peculiar to the states for which they are suggested, are somewhat similar. The author is pleased with the similarities and no doubt would have adopted them sooner had he read the Trebach article. Nevertheless, he bows in deference to Mr. Trebach in all suggestions in which the latter has pre-empted him.

mittee incorporated as a non-profit organization and granted certain specific statutory power. It is felt that the existence of a non-governmental governing body armed with sufficient power and funds will be more acceptable to those who distrust government intervention in the area. It certainly will eliminate most political considerations and objections.

The statute is drafted to permit the defender committee to appoint a defender for every judicial circuit. It does not dictate salary and other details. Instead the committee is free to assay the requirements and peculiarities of each judicial circuit and to contract on an individual basis with the attorney it chooses to be the defender. It is submitted that such latitude will permit an arrangement suited to the needs of the area with size, population, crime rate and other variables taken into consideration.

The statute further provides for the committee to set policy concerning how soon after arrest representation will begin. It also permits representation in post-conviction remedy proceedings[189] and other non-criminal matters which the committee may approve. Representation in most misdemeanor cases is also urged upon the General Assembly.[190] All appellate litigation would be conducted

---

[189] See Smith v. Bennett, 365 U.S. 708 (1961). See also Lane v. Brown, 372 U.S. 768 (1963).

[190] This provision would permit the defender to represent indigents in all misdemeanors except in cases where the fine is not limited to twenty dollars by statute or where a city ordinance has been breached. See KRS 25.010, 26.010 (1963). There is growing ferment to the affect that the sixth amendment guarantee applies to misdemeanor offenses. This has been held to be the rule in federal misdemeanors triable in the district court. Evans v. Rives, 126 F.2d 633 (D.C Cir. 1942). The Supreme Court has said in dictum: "By virtue of the [sixth amendment] . . . counsel must be furnished to an indigent defendant prosecuted in a federal court in every case. . . ." Foster v. Illinois, 332 U.S. 134, 136-37 (1947). A recent federal case has applied this principle to state courts in a rather serious misdemeanor case involving a $500 fine and ninety days in jail. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). One accused of crime has the right to the assistance of counsel before entering a plea because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as an accused felon. *Id.* at 269. At least twenty-one states require that counsel be assigned in "all" criminal cases. Simone & Richardson, *The Indigent & His Right to Legal Assistance in Criminal Cases,* 8 St. Louis U.L.J. 15, 49-50 (1963). This permits assignment in misdemeanor cases if so interpreted. *E.g., In re* Newbern, 53 Cal. 2d 786, 790, 350 P.2d 116, 119 (1960). However, it seems that even in California this right is mainly observed in its denial. Note, 13 Stan. L. Rev. 522, 523-25 (1961). Some states not only specifically provide for appointed counsel in misdemeanor cases but pay them as well. *E.g.,* W. Va. Code Ann, § 6190 (1961). In view of the recent counsel cases it seems best to make provision for representation of misdemeanants. See generally Note, *Right to Counsel in Misdemeanor Cases,* 48 Calif. L. Rev. 501 (1961).

through a single-separate office on the theory that appellate advocacy is a specialty separate from trial advocacy.

Provisions are also made for the borderline indigent who may have some, but not enough, funds. Here representation can be shared with a private attorney.

The system would be supported in part by appropriations by the General Assembly as well as charitable contributions. It is quite possible that funds for a pilot program of this nature would be supplied by National Legal Aid and Defenders Association which has used part of its 4.3 million dollar grant from the Ford Foundation to encourage such projects.[191]

Such a system would not abolish the admirable practice of attorneys devoting free time to defend indigents. It would encourage it. At the same time, however, only competent attorneys would be chosen and then only upon volunteering.

In short, the proposed statute is flexible enough to meet constitutional changes while at the same time providing a workable program. If nothing else it is hoped that this suggestion will prickle the ears of the legal profession in Kentucky and rally support to a movement which will: "[R]easses and change Kentucky's archaic system of assigning lawyers without compensation to represent indigent criminal defendants.[192]

VII. PROPOSED KENTUCKY DEFENDER ACT

1. *Kentucky Defender Committee.* There shall be a Kentucky Defender Committee consisting of the judges of the Court of Appeals, the deans of the law schools of the Commonwealth and a representative of the state bar association. The Chief Justice shall serve as chairman.

2. *Duties.* It shall be the primary duty of the committee to provide legal counsel at every stage of the proceedings against criminal defendants unable to do so themselves. In fulfulling this duty the committee shall;

(a) appoint a defender for each judicial district of the Commonwealth;

---

[191] N.L.A.D.A., Guidelines For Adequate Defense Systems 9 (1964).

[192] Matthews, *To Make the Unfee'd Lawyer a Footnote History*, 28 Ky. B.J. 18 (November 1964).

(b) appoint assistant defenders where necessary;

(c) appont an appellate defender and such assistants as he may require;

(d) set the salary of each appointee;

(c) appoint an appellate defender and such assistants as he by each defender office;

(f) make the rules and regulations necessary for the carrying out of the duties of the committee and the defenders.

3. *Powers.* Aside from the duties enumerated in 2 which also include the power to so act, the committee may:

(a) accept gifts, grants and contributions or services from any source, public or private, and may expend the same to acheive the purposes of this Act;

(b) incorporate under the laws of the Commonwealth as a non-profit corporation;

(c) appoint an executive secretary who shall carry out such duties as the committee may authorize;

(d) compensate the executive secretary at a sum not to exceed $ ———— per year and set by the committee;

(e) make proper requests for financial aid from each session of the General Assembly after formulating and presenting an itemized budget;

(f) remove for breach of duty, as spelled out in this Act and any rules or regulations adopted by the committee, any defender or assistant defender; provided that a public hearing may be required by either party to such action;

(g) authorize study into the administration of criminal justice in the Commonwealth.

4. *Defender.* Each judicial district in the Commonwealth shall have a defender.

5. *Qualifications.* Each defender shall be an attorney licensed to practice before the Court of Appeals and shall have practiced law for at least —— years in the Commonwealth. The committee may set up any other uniform qualifications which it deems necessary;

6. *Assistants.* Each assistant defender shall be an attorney licensed to practice before the Court of Appeals. The committee may set up any other uniform qualifications which it deems necessary.

7. *Appointment.* The defender for each district and his assistants shall be appointed by the committee upon the committee's own motion or the recommendation of the organized bar of the district. The appointment is for four years subject to removal for cause as outlined in 3 (f).

8. *Appellate Defender.* There shall be one appellate defender appointed by the committee on the recommendation of the state bar association or the motion of any member of the committee. He shall serve for four years subject to removal for cause as outlined in 3 (f).

9. *Regulations.* All provisions of this Act concerning defenders are equally applicable to the appellate defender.

10. *Nonpartisan Office.* The political persuasion of any applicant for the office of defender, appellate defender or assistant or anyone already holding such office shall in no way influence his appointment, re-appointment, salary, expenses or removal.

11. *Duties of the Defender.* It shall be the duty of a defender to represent any person arrested and charged with a crime over which the circuit court of his judicial district has exclusive or concurrent jurisdiction, as the committee may direct or when the defender deems it necessary in the interests of justice to represent the person charged, if:

(a) the defendant so requests; or

(b) the circuit court, on its own motion or otherwise, so orders and the defendant does not affirmatively and intelligently reject the opportunity to be so represented; and the defendant meets the requirements of this Act concerning inability to retain private counsel.

12. *Duties of Appellate Defender.* It shall be the duty of the appellate defender to represent persons convicted of a crime by the Commonwealth and seeking review of their case by the Court of Appeals if the person so desires and otherwise meets the require-

ments concerning the inability to retain private counsel as spelled out in this Act.

13. *Financial Report.* Every person who seeks the services of the defender for trial under this Act must at or before arraignment submit a financial statement under oath, setting forth his current assets and liabilties, source or sources of income and names of persons able to support him or her or from whom he or she is entitled to support.

14. *Confidential.* The financial statement shall be confidential and shall be used only in connection with the determination of the individual's financial worth insofar as it affects his or her eligibility for representation by the defender.

15. *Trial Judge.* In following the dictates of 13, the trial judge, upon arraignment, should determine whether an unrepresented person seeks the aid of the defender and if such aid is sought, a continuance to enable the preparation of the financial statement should be granted if necessary.

16. *Eligibility for Assistance.* If after submission of the financial statement and the conclusion of any independent investigation into the claimant's financial situation it is concluded that the claimant is a pauper, he shall continue to be represented by the defender without charge. In the event the claimant is not a pauper but does lack sufficient funds or means to carry on an adequate defense, the defender may defend him on the condition that the claimant shall pay to the committee so much as the Court and the defender deem advisable.

Or in the same situation last mentioned, the defender may advise the defendant to retain counsel of his own choosing to aid the defender in conducting the defense, said private counsel to be paid whatever sum agreed to by the partially needy person, and said private counsel to contribute to the case so much time as the agreed upon fee permits, subject to the approval of the defender.

17. *When Not Eligible.* When from the financial report and investigation it appears that the defendant can afford to retain private counsel exclusively, he should be so advised by the Court; and the defender shall not continue to represent such a person unless further investigation reveals a need to do so.

18. *Right to Representation After Arrest.* The right to representation by the defender shall attach upon arrest or at such time thereafter as the committee shall designate. The lack of a financial affadavit at this point shall not postpone the right to representation. If upon arraignment or thereafter the defendant qualifies for further representation according to the provisions of this Act, he shall be represented by the defender or his assistant at trial, sentencing, appeal and post conviction proceedings. Provided further that anyone represented by the defender prior to the determination of his eligibility for such representation who fails to qualify for such representation shall pay a fee designated by the committee for the services rendered by the defender. Nothing in this Act should be construed to grant an absolute right to counsel the denial of which, without resulting prejudice, would be grounds for reversal.

19. *Loyalty to Defendant.* It shall be the primary duty of each defender and assistant to represent needy criminal defendants assigned them, to the utmost of their particular abilities and in conformity with the Canons of Ethics of the American Bar Association to the same extent that any lawyer is duty bound to represent his client.

20. *Expenses.* Each defender shall keep an itemized record of clerical, investigatory and other expenses incurred during each term of Court in the fulfillment of his office and shall have the same certified as legitimate and reasonable by the judge of the district in which he practices and forwarded to the committee for approval and payment. Refusal by the judge to certify these expenses shall entitle the defender to a hearing before the committee to determine the reasonableness of the claimed expenditure.

21. *Office Space-Clerical Help.* It shall be determined by the committee whether to provide office space, clerical help and miscellaneous necessities for any part-time defender;

(a) on a pro rata basis depending on the amount of time the particular defender spends in private law practice; or

(b) as an expense directly and wholly incurred by the committee if the defender is full-time; or

(c) by making adjustments in the defender's annual salary.

22. *Full-Time Defender.* Any defender being paid an annual salary in excess of $ ———, exclusive of expense allowances, is a full-time defender and may not practice law except in accordance with the provisions of this Act.

23. *Part-Time Defenders.* Any defender being paid an annual salary less than $ ———, exclusive of expense allowances is a part-time defender and may not practice criminal law except in accordance with the provisions of this Act.

24. *No Fees.* In no event may a defender or an assistant demand or accept any payment, monetary or otherwise, from anyone, except as provided in this Act, for representing one accused of or convicted of a crime in this Commonwealth.

25. *Preference to Duty.* Any defender or assistant defender shall give priority and preference to his duties under the provisions of this Act. In no case is a defender or his assistant permitted to practice any form of criminal law except in carrying out the duties of his office. The practice of civil law may be carried on insofar as the committee permits by: uniform regulation for full-time defenders; agreement with part-time defenders and assistants. In no case, however, should the private practice of law interfere with or prevent the performance of the office.

26. *Local Help.* Nothing in this Act shall be construed so as to discourage local bar associations or private practicioners from offering voluntary aid and assistance to the committee and the local defender. It is the policy of the Commonwealth to promote a system of fair representation to all criminal defendants in the manner best suited, in the judgement of the committee, to the particular judicial district.

27. *Name of Act.* The foregoing sections (1-26) shall be known as the Kentucky Defender Act.

APPENDIX

*Table A**

County & Population	Salary	Expenses	No. of Cases Per Year[a]	Per Case Approx. Cost
Marin (164,000)				
Public Defender	$7,356 - $8,520	$1,200	220	$51
Deputy	$4,080 - $5,100			
Merced (90,446)	$3,900	$6,584[b]	120	$87
Tulare (168,403)		No	330	$25[c]
Public Defender	$5,400	Figures		
Deputy	$3,000			
Yolo (65,727)	$6,480	$ 700	130	$55
Yuba (33,859)	$5,772	$1,200	120	$58
Sacramento (502,778)	$62,127[d]		1,357	$45

a. "Cases" includes all criminal defendants and persons represented in "mental illness" proceedings, except in the Sacramento county which represents the number of felony complaints for the year.

b. Includes full time secretary.

c. This average does not include expenses.

d. Includes the entire budget for one year.

* This table compares the cost of defender systems in California. The six counties are roughly analogous in population to the different judicial circuits in Kentucky.

Table B

Following is the questionnaire sent to all circuit judges in Kentucky handling criminal cases, as well as a compilation of the results as of July 27, 1964. Twenty-four of the fifty judges had answered at that time. It should be noted that several questions call for percentages. These answers are not exact because of the lack of records in such areas. Moreover, the results of several questions calling for general non-uniform answers are not compiled because of space limitations.

1. What is the percentage of criminal defendants who come before you claiming indigency and requesting appointed counsel?

(a) 0–20% 4 (b) 21–40% 4 (c) 41–60% 6
(d) 61–80% 9 (e) 81–100% 1

2. What is the percentage of criminal defendants who come before you and waive their right to counsel?

(a) 0–20% 14 (b) 21–40% 1 (c) 41–60% 1
(d) 61–80% —— (e) 81–100% —— None 8

3. In what percentage of the cases in which defendant has waived counsel has it later seemed that there were sufficient grounds for a defense to have made representation valuable?

(a) 0– 5% 14 (b) 6–10% 1 (c) 11–15% ——
(d) 16–20% —— (e) More ——— None 9

4. When counsel is requested by an indigent criminal defendant, what method do you employ in choosing the appointee? (Please explain in detail giving how lists are compiled; whether choice is in order or random; whether you or someone else makes the choice; whether one or more attorneys are chosen for particular cases.)

None–1
Atty'n available–6
List of Cr.L. at random–3
Order (Cr. Lawyers)–1
No answer–1
Younger Atty'n–2
Order (entire bar)–7
From list (Acc. to cases not order)–3

5. At what time will an indigent's request for appointed counsel be honored?

(a) on arrest? —— (b) before examining trial? ——— (c) at examining trial? —— (d) before indictment by grand jury? ——
(e) after indictment by grand jury? —— (f) at arraignment? ——

6. If your answer to 5 was (e) or (f), how much time does counsel have to interview his client before arraignment? ————————.

None–2
Whatever necessary–15
On request 24 Hrs–1%
1 Week–2
30 Minutes–1
No answer–3

7. In appointing counsel, to what segments of the bar, if any, are your assignments limited?

None–16
Experienced in type of case–1
Younger 2/3's of bar–1
Criminal Experience–4
Younger if possible–2

8. Is this segment so small as to place a serious burden upon its members?

No–15
Yes–4
No answer–5

9. To what degree is there difficulty in obtaining counsel for all indigents who request it?

(a) substantial difficulty–2 (b) some difficulty–2
(c) very little difficulty–20

10. Do you compel lawyers, who refuse or object to assignment without a bona fide reason, to serve? Yes ——— No ———

11. For what types of cases is it especially difficult to obtain counsel?

12. (A) Are only lawyers wtih criminal experience assigned?
Yes—14 No—10

(B) Are only lawyers with trial experience assigned? Yes—10 No—5

(C) What other limitations do you place on the group from which counsel is chosen?

None—24

(D) Are the lawyers assigned often younger and less experienced than the prosecutor?

Yes—13 No—11

(E) In what types of cases do you attempt to obtain more experienced counsel?

Capital cases—10
Serious cases—10
None—1

(F) In general, do you consider the experience of assigned counsel
(1)more than adequate—4 (2) adequate—18 (3) inadequate—2
(4) seriously inadequate ———

13.How do you determine the verity of a plea of indigency?

Open Ct. Exam—11
On claim—7
Extra-jud. Exam—6

14. Explain any investigations in connection with this?

Bond—1
None—19
Lawyer App't—2
Other—2

15. (A) Do you think the system is being abused by persons not actually indigent?

Yes—20 No—4

(B) If yes, to what extent?

16. To what extent would you say the defense is hampered by the unavailability of funds for investigation?

(a) substantially—9 (b) slightly—14 (c) not at all—1

17. Does the prosecution make available records in order to ameliorate the lack of funds for defense investigation?

Yes—23 No—1

18. Is there any way the defense can use the prosecution's investigatory facilities?

Yes—10 No—14

19. In each of the following respects, please compare the performance of assigned counsel with that of retained counsel.

(a) Frequency of guilty pleas. More—14 Equal—10 Fewer ——

(b) Skill in challenging the admission of objectionable evidence.

Greater —— Equal—20 Less—4

(c) Skill in protecting the record for appeal. Greater ——

Equal—17 Less—7

(d) Assistance in achieving the proper disposition of a case fater conviction.

Greater—2 Equal—11 Less—11

20. What general comment would you have on the quality of representation provided by assigned counsel?

21. How frequently is a particular lawyer assigned to defend an indigent?

3 - 10 Years—1	Depends—9
Once a term for trial—2	1 - 4 Years—10
Each case (one co.)—1	Often—1

22. In your estimation, in what percentage of cases does the assigned counsel spend in out of court preparation?

zero to three hours ..... 56.5 —approx.
three to twelve hours ..... 32.33—approx.
more than twelve hours ..... 13 —approx.

23. In general how adequate is assigned counsel's preparation?

Very adequate—14 Inadequate—4 Seriously inadequate—0

No opinion—1

24. Do you feel that the out-of-pocket expenses assigned counsel must bear are a (12) trivial burden, (10) burdensome, or (2) highly burdensome?

25. What is the general reaction of attorneys when assigned to an indigent defendant?

Displeased—4 Neutral—15 Pleased—4

No answer—1

26. How many criminal actions do you hear a year in each county (name county and give amount) of your circuit?

See Chart.

27. For what kind of charges will you appoint counsel for indigents?
Felonies that go to trial–11
Felonies & Mis. (High)–11
On request–2

28. Do you ever appoint counsel in non-criminal matters? (Please explain)
No–19
Dom. Rel.–2
Mental–3

29. Taking into consideration the local problems in your circuit, which if any of the following systems do you think preferable to the court appointed or designated counsel method?

(A) A full or part-time paid public deefnder for the county–4*

(B) A paid public defender for the entire circuit–5*

(C) Appointed counsel remunerated according to a fee set by law–16*

(D) A private volunteer defender association supported in whole or in part by public funds–1*

* Answers of and/or A&C, B&C, C&D

Table C

Judicial Districts in Kentucky
(Based on 1960 Census)

Circuit	Crimes*	Comprised of (Counties)	Population of Circuit	Area (Sq. Miles)
1	364	Ballard, Carlisle, Fulton, Graves, Hickman	61,792	1,226
2	272	McCracken	57,306	239
3	557	Christian, Lyon, Trigg	71,698	1,430
4	494	Caldwell, Crittenden, Hopkins	60,179	1,259
5	238	Henderson, Union, Webster	62,300	1,104
6	325	Daviess	70,588	478
7	242	Logan, Todd	32,260	1,010
8	490	Warren	45,491	530
9	90	Hardin	67,798	606
10	280	Bullitt, Hart, Larue, Nelson	62,359	1,437
11	221	Green, Marion, Washington, Taylor	55,489	1,202

Circuit	Crimes*	Comprised of (Counties)	Population of Circuit	Area (Sq. Miles)
12	378	Anderson, Henry, Oldham, Shelby, Spencer, Trimble	62,268	1,451
13	228	Boyle, Garrard, Lincoln, Mercer	62,103	1,014
14	200	Bourbon, Scott, Woodford	45,467	738
15	218	Boone, Carroll, Gallatin, Owen, Grant	51,411	1,123
16	196	Kenton	120,700	163
17	599	Campbell	86,803	145
18	146	Harrison, Nicholas,		
19	84	Bracken, Fleming, Mason	36,766	756
20	101	Greenup, Lewis	42,353	837
21	251	Bath, Menifee, Roman, Montgomery	39,659	943
22	809	Fayette	131,906	269
23	310	Estill, Lee, Owsley	25,255	669
24	596	Johnson, Lawrence, Martin	42,083	917
25	446	Clark, Jessamine, Madison	68,172	883
26	242	Harlan	51,107	478
27	502	Knox, Laurel	50,159	803
28	354	Pulaski, Rockcastel	46,737	938
29	446	Adair, Casey, Cumberland,		
30	3,006	Jefferson (2 criminal branches)	610,947	387
31	327	Floyd	41,642	399
32	218	Boyd	52,163	159
33	220	Perry	34,961	335
34	802	McCreary, Whitley	38,278	848
35	682	Pike	68,264	779
36	407	Knott, Magoffin	28,518	650
37	337	Carter, Elliott, Morgan	38,203	1,045
38	261	Butler, Edmonson, Ohio, Hancock	40,676	1,502
39	329	Breathitt, Powell, Wolfe	28,698	894
40	478	Clinton, Russell, Wayne	44,662	1,030
41	649	Clay, Jackson, Leslie	42,466	1,184
42	180	Calloway, Livingston, Marshall	44,700	1,131

Circuit	Crimes*	Comprised of (Counties)	Population of Circuit	Area (Sq. Miles)
43	271	Barren, Metcalf	36,670	788
44	333	Bell	35,336	384
45	119	McLean, Muhlenberg	37,146	725
46	150	Breckinridge, Meade, Grayson	49,506	1,366
47	159	Letcher	30,102	355
48	133	Franklin	29,421	199
49	111	Allen, Simpson	23,817	610

* According to Report to Judicial Council, Court Docket of Circuit Courts July 1, 1962 - July 1, 1963. (Criminal Docket including cases pending first day of quarter, cases commenced during the year and changes of venue.)

KENTUCKY LAW JOURNAL

Volume 54 | Spring, 1966 | Number 3

The *Kentucky Law Journal* is published in Fall, Winter, Spring, and Summer by the College of Law, University of Kentucky, Lexington. Second class postage paid at Lexington, Kentucky 40506.

Communications of either an editorial or a business nature should be addressed to *Kentucky Law Journal*, University of Kentucky, Lexington, Kentucky.

The purpose of the *Kentucky Law Journal* is to publish contributions of interest and value to the legal profession, but the views expressed in such contributions do not necessarily represent those of the *Journal*.

The *Journal* is a charter member of the Southern Law Review Conference and the National Conference of Law Reviews.

Subscription price: $5.00 per year $2.00 per number