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SMU Law Review

Volume 19 | Issue 3

Article 6

1965

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Recommended Citation

Carl W. McKinzie, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases*, 19 Sw L.J. 593 (1965)
<https://scholar.smu.edu/smulr/vol19/iss3/6>

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THE INDIGENT DEFENDANT'S RIGHT TO COUNSEL IN MISDEMEANOR CASES

by Carl W. McKinzie

I. INTRODUCTION

The need for counsel in a criminal case was clearly expressed by Mr. Justice Sutherland in *Powell v. Alabama* when he stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹

The need to be represented by counsel is, however, to be distinguished from the *right* to be so represented.

A defendant's right to be represented by counsel in criminal proceedings has been in issue at common law for centuries.² Development of this right has been gradual. Recently, however, major strides have been made in its evolution. The sixth amendment's guarantee³ of the right to counsel "in all criminal prosecutions" definitely establishes that this right exists in the United States. Interpretation of this guarantee has left many constitutional questions unanswered. When does the right to counsel begin? When does it end? Does it apply only to felonies or is it also applicable to misdemeanors? If applicable to misdemeanors, will it encompass all misdemeanors or only the more serious ones?

It is the purpose of this comment to examine one phase of the constitutional problem: the right of the indigent defendant to court-appointed counsel in a misdemeanor case. An attempt will be made to trace the development of the right to counsel in misdemeanor cases through both federal and state courts, to analyze the decisions,

¹ 287 U.S. 45, 68-69 (1932).

² IV BLACKSTONE, COMMENTARIES 354-55 (1807).

³ U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

and to draw conclusions about their application. It is important to the development of this topic, however, to first study the evolution of the right to counsel in felony cases.

II. FELONY CASES

A. *English Common Law*⁴

In early England, a defendant charged with a felony or treason was denied the aid of counsel, except as to legal questions which the defendant himself might suggest. The practice of English judges, however, was to permit counsel to confer with a defendant as to the conduct of the defendant's case, and to represent him in collateral matters and with regard to questions of law arising at the trial. At the same time, parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel.⁵

A statute passed in 1695⁶ permitted one accused of treason the privilege of being heard by counsel, but the rule forbidding the participation of counsel on indictments for felony stood until 1836.⁷ Much controversy apparently existed prior to passage of the statute in 1836 concerning a rule which permitted the aid of counsel in petty offenses, but denied this aid in "crimes of the gravest character."⁸

Colonial America was unreceptive to this phase of its English heritage. In at least twelve of the thirteen colonies, the rule of English common law was "definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes. . . ."⁹ The adoption of the sixth amendment, therefore, came at a time when England was just beginning to permit retained counsel in felony cases.

B. *Federal Courts*

Prior to 1938, doubt existed in the United States whether the

⁴ The material presented in this section of the paper is derived from the historical analysis of the Court as presented in *Powell v. Alabama*, 287 U.S. 45 (1932); and in *Betts v. Brady*, 316 U.S. 455 (1942).

⁵ 1 COOLEY, CONSTITUTIONAL LIMITATIONS 698 (8th ed. 1927).

⁶ 7 Wm. III, chap. 3, § 1.

⁷ 6 & 7 Wm. IV, chap. 114, §§ 1 and 2. This statute accorded the right to defend by counsel against summary convictions and charges of felony.

⁸ Blackstone, in 1758, denounced the rule as not in keeping with the humane treatment of prisoners under English law. He stated: "For upon what face of reason can that assistance be denied to have the life of a man, which yet is allowed him in prosecution for every petty trespass?" IV Bl. Com. 355 (1807). Lord Coke defended the rule asserting that the court itself was counsel for the prisoner. 1 COOLEY, *supra* note 5.

⁹ *Powell v. Alabama*, 287 U.S. at 64-65.

"right" to counsel merely insured the defendant's privilege to *retain* counsel in criminal cases, or whether the defendant could also demand that counsel be appointed by the court if he were indigent. In 1938, the Supreme Court in *Johnson v. Zerbst*¹⁰ resolved the conflict, holding that under the sixth amendment the defendant in a federal felony prosecution has a right to court-appointed counsel, unless competently and intelligently waived, if for financial or other reasons he is unable to secure counsel himself.¹¹ The *Johnson v. Zerbst* rule was later interpreted to mean that in federal prosecutions counsel had to be provided "at every step of the proceedings"¹² and that it was not limited to felonies.¹³

The holding of the *Johnson* case is the basis of Rule 44 of the Federal Rules of Criminal Procedure which provides: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."¹⁴ The Criminal Justice Act of 1964,¹⁵ requires each United States district court to institute a plan for furnishing representation for defendants charged with felonies or misdemeanors other than petty offenses. The legislative history of this statute includes the following statement by President Kennedy

¹⁰ 304 U.S. 458 (1938).

¹¹ The Court summarized:

If the accused, however, is not represented by counsel and has not *competently* and *intelligently* waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of the trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not *intelligently* waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus*. 304 U.S. at 468. (Emphasis added.)

¹² *Edwards v. United States*, 139 F.2d 365, 367 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 769 (1944).

The phrase, every step of the proceedings, does not refer to mere lapses of time. It contemplates effective aid of counsel in the preparation and trial of the case. It is true that denial, for a long time, of opportunity for conference and consultation with counsel, might result in a deprivation of the Constitution's guarantee of assistance. Ordinarily this would be manifested in inadequate representation at the preliminary hearing, at the arraignment, during the progress of the trial, or in connection with the filing of notice of appeal, settling the bill of exceptions, designating the record and assigning errors. *Supra* at 367-68.

¹³ See *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942); note 44 *infra* and accompanying text.

¹⁴ FED. R. CRIM. P. 44.

¹⁵ 78 Stat. 552 (1964), as amended, 18 U.S.C. § 3006A (1964).

in his State of the Union address on January 14, 1963: "The right to competent counsel must be assured every man accused of crime in a Federal court regardless of his means."¹⁶ Thus, the constitutional mandate that "the accused shall have the right . . . to have the Assistance of Counsel for his defense" has been recognized and provided for in federal felony cases.

C. State Courts

State constitutions early provided that a defendant in a criminal case should have the right to be represented by counsel *retained* by him.¹⁷ Apparently this was done to prevent the inequity which resulted from the early English practices. *Appointment* of counsel, however, was discretionary with the judge.¹⁸

The Bill of Rights, however, is not directly applicable to state court procedures. Therefore, an attack upon a state statute as being violative of rights guaranteed by the United States Constitution must be predicated on the due process or equal protection clauses of the fourteenth amendment. Considerable controversy currently exists as to whether the same federal standard as contained in the Bill of Rights (*e.g.*, the sixth amendment's right to counsel) is to be applied to the states through the due process clause, or whether the due process standard is broader, thus permitting the states to experiment.¹⁹

In 1932, in *Powell v. Alabama*,²⁰ the Court first applied the due process clause of the fourteenth amendment to the question of the right to counsel in state criminal proceedings. The Court stated:

[I]n a *capital* case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.²¹

Though the holding was based on and clearly limited to the trial

¹⁶ U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess., 2990-91 (1964).

¹⁷ *Powell v. Alabama*, 287 U.S. at 61-64.

¹⁸ BEANY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 25 (1955).

¹⁹ As indicated by Professor Paul A. Freund of the Harvard School of Law at a recent lecture given at Southern Methodist University School of Law (April 15, 1965), reason would seem to prefer a standard permitting the state courts to experiment, but this is apparently not the current trend of Supreme Court decisions. An illustration permitting such experimentation was the federal requirement compelling the federal officer to knock before entering with a search warrant. If the states are held to the same standard, they must also knock; but if allowed to experiment, perhaps they could enter without knocking.

²⁰ 287 U.S. 45 (1932).

²¹ *Id.* at 71. (Emphasis added.)

court's failure to make effective appointment²² of counsel in a capital case, the language of Mr. Justice Sutherland's opinion²³ pointed toward the existence of a right to counsel in noncapital cases.

Ten years later, in *Betts v. Brady*,²⁴ the Court extended the right to appointed counsel to noncapital cases. The Court held that while the "appointment of counsel is not a fundamental right, essential to a fair trial,"²⁵ in special circumstances,²⁶ the absence of counsel may result in a conviction lacking in fundamental fairness. It is only when these special circumstances exist that the denial of the rights guaranteed by a specific provision of the Bill of Rights also would be a denial of due process under the fourteenth amendment. The Court held that no definite criteria could be established as to when the right to appointed counsel arises since the concept of due process is "less rigid and more fluid"²⁷ than the requirements of the first eight amendments. The asserted denial of the right was to be "tested by an appraisal of the totality of facts in a given case."²⁸

Gradual erosions were made on the special circumstance rule of *Betts v. Brady* so that, in time, it became little more than an "incantation to be pronounced by the Court before reversing a state conviction."²⁹ In fact, no denial had been affirmed by the Court since 1950.³⁰ The Court demonstrated increasing sensitivity to the disadvantages imposed on indigent defendants by state procedures for post-conviction relief. Procedures that conditioned habeas corpus relief on payment of a filing fee³¹ or made purchase of a trial record in effect a condition to effective appellate review³² were struck down.

²² The trial court's appointment of the entire local bar and the latter's subsequent inaction was not an effective appointment. *Id.* at 53-57.

²³ See text accompanying note 1 *supra*.

²⁴ 316 U.S. 455 (1942).

²⁵ Mr. Justice Roberts, speaking for the Court, pointed out that the question of appointment of counsel had been settled by legislative policy in different ways in the various states and that at common law there existed no right to appointed counsel. These two facts were used to support the proposition that the "appointment of counsel is not a fundamental right, essential to a fair trial." *Id.* at 471. The Court concluded that "while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.* at 473.

²⁶ The Court used the phrase "certain circumstances." This phrase was termed the "special circumstances rule" and was the constitutional standard in right to counsel cases until the *Gideon* decision.

²⁷ 316 U.S. at 462.

²⁸ *Ibid.*

²⁹ *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 103-04 (1963).

³⁰ See *Hamilton v. Alabama*, 368 U.S. 52 (1961).

³¹ *Smith v. Bennett*, 365 U.S. 708 (1961).

³² *Griffin v. Illinois*, 351 U.S. 12 (1956).

These and similar rulings set the stage for overturning the special circumstances rule altogether.

Twenty-one years after its adoption, a unanimous Court in *Gideon v. Wainwright*³³ expressly overruled the "special circumstance" rule stating:

We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory on the States by the Fourteenth Amendment. We think that the Court in *Betts v. Brady* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.³⁴

Gideon, an indigent, was convicted of a noncapital felony in a Florida court after requesting and being denied appointed counsel. The reversal of *Gideon's* conviction made it mandatory that counsel for indigents be supplied when requested in state criminal proceedings and not merely when special circumstances would make trial without counsel "offensive to the common and fundamental ideas of fairness."³⁵ The effect of *Gideon* may further be to place the federal standards of *Johnson v. Zerbst* upon the state courts.³⁶

In Texas, many judges have been appointing attorneys to represent indigents in felony cases for thirty years.³⁷ This practice was made state law in 1957 when article 494 of the Texas Code of Criminal Procedure³⁸ was enacted. Prior to 1957, appointment of counsel was required only in capital cases and in cases where a guilty plea was entered before the court.³⁹ Texas courts have applied *Gideon*

³³ 372 U.S. 335 (1963).

³⁴ *Id.* at 342.

³⁵ *Betts v. Brady*, 316 U.S. 455, 473 (1942).

³⁶ Mr. Justice Black, speaking for the majority in *Gideon* states: "We have construed this [the sixth amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." 372 U.S. at 339-41.

³⁷ Schieffer, *Lawyers Are for Poor People Too*, 28 TEXAS BAR J. 275 (1965).

³⁸ "Whenever it is made known to the court at an arraignment or any other time that an accused charged with a felony is too poor to employ a counsel, the court shall appoint one (1) or more practicing attorneys to defend him." TEX. CODE CRIM. PROC. art. 494, as amended (1957).

Article 26.04 of the new Texas Criminal Code, effective January 1, 1966, supersedes article 494 and compels the appointment of counsel for indigents charged with misdemeanors punishable by imprisonment as well as for felonies. TEX. CODE CRIM. PROC. art. 26.05, § 3 (1965).

³⁹ Morrison, *Recent Decisions Requiring the Appointment of Counsel at Trial and on Appeal*, 28 TEXAS BAR J. 23, 70 (1965).

retrospectively⁴⁰ to noncapital felony cases tried prior to the enactment of article 494. Apparently the major remaining problem facing the courts in felony cases will be interpreting just when the right to counsel begins, though the problem of when the right to counsel ends may also prove troublesome.⁴¹

III. MISDEMEANOR CASES

A. Federal Courts

Few federal standards are to be found with regard to misdemeanors. Perhaps the most important such standard is the Criminal Justice Act of 1964⁴² which divides public offenses into three categories: (1) felonies, (2) misdemeanors, and (3) petty offenses. The offenses are defined as follows:

Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony. (2) Any other offense is a misdemeanor. (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both is a petty offense.⁴³

The 1964 Act provides for the appointment of counsel in *all* cases other than petty offenses.

1. *Misdemeanors other than Petty Offenses* Though no doubt exists that a defendant accused of any of the three types of offenses has a right to be represented by *retained* counsel, the Supreme Court has never directly held that a right exists to have court-appointed counsel in a misdemeanor case.

The Court of Appeals for the District of Columbia in *Evans v. Rives*⁴⁴ expressly held that the *Johnson v. Zerbst* rule was applicable to misdemeanors, that is, that a federal district court must appoint counsel for an indigent accused of a misdemeanor unless his right is competently and intelligently waived. Evans was sentenced to serve one year under a conviction of the juvenile court for the crime of

⁴⁰ *Ex Parte Davis*, 379 S.W.2d 922 (Tex. Crim. App. 1964); *Ex Parte Hamilton*, 376 S.W.2d 575 (Tex. Crim. App. 1964); *Ex Parte Bushnell*, 375 S.W.2d 720 (Tex. Crim. App. 1964); *Ex Parte Parsons*, 374 S.W.2d 442 (Tex. Crim. App. 1964); *Ex Parte Hope*, 374 S.W.2d 441 (Tex. Crim. App. 1964).

⁴¹ Though the Court of Criminal Appeals has not had an opportunity to interpret *Douglas v. California*, 372 U.S. 353 (1963), fully in an opinion, in *Donaldson v. State*, 372 S.W.2d 339, *Douglas* was cited as requiring the appointment of counsel on appeal. The issue of when the right to counsel ends (*i.e.*, does the right go beyond the first appeal) has not been decided.

⁴² 78 Stat. 552 (1964), as amended, 18 U.S.A. § 3006A (1964).

⁴³ 18 U.S.C. § 1 (1958).

⁴⁴ 126 F.2d 633 (D.C. Cir. 1942).

refusing to provide for support and maintenance of a minor child, a misdemeanor. The defendant pled guilty and was not advised that he could have a lawyer nor that he was waiving his right to counsel. On appeal, the court refused to accept the argument that the charge was not of such a serious nature as to bring into operation the constitutional guarantee of a right to appointed counsel and stated:

No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.⁴⁵

The Criminal Justice Act now makes this point moot as to misdemeanors other than petty offenses. Likewise, Rule 44 of the Federal Rules of Criminal Procedure seems to have been applicable to misdemeanors, and as stated, is now clearly applicable under the Criminal Justice Act of 1964. This is not true, however, with respect to cases involving petty offenses.

2. *Petty Offenses* The right to trial by jury provided by the sixth amendment has been held not to extend to petty offenses⁴⁶ since the guarantee is applicable only to those cases in which the right had been recognized at common law.⁴⁷ It has been argued⁴⁸ that the holding that a jury trial is not required implies that representation by appointed counsel is not a prerequisite to a fair trial in a petty offense case. Although the right to counsel has not paralleled the right to trial by jury, this may well become a persuasive analogy in the eyes of the courts.

The petty federal offense is specifically excluded from the benefits conferred by the Criminal Justice Act of 1964. Not only are funds not provided for court-appointed attorneys, but no duty is placed upon the United States commissioner or the court to advise the de-

⁴⁵ *Id.* at 638.

⁴⁶ *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Schick v. United States*, 195 U.S. 65 (1904). This rule has been recently reaffirmed in *United States v. Barnett*, 376 U.S. 689, 695 (1964). For a thorough treatment of the problem, see Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

⁴⁷ *District of Columbia v. Colts*, 282 U.S. 63 (1930).

⁴⁸ Note, 43 B.U.L. REV. 570, 574 (1963).

fendant that he has the right to be represented by counsel.⁴⁹ This treatment of the petty offender would seem to squarely raise the constitutional issue: if a right to court-appointed counsel exists in a misdemeanor case, does it exist with regard to *all* offenses or merely the more serious misdemeanors? The Fifth Circuit, in a recent case,⁵⁰ applying the due process clause of the fourteenth amendment to a state prosecution in which an indigent defendant had been denied the assistance of counsel, held the state procedure and consequently the maximum ninety-day period of incarceration unconstitutional. If this is to become the standard for state courts under the fourteenth amendment, surely the federal courts must be held to at least as demanding a standard under the sixth amendment. If this be true, the portion of the Criminal Justice Act relating to petty offenses would appear to be unconstitutional if literally applied.

B. State Courts

*Gideon v. Wainwright*⁵¹ has established that an indigent defendant is entitled to be represented by court-appointed counsel in felony cases. This decision leaves unsettled, however, the question of whether it is a violation of due process for a state to deny appointment of counsel in a non-felony case.

Before proceeding further, it should be noted that a definitional problem exists from state to state in the labeling of offenses. Whether or not *Gideon* extends to misdemeanors is really a false question, for what is termed a felony in one state may be labeled a misdemeanor in another.⁵² Compounding the problem created by the felony-misdemeanor classification is the fact that though a crime be labeled as a misdemeanor in all jurisdictions or as a felony in all jurisdictions, the punishment assessed within the classification may vary greatly from jurisdiction to jurisdiction.⁵³

⁴⁹ "In every criminal case in which the defendant is charged with a felony or a misdemeanor, *other than a petty offense*, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel." § 3006A (b). (Emphasis added.)

⁵⁰ *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965). See text accompanying note 83 *infra*.

⁵¹ 372 U.S. 335 (1963).

⁵² For example, adultery, a statutory crime in most jurisdictions, is classed as a felony in some (see, e.g., ARIZ. REV. STAT. ANN. ch. 1, art. 3, § 13-221 (1956)) and as a misdemeanor in others. (See, e.g., KAN. GEN. STAT. ANN. ch. 21, § 907 (Supp. 1963)).

⁵³ Illustrating this is the offense of hazing which is a misdemeanor in both New York and Colorado, yet the penalties which may be assessed are widely divergent. In Colorado, the misdemeanant, may be fined not less than \$5 nor more than \$50; no incarceration whatever is provided for. COLO. REV. STAT. ANN. ch. 40, art. 2, § 38 (1963). In New York, a defendant found guilty of hazing may be fined not less than \$10 nor more than \$100, or imprisoned for not less than thirty days nor more than one year, or both. N.Y. PEN. LAWS § 1030 (1944).

The pre-*Gideon* "special circumstances" test of *Betts v. Brady* seems to have had application in several states to a misdemeanor count when the circumstances proved "offensive to the common and fundamental ideas of fairness."⁵⁴

In 1951, the Supreme Court of Indiana in *Bolkovac v. State*⁵⁵ held that the due process clause of the fourteenth amendment compelled court-appointed counsel in the misdemeanor case before the court. The defendant had been convicted of child neglect, sentenced to a term of 180 days and fined one dollar. The facts indicated that the defendant was an uneducated layman and knew nothing of how to properly conduct his own defense.⁵⁶ Relying on *Gibbs v. Burke*,⁵⁷ the court concluded that "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty. The record in this case evidences petitioner's helplessness, without counsel and without more assistance from the judge in defending himself against this charge"⁵⁸

In 1952, a California court, in *People v. Agnew*,⁵⁹ held that the constitutional rights of the misdemeanant had been violated by the refusal of the trial court to appoint counsel as requested. The misdemeanant was represented at the arraignment, but not at the time of her plea nor at the time of her trial. In holding that this violated due process the court adopted the following language of *Wade v. Mayo*:⁶⁰

There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely

⁵⁴ *Betts v. Brady*, 316 U.S. 455, 473 (1942). Supreme Court decisions prior to *Gideon* gave some indication that the Court would apply the sixth amendment right to appointed counsel in cases other than felonies. Operating under the special circumstances rule of *Betts v. Brady*, the Court in *Foster v. Illinois*, 332 U.S. 134 (1947), stated that "By virtue of the [sixth amendment] . . . counsel *must* be furnished to an indigent defendant prosecuted in a federal court in every case, *whatever the circumstances* . . ." *Id.* at 136-37. (Emphasis added.) A year later, in *Bute v. Illinois*, 333 U.S. 640 (1948), the Court held that "The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment which expressly *requires* that, in *all* criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense." *Id.* at 660. (Emphasis added.)

⁵⁵ 98 N.E.2d 250 (Ind. 1951).

⁵⁶ *Id.* at 252.

⁵⁷ 337 U.S. 773 (1949).

⁵⁸ 98 N.E.2d at 255.

⁵⁹ 250 P.2d 369 (App. Dep't Super. Ct. of Calif. 1952).

⁶⁰ 334 U.S. 672 (1947). The California court also relied upon the language of the United States Supreme Court in *Palmer v. Ashe*, 342 U.S. 134 (1951). "This Court repeatedly has held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in non-capital criminal cases where there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."

personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.⁶¹

Finding the incapacity of the defendant to be patently present, the court reversed the conviction, stating:

It is true, as counsel for the People contend, that none of the cited cases deals with misdemeanors. This, however, does not serve to distinguish them, for the requirement of the Fourteenth Amendment, that no person shall be deprived of liberty or property without due process, applies equally where the deprivation occurs by means of a prosecution on a misdemeanor charge.⁶²

Since the decision in *Gideon*, there has been some indication that the Supreme Court will apply the court-appointed counsel doctrine to misdemeanors. The Court of Appeals of Maryland⁶³ in 1961 affirmed the conviction and the two-year sentence of a misdemeanant charged with being in possession of a concealed weapon.⁶⁴ The trial judge had refused to appoint counsel on the ground that the charges involved were not serious.⁶⁵ The United States Supreme Court granted certiorari, vacated the Maryland decision and remanded the case for "further consideration in light of *Gideon v. Wainwright*."⁶⁶ Upon remand, the Maryland court reversed the conviction and remanded for new trial,⁶⁷ indicating its belief that the *Gideon* decision applies to at least some misdemeanors.

The Texas Court of Criminal Appeals has not reached the same result. It recently faced the misdemeanor problem, but held *Gideon* to be inapplicable. In *Pizzitola v. State*,⁶⁸ the defendant was convicted of aggravated assault, a misdemeanor, and assessed a punishment of ninety days in jail. Article 753 of the Texas Code of Criminal Procedure⁶⁹ provides that "New trials, in cases of felony, shall be granted for the following causes, and for no other: (1) Where the defendant has been . . . denied counsel." Article 754⁷⁰ provides "New trials

⁶¹ 334 U.S. at 684. See also *Uveges v. Pennsylvania*, 335 U.S. 437 (1948).

⁶² 250 P.2d at 371.

⁶³ *Patterson v. State*, 227 Md. 194, 175 A.2d 746 (1961).

⁶⁴ MD. ANN. CODE art. 27, § 36 (Supp. 1964).

⁶⁵ Maryland Rule 723b provided that unless a defendant elects to proceed without counsel the court shall assign counsel in all capital or other serious cases.

⁶⁶ *Patterson v. Warden, Maryland Penitentiary*, 372 U.S. 776 (1963).

⁶⁷ *Patterson v. State*, 231 Md. 509, 191 A.2d 237 (1963).

⁶⁸ 374 S.W.2d 446 (Tex. Crim. App. 1964).

⁶⁹ TEX. CODE CRIM. PROC. art. 753, § 1 (1950).

⁷⁰ TEX. CODE CRIM. PROC. art. 754 (1950). This statute has been substantially changed by art. 40.04 of the new criminal code. Denial of counsel in a misdemeanor case is not a ground for new trial *only* if the maximum punishment which may be assessed is by fine only. See note 110 *infra* and accompanying text.

in misdemeanor cases may be granted for any cause specified in the preceding article, *except* that contained in subdivision one of said article." The court held that under these statutes, the trial court did not err in overruling the motion for new trial based upon lack of counsel, "this being a misdemeanor case."⁷¹ The defendant had argued that *Gideon v. Wainwright* was applicable in this case. In response, the court in overriding defendants motion for rehearing stated, "We do not construe such case [*Gideon*] to embrace the misdemeanor case at bar."⁷² Judge Morrison registered a strong dissent in the case, stating: "I can bring myself to no other conclusion but the appointment of counsel for indigent accused in misdemeanor cases where the possible punishment is confinement in jail is mandatory under the Federal Constitution as interpreted by the Supreme Court of the United States."⁷³

The Fifth Circuit appears to be in complete accord with the dissenting views of Judge Morrison. In *Harvey v. Mississippi*,⁷⁴ a federal court for the first time ruled that an indigent defendant was denied due process of law in a state court if not notified of his right to the assistance of counsel though he be charged with a misdemeanor. Harvey was charged with possession of whiskey, a misdemeanor in Mississippi, punishable by a fine of up to \$500 and up to ninety days in jail.⁷⁵ Harvey "pled guilty"⁷⁶ and received the maximum sentence. He was neither notified of the sentence nor confined in jail until after the statutory time for appeal had expired.⁷⁷ The case reached the Fifth Circuit on writ of habeas corpus.⁷⁸

The court noted that no doubt exists in a felony case that a de-

⁷¹ 374 S.W.2d at 447.

⁷² *Id.* at 448.

⁷³ 374 S.W.2d at 449.

⁷⁴ 340 F.2d 263 (5th Cir. 1965).

⁷⁵ The case has certain racial overtones. Harvey had housed "Civil Rights Workers" who were assisting in registering Negro applicants to vote in the State of Mississippi.

⁷⁶ Harvey went to the home of the justice of the peace one night and entered his plea of guilty in the justice's front yard. Only a fine had been discussed in the case and apparently there was some confusion as to just what Harvey was pleading guilty to.

⁷⁷ Although sentence was imposed on July 23, 1964, the mittimus or order for arrest was not issued until September 4, 1964. Harvey was picked up and put in jail on September 9, 1964.

⁷⁸ An interesting occurrence in the case was that Professor Anthony G. Amsterdam, a professor of law at the University of Pennsylvania, who argued the case before the Fifth Circuit in Harvey's behalf did so without briefs. "Because of the speed with which that habeas corpus appeal had to be processed in order to reach argument before Harvey's sentence had run, the appeal was presented to the Fifth Circuit without briefs." Letter from Professor Amsterdam, to author, April 6, 1965. This presents an interesting problem which is likely to be frequently encountered in misdemeanor cases. Because of the short sentences frequently imposed, the question may become moot before the constitutional issues may be decided by a writ of habeas corpus, but the direct appeal from the conviction will, of course, be open to the defendant.

fendant is entitled to the assistance of counsel when entering a plea in state as well as federal courts.⁷⁹ As to the felony-misdemeanor distinction, the court stated:

It is true that the cases which support appellant's argument [that counsel should have been appointed] all involved felony convictions, but their rationale does not seem to depend on the often purely formal distinction between felonies and misdemeanors. One accused of crime has the right to the assistance of counsel before entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon.⁸⁰

The court then pointed to the federal misdemeanor case, *Evans v. Rives*,⁸¹ holding that the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one, and concluded:

While the rule as thus stated has never been expressly extended to misdemeanor charges in state tribunals, it has been argued that such a principle is implicit in the Supreme Court's decision in *Gideon v. Wainwright*. . . . Be this as it may, the reasoning in *Evans* along with other recent right-to-counsel decisions persuades us that we should apply that rule in the present case. . . . The failure of notice to Harvey of his right to the assistance of counsel invalidated his guilty plea and rendered his conviction and incarceration constitutionally improper.⁸²

This case would appear to have special significance not only because of the ramifications it will have upon Texas law, but also because of the fact that it would have been classified as a petty offense had the case been tried under federal law. *Harvey* may be limited because of the particularly flagrant circumstances involved in the case. A literal reading of the opinion, however, would seem to indicate that the possibility of even a ninety-day jail sentence would be a sufficient deprivation of liberty to run afoul of due process if counsel has not been provided for an indigent defendant. Had *Harvey* been decided prior to the Court of Criminal Appeal's holding in *Pizzitola v. State*, the outcome would seemingly have been different.⁸³

⁷⁹ *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

⁸⁰ 340 F.2d at 269.

⁸¹ 126 F.2d 633 (1942).

⁸² 340 F.2d at 271.

⁸³ A literal reading of *Harvey* would seem to indicate that *Pizzitola's* ninety-day sentence due to a trial without benefit of counsel would be violative of due process. However, as previously mentioned *Harvey* may be limited to its own special facts because of the particularly flagrant circumstances and the racial overtones involved.

IV. ANALYSIS

It would seem clear from the cases previously discussed, especially the Supreme Court's treatment of *Patterson v. State of Maryland*, that the right to counsel extends to at least some misdemeanors.⁸⁴ The Fifth Circuit's interpretation of the constitutional mandate in *Harvey v. Mississippi*⁸⁵ indicates that the right may be broad indeed. Perhaps the basic question involved is whether a line of any sort should be drawn between classes of crimes for the purpose of providing the indigent defendant with representation. If a line is to be drawn at all, the maximum penalty which may be imposed, rather than an artificial and arbitrary classification, should be taken as the frame of reference. These are problems of considerable difficulty which reflect differing views by members of the Court. The sixth amendment language extending the right to assistance of counsel to "all criminal prosecutions" is certainly broad enough to cover all offenses. Perhaps some guidelines may be drawn from *Gideon* itself.

The majority opinion in *Gideon* written by Mr. Justice Black returned to the precedents established by *Powell v. Alabama*.⁸⁶ The Court held:

Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, *any person* haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him The right of one charged *with crime* to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantial safeguards designed to assure fair trials before impartial tribunals in which *every defendant* stands equal before the law. This noble ideal cannot be realized if the poor man charged *with crime* has to face his accusers without a lawyer to assist him.⁸⁷

This language likewise seems broad enough to encompass *all* offenses, including misdemeanors of whatever seriousness. Though the language is broad enough to cover *all* offenses, various members of the Court would apparently not be willing to establish such an all inclusive standard. The real lines of distinction in the Court's views are to be drawn from the various concurring opinions of the Justices in *Gideon*.

⁸⁴ See notes 63-67 *supra* and accompanying text.

⁸⁵ 340 F.2d 263 (5th Cir. 1965).

⁸⁶ 287 U.S. 45 (1932).

⁸⁷ 372 U.S. at 344. (Emphasis added.)

Mr. Justice Douglas would incorporate the sixth amendment into the fourteenth. Under this view, the indigent's right to counsel would necessarily have the same breadth in state courts that it has in federal courts. Douglas argues that not only should the fundamental guarantees of the Bill of Rights be made applicable to the states by the fourteenth amendment, but that the fourteenth amendment protects from infringement by the states *all* guarantees of the Bill of Rights.⁸⁸

Mr. Justice Harlan rejects the incorporation argument and maintains that the constitutional obligations of the states need not be identical with those of the federal government.⁸⁹ He would limit *Gideon* to the more serious crimes.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a *substantial* prison sentence.⁹⁰

He does state, however, that "Whether the rule should extend to *all* criminal cases need not now be decided."⁹¹

Another approach to the problem would be to use the equal protection clause of the fourteenth amendment.⁹² This clause has frequently been applied in economic areas⁹³ and to cases dealing with racial discrimination,⁹⁴ but has seldom been applied in treating inequalities in the administration of criminal justice.⁹⁵ Should the equal

⁸⁸ Bennett, *Gideon in Retrospect*, 38 WIS. BAR BULL. 34, 37 (1965). Mr. Justice Douglas states in *Gideon*:

While I join the opinion of the Court, a brief historical resumé of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. . . . Unfortunately it has never commanded a Court.

372 U.S. at 345-46.

⁸⁹ When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems they face, and the significantly different consequences of their actions. 372 U.S. at 352.

⁹⁰ *Id.* at 351. (Emphasis added.)

⁹¹ *Ibid.*

⁹² Dissenting in *Douglas v. California*, decided the same day as *Gideon*, Mr. Justice Harlan pointed out that if *Gideon* could have been decided on equal protection grounds, there would have been no reason for the more complicated analysis which the Court in fact employed. 372 U.S. 353, 363 (1963).

⁹³ See, e.g., *Morey v. Doud*, 354 U.S. 457 (1957).

⁹⁴ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁹⁵ Goldberg, *Equality and Government Action*, 39 N.Y.U.L. REV. 205, 217 (1964); Note, 25 U. PRRT. L. REV. 719 (1964).

protection clause be found applicable, there certainly could be no doubt as to the existence of state action.⁹⁶ The decisions in *Griffin v. Illinois*,⁹⁷ which provided the indigent with a transcript to aid in perfecting his appeal,⁹⁸ and *Douglas v. California*,⁹⁹ which provided court-appointed counsel on the indigent's first automatic appeal, are perhaps the best known of the criminal cases decided under the equal protection clause.

Discriminating against a man accused of a misdemeanor merely because he is poor would seemingly do violence to the equal protection clause. The fact that a man of means can retain the assistance of counsel when charged with even a minor offense and thus better safeguard his liberty and property provides some basis for showing that inequality does exist when compared with the plight of the indigent charged with the same offense. Before the equal protection clause can be utilized, however, there must be a showing of a significant inequality which results in fundamental unfairness.¹⁰⁰ Whether the unfairness is of such a basic fundamental character may be open to some question.

As to the propriety of the indigent relying on the equal protection clause, Mr. Justice Goldberg in a recent lecture stated:

I cannot, with propriety, predict how much further the equal protection clause will require the Court to go in the elimination of economic inequalities in the administration of criminal justice. But no judge, lawyer or layman is inhibited from emphasizing the moral imperative implicit in the noble concept of equal justice before the law. What the equal protection clause of the Constitution does not command, it may still inspire.

Although the cases which have come before our Court have involved the rights of the indigent at trial and on appeal, it should not be forgotten that problems of equal criminal justice extend to the near-poor and the average wage earner as well as the indigent, and that such problems begin well before trial and continue after the appeal.¹⁰¹

⁹⁶ "When the poor are denied equal justice in a criminal trial there can be no question of state action, involvement and responsibility. The state is the 'plaintiff'; it elects or appoints the judges; it hires the prosecutors; it retains and compensates expert witnesses and investigators; it arrests and often incarcerates the accused; and it lodges the convicted in its jails." Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. at 217.

⁹⁷ 351 U.S. 12 (1956).

⁹⁸ Mr. Justice Black's opinion in *Griffin v. Illinois*, stated that: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19.

⁹⁹ 372 U.S. 353 (1963).

¹⁰⁰ Note, 25 U. PITT. L. REV. 719 (1964).

¹⁰¹ Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218-19 (1964). Mr. Justice Goldberg concludes:

[P]roblems of poverty cut across the conceptual lines dividing criminal from

Because the breadth of the equal protection clause is much greater than that of the due process clause, a holding that an indigent is equally entitled to counsel to safeguard his property as well as his life and liberty would necessitate appointment of counsel in civil matters as well as criminal. It is doubtful, at this time, that such a sweeping change will become a reality. Application of the equal protection clause to an indigent defendant accused of a misdemeanor is a possibility, though presently it would seem remote.

V. CONCLUSION

If *Gideon* runs only so far as the felony-misdemeanor line, it would merely give federal constitutional underpinning to the already existing practice in thirty-seven states.¹⁰² If, on the other hand, *Gideon* is applied to all criminal prosecutions its effect would be of considerably greater magnitude as only a minority of states now require appointment of counsel for indigents accused of misdemeanors.¹⁰³ Many statutes and court rules are ambiguous as to coverage in misdemeanor cases,¹⁰⁴ and the courts would likely move forward only after great deliberation, for misdemeanor prosecutions constitute numerically the greater part of state criminal practice.¹⁰⁵

In Texas, profound effects and significant changes will result from applying the due process clause so as to require the assistance of counsel in misdemeanor cases. As previously discussed,¹⁰⁶ article 754 in conjunction with article 753 currently prohibits a new trial in a misdemeanor case when the defendant has been denied counsel. Under the Fifth Circuit's holding in *Harvey v. Mississippi*,¹⁰⁷ the result achieved by the operation of these statutes would seem clearly unconstitutional. This problem in Texas has been greatly alleviated by

civil cases, and that the poor person must be made aware of his legal rights and obligations—whether they be in signing a lease, executing a credit agreement, settling a domestic dispute, or paying taxes—before he can be expected to participate in the community as a fully responsible citizen. . . .

The widespread participation of the Bar in the criminal process, which will result from our recent decisions holding that all criminal defendants must, upon request, be afforded representation at trial and on appeal, will bring the present inequities of the criminal process more forcefully to the attention of the Bar. This itself is desirable, for awareness of the problem is the first and most important step toward solution. *Id.* at 226-27.

¹⁰² Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 17 (1962).

¹⁰³ See Note, 48 CALIF. L. REV. 501, 510 (1960).

¹⁰⁴ See the compilation of statutes, rules, and decisions in Brief for Respondent, pp. 67-74, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁰⁵ The foregoing discussion is taken from the "Due Process in State Criminal Proceedings" section of *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 105 (1963).

¹⁰⁶ See notes 69-70 *supra* and accompanying text.

¹⁰⁷ 340 F.2d 263 (5th Cir. 1965).

the enactment of articles 26.04 and 40.04¹⁰⁸ in the new Texas Criminal Code. As previously discussed, "whenever the court determines at an arraignment or at any time prior to arraignment that an accused charged with a felony or a *misdemeanor punishable by imprisonment* is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him."¹⁰⁹ In addition, denial of court-appointed counsel in at least some misdemeanor cases is now recognized as a violation of the defendant's right to a new trial. Article 40.04 now provides that denial of counsel "shall not be available as ground for new trial in any misdemeanor case where the maximum punishment may be by fine only."¹¹⁰ Therefore, as of January 1, 1966, the indigent misdemeanant in Texas will be statutorily entitled to the assistance of counsel. While the new code appears to be largely dispositive of the constitutional problem in Texas, the difficulties facing the bench and bar in fulfilling the statutory mandate will likely be substantial.

A recent article¹¹¹ indicates that in one Dallas County criminal court alone, some 200 persons annually are tried on misdemeanor counts without the benefit of counsel. The misdemeanor charges cover such offenses as negligent homicide, writing hot checks, carrying a knife, wife-beating, theft under \$50.00, liquor law violations, shoplifting, and driving while intoxicated. Penalties for these offenses range up to fines of \$3,000.00, three years imprisonment in the county jail or both. The article further states that the judge of this county court has appointed only three lawyers to defend misdemeanants in over ten years. These attorneys had to defend the accused without pay, as there was no provision under state law for remunerating assigned counsel in misdemeanor cases.

Perhaps the real difficulties presented by the scope of the indigent defendant's right to counsel center around the increased burden which would be placed on the bench and bar. The increase in the number of cases to be docketed for trial would likely be substantial even if right to counsel is limited somewhere above granting the privilege to all misdemeanants. The projected demand upon the bar is certainly staggering, especially as the situation currently exists re-

¹⁰⁸ TEX. CODE CRIM. PROC. (1965).

¹⁰⁹ TEX. CODE CRIM. PROC. § 26.04 (1965). (Emphasis added.) This new rule is not completely dispositive of the constitutional problem in Texas. If an indigent is convicted of a misdemeanor punishable by fine only, the fact that he is truly indigent would most likely prevent him from being able to pay such fine. This would likely result in his being placed in jail to "work-off" the fine which would seem to present the same "deprivation of liberty" as if he had been sentenced to jail in the first instance.

¹¹⁰ *Id.* at § 40.04.

¹¹¹ Dallas Morning News, Apr. 4, 1965, p. 26, col. 1.

quiring attorneys to serve without compensation when they are court-appointed in Texas misdemeanor cases punishable by fine only and federal petty offense cases.¹¹²

It was not until the enactment of article 494a in 1959 that any sort of compensation was authorized for court-appointed attorneys in Texas.¹¹³ This act provided for the discretionary payment of court appointed attorneys at the rate of \$25.00 per day in court in the defense of persons charged with felonies, but only \$10.00 on pleas of guilty. The compensation to be paid court appointed counsel has been changed by the new Texas Criminal Code. Article 26.05¹¹⁴ now provides for the payment from the general fund of the county in which the prosecution was instituted a fee of not less than \$25.00 nor more than \$50.00 for each day in trial court representing the accused. If the death penalty is being sought, a fee of not less than \$25.00 nor more than \$100.00 is provided for. In addition, expenses incurred of not more than \$250.00 have been authorized for purposes of investigation and expert testimony. The above fee schedule is applicable to both felonies and misdemeanors punishable by imprisonment. The minimum fee will be allowed automatically unless the trial judge orders a greater fee within five days of the judgment.

As to attorneys appointed to defend indigents in federal courts, the Criminal Justice Act of 1964¹¹⁵ has provided compensation at a rate not exceeding \$15.00 per hour in court and \$10.00 per hour out of court, with total compensation not to exceed \$500.00 in a case in which one or more felonies are charged. Provision has also been made for purposes of obtaining expert testimony. The same hourly rate provided for attorneys in felony cases is also applicable to misdemeanors other than petty offenses, but not to exceed \$300.00.

Solutions which would provide adequate representation are being sought on many fronts. Plans being experimented with include public

¹¹² The demands upon the bench and bar would be even more staggering should the Court find the indigent's lack of counsel to be a violation of the fourteenth amendment's guarantee of equal protection. Such an extension would presumably apply as readily to civil cases as it would to criminal cases. One writer has stated: "Some minor offenses, as violating a parking ordinance, are such that the utility of providing counsel is far outweighed by the economic and administrative burden it would cause. Violations of the sort described above which are usually disposed of by summary proceedings should not be classified as criminal proceedings and are therefore not within the pale of the sixth amendment." Note, 25 U. PITT. L. REV. 719, 824-26 (1964). The economic and administrative burdens in both state and federal prosecutions may well influence the constitutional standard to be applied.

¹¹³ TEX. CODE CRIM. PROC. art. 494a (1959).

¹¹⁴ TEX. CODE CRIM. PROC. art. 26.05 (1965).

¹¹⁵ 78 Stat. 552 (1964), as amended 18 U.S.C. § 3006A (1964).

defender systems, private defender systems, combinations of the two systems, legal aid clinics utilizing the services of law students, and various plans devised by bar associations for representation by private attorneys. Because of the practical necessities involved, it would seem that some balance must be struck between the positive arguments for right to counsel on one hand, and the social utility of requiring counsel at certain types of hearings, the costs of financing such an operation, the administrative burden upon the bench, and the practical burden on the bar on the other hand.