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Brian P. Moehn

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THE RIGHT OF THE ACCUSED TO TRIAL
BEFORE A LAWYER JUDGE

We will not make justices... save of such as know the law of the kingdom
and mean to observe it well.1

—Magnæ Carta

I. Introduction

While driving through Lynch, Kentucky, Lonnie North was arrested for
driving under the influence of alcohol. His case was heard by a justice of the
peace who did not have a law degree and who had been on the bench only six
months. North requested a jury trial as provided by Kentucky statute,2 but after
conferring with the prosecutor the justice denied the request. In addition, the
justice allegedly made errors concerning North's constitutional right to counsel.
North was found guilty and sentenced to 30 days in the county jail.3

Under the Kentucky court system, similar to many other state court systems,4
North could either accept the sentence or, as a matter of right, demand and
receive a trial de novo before a circuit judge who would be a member of the
state bar.5 Pursuing neither course, North sought a writ of habeas corpus from
the circuit court, challenging the constitutionality of Kentucky's judiciary scheme.
He contended that he had the right in the first instance to a lawyer judge capable
of recognizing and protecting his constitutional rights. The Kentucky statute,
argued North, by subjecting a defendant to trial before a nonlawyer judge and
potential imprisonment, violated the fifth, sixth and fourteenth amendments.
Both the circuit court and the Kentucky Court of Appeals rejected his contention,
relying on an earlier Kentucky case, Ditty v. Hampton,6 which upheld the use
of nonlawyer justices of the peace.7

North is not the first to argue that due process requires the states to afford
the defendant a lawyer judge in misdemeanor cases punishable by imprison-

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3 North v. Russel, 18 Cr. L. Rptr. 4109 (U.S. Dec. 17, 1975) (No. 74-1409) (oral argu-
   ment). This was North's first offense for driving while intoxicated and the maximum sentence
   should have been a $500 fine and not imprisonment. Ky. Rev. Stat. Ann. § 189.990(9)(a)
   (1975). The equal protection argument raised in this case and other right to a lawyer judge
   cases will not be discussed.
4 An accurate and current description of the justice of the peace court systems throughout
   the United States is difficult to obtain. According to the charts supplied in The Institute of
   Judicial Administration, The Justice of the Peace Today (1965), approximately 20
   states allow nonlawyer justices of the peace to hear criminal cases where imprisonment is a
   potential punishment. These states grant the defendant the unconditional right to a trial
   de novo. In Colten v. Kentucky, 407 U.S. 104, 112 n.4 (1972), the Supreme Court noted that
   24 states have a justice of the peace system comparable to that of Kentucky. For a compre-
   hensive and contemporary study of the justice of the peace systems in the United States, see
   appeal, it is in fact a trial de novo.
6 490 S.W.2d 772 (Ky. 1973), dismissed as moot, 414 U.S. 885 (1974). The appeal was
   dismissed due to the death of the petitioner.
7 North v. Russel, 516 S.W.2d 103 (Ky.), vacated and remanded for further consider-
   ation, 419 U.S. 1085 (1974), aff'd on rehearing,—S.W.2d—(Ky.), prob. juris. noted, 422
   U.S. 1040 (1975).
ment. The few state supreme courts considering this issue have taken three different positions. Some, such as *Crouch v. Justice of the Peace Court of the Sixth Precinct,* find no due process violations by the state in allowing nonlawyer judges to preside over minor misdemeanor trials. The court was not presented with any proof that a nonlawyer judge is per se unqualified and even if judicial error occurred, it was not necessarily a denial of due process. The court concluded that the state need only establish a fair system of justice and not an ideal one.

The second approach has been adopted by only the California Supreme Court. In *Gordon v. Justice Court for Yuba J.D. of Sutter County,* the court held that the accused is entitled to a lawyer judge where incarceration is a potential sentence. Although the court realized that it was impossible in the 1800's for the state to supply every justice of the peace court with a lawyer judge, the improvements in travel, the increase in lawyers, and the added complexity of criminal trials were seen as undercutting these historical justifications for nonlawyer judges. Due process is a living principle which changes according to the advances in the society. An additional argument by the court was equally compelling; the court reasoned that since the fundamental right to counsel in trials where imprisonment in fact occurs was recognized by the Supreme Court in *Argersinger v. Hamlin,* it logically follows that the failure to provide a judge qualified to comprehend counsel's arguments is likewise a denial of due process.

Implicit in the concept of constitutional rights and procedural safeguards is the notion that there will be a judge learned in the law to give them effect. The third approach is represented by *Ditty v. Hampton.* Again, the neutrality of the justice of the peace was emphasized as securing a fair and impartial disposition of the defendant's case. The court then conceded the shortcomings of the justice of the peace courts, but maintained that any constitutional defect is cured by the unconditional right of the accused to a trial *de novo* where he will be provided with full constitutional safeguards, including a lawyer judge.

In examining the question of whether the accused has the right to a lawyer judge in the first instance, it should be initially determined whether at any time in the proceedings due process demands adjudication by a lawyer judge in a

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12 Id. at 328, 525 P.2d at 75, 115 Cal. Rptr. at 634-635.
14 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638. See also the dissenting opinion in *Perry v. Banks,* 521 S.W.2d 549, 550 (Tenn. 1975).
15 490 S.W.2d at 775.
16 490 S.W.2d at 775-76. See also *Ex parte Ross,* 522 S.W.2d 214 (Tex. Crim. Ct. App. 1975).
criminal trial involving potential imprisonment. Accordingly, the proposition that a lawyer judge is an essential element in giving effect to the constitutional rights of the accused must be further explored. Moreover, if due process does require a lawyer judge, then the question of whether a de novo trial system is an acceptable method of meeting this requirement must be answered.

II. Due Process and the Right to a Lawyer Judge

Determining what the due process clause requires on the part of states is an imprecise procedure. Many times, as in the present controversy, state courts adopt an historical perspective to ascertain whether a right is so rooted in the people's tradition or conscience as to be considered fundamental. Another criterion used by the courts to determine the nature of due process is to analogize accepted constitutional rights and procedures to the newly proposed right. Both of these methods will be employed in resolving the question whether due process compels the state to afford the accused with a trial before a lawyer judge.

A. English and American Historical Perspectives

In Ditty v. Hampton, the court came to the "inescapable conclusion . . . that traditional concepts of fundamental fairness do not require that an accused be tried by a lawyer judge. . ." The court noted that in both England and the United States a large volume of criminal cases have been and still are handled by lay magistrates. A more detailed survey of the development of the justice of the peace courts in England and the United States, however, may reveal that the Ditty court applied a facile analysis to the question and that a contrary conclusion may be called for through an historical approach.

1. The English Experience

The justice of the peace originated in 1195 under Richard I when knights swore oaths to aid in preserving the King's peace. The many outbreaks of civil disturbances necessitated this development. About 150 years later, the justice of the peace received its first statutory authority to hear felony cases in an Act of 1344 which provided that:

two or three of the best reputation in the counties shall be assigned Keepers of the Peace by the King's Commission; and at what time shall need be, the

17 Powell v. Alabama, 287 U.S. 45, 65 (1932) in which the Supreme Court stated:
One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence. subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation.

18 490 S.W.2d at 775.

19 Id.

same, with other wise and learned in the law, shall . . . hear and determine felonies and trespasses done against the peace in the same counties. . . . 21

A similar statute, an Act of 1361, also assigned to every county “one lord and with him three or four of the most worthy in the county with some learned in the law” to keep the peace and try criminal cases. 22

It is significant that from the very inception of the justice of the peace courts, their statutory commissions specifically and consistently directed the lay justices to hear the case with the aid of those learned in the law. Though the justices may have been laymen, they were admonished to seek the advice of one versed in the law. This was consistent with the earlier concession made by King John in § 45 of the Magna Carta in which he promised to appoint justices who knew the law of the realm. 23

By 1590 the duties of the justice of the peace had grown considerably and therefore Sir Christopher Wray, Chief Justice of the Queen’s Bench, revised the commission of the justices, attempting to improve and modify the office. The resulting commission is substantially the same today. In the commission, Sir Wray instituted a Quorum, membership in which required the justice to be learned in the law. Sir Wray intended that two justices be present at the hearing of a case, one from the Quorum, thereby insuring adjudication of the case by at least one learned judge. Membership in the Quorum became a political favor, however, and eventually all justices were made members. The failure of the Quorum to achieve the purpose Sir Wray had intended was not catastrophic, however, because by this time the clerks of the justice of the peace courts were learned in the law and supplied the necessary legal knowledge. 24

If Sir Wray’s attempt had been successful, the development of the justice of the peace courts may have been dramatically altered. Unsatisfied with justices being only advised by legally trained clerks, he endeavored to require one of the magistrates to be learned in the law. The success of Sir Wray’s experiment would have rendered the present question of due process and the right to a lawyer judge more readily answerable; the Quorum would have firmly embedded in the people’s tradition the practice of requiring at least one learned judge presiding over trials and the concomitant right to a lawyer judge.

The present-day justice of the peace court in England normally consists of three lay justices. After hearing the evidence and arguments on both sides the justices retire to discuss and decide the case. Since they may not be trained in the law, it is the responsibility of the clerk of the court who is knowledgeable in the law to anticipate inadmissible evidence, to answer the justices’ legal questions, and to call to their attention legal points which may have been overlooked by the justices. 25 Clearly, then, even though the contemporary English justice of the peace court system allows lay justices, these justices always have the advice of a clerk who is learned in the law. It is therefore misleading to maintain, as the court did in Ditty, that laymen preside in criminal cases in England without

21 Id. at 519 (emphasis added).
22 Id. at 519 (emphasis added).
24 Maudsley & Davies, supra n.20, at 528.
25 Id. at 531-35.
adding that they are aided by legally trained clerks. The prosecutor in *North v. Russel* was actually functioning as an English clerk in advising the justice, but there is a glaring difference between the English clerk and the prosecutor in *North*. The English clerk is detached from the trial representing neither the accused nor the state. The prosecutor, on the other hand, represents the state's interest which may color his advice to the nonlawyer judge. The adversary system cannot operate properly if the judge must depend on one of the parties for legal counsel; the magistrate must have an independent and impartial source to draw upon, whether it is from his own legal training or that of a neutral clerk.

2. The American Experience

The American justice of the peace court was substantially transplanted from England to the United States. This court system was well suited for the rugged, isolated backwoods communities which were prevalent in the early years of the nation's history. Towns were small and dispersed, travel was difficult, and local lawyers were not generally trusted. Chester Sutherland describes the environment in which the early American justice of the peace operated:

> Few legal principles or rules had been worked out and there was little legislation either to guide or hamper the magistrate. Hence, he was probably as capable as anyone to administer justice according to his own judgment and common sense.

In this frontier life, the justice of the peace was concerned with keeping the peace and not fine legal distinctions or constitutional safeguards.

Though these magistrates greatly aided the administration of justice, the state legislatures realized their limitations. The states, therefore, consistently implemented a system of trial *de novo*, giving the defendant access to a completely new trial before a lawyer judge in a higher court. A lucid explanation of this two-tier procedure is found in the opinion of Chief Justice Weintraub in *State v. De Bonis*:

> we are mindful of the reason for a trial *de novo* in these matters. The Legislature long ago provided for a retrial at the county level because of the weaknesses inherent in the system of local courts whose judges were locally appointed, served part-time and frequently were not even members of the Bar. A structure of that kind could not command the complete confidence of the public. Although the municipal court of today is much improved over its ancestor, the structure remains unsound.

As Chief Weintraub indicates, maintaining confidence in the judiciary system requires that the defendant be accorded the opportunity to a redetermination of

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26 490 S.W.2d at 775.
30 Id. at 188, 276 A.2d at 141.
guilt or innocence by a higher court with a lawyer judge. This may well reflect a principle rooted in the conscience of the people that a nonlawyer judge should not try criminal cases with finality; rather, the defendant should have the option of a completely new trial before a legally trained judge. This notion becomes more pronounced as a greater number of states either abolish the justice of the peace courts or require the justices to have legal training.  

Admittedly, the American historical experience does not unequivocally support the proposition that due process demands the state to provide lawyer justices of the peace. The absence of such support, however, is probably due more to logistical rather than jurisprudential considerations. When the justice of the peace courts were first established in the several states, law schools were scarce, legal training was a luxury, and travel and communication were difficult. As soon as the country became more settled, the states responded by establishing the de novo trial system to insure the defendant of a trial before a lawyer judge. Presently, many states are taking the next step by eliminating justice of the peace courts or raising their qualifications of the justices. As the California Supreme Court noted in Gordon, the historical justifications for untrained magistrates have been undermined by improvements and advances in society during the past years.

The combination of the English and American experiences constitutes a convincing argument that from a historical perspective due process does require that a criminal defendant be tried by a lawyer judge. In England, though the judges themselves could be laymen, the presence of a legally trained clerk insured a fair and properly conducted trial. In the United States, the practical considerations caused the widespread use of nonlawyer justices. As these obstacles were overcome, however, the state legislatures made trials by lawyer judges more accessible to the accused. The historical experience, then, indicates that the right to a lawyer judge is a fundamental right which the states may no longer ignore.

B. An Analytical Perspective

1. Powell and the Right to a Legally Competent Tribunal

State courts have taken another approach in determining the content of due process requirements. After examining Supreme Court pronouncements on broader or related issues, the state courts apply the Court’s reasoning to their own unique legal question. The Kentucky Court of Appeals in Ditty v. Hampton assumed that the Supreme Court never addressed itself directly to the issue of

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31 Gazell, supra n.28, at 806-16.
32 12 Cal. 3d at 528, 525 P.2d at 75, 115 Cal. Rptr. at 635. The notion of due process standards changing with the advance of society was established in Wolf v. Colorado, 338 U.S. 25 (1949), where the Supreme Court stated that: basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights.

Id. at 27.
the right to a lawyer judge and, as proposed by the appellant, turned for guidance to the Supreme Court's rulings on the related issue of the right to counsel. The court briefly surveyed the right to counsel cases remarking that none ever suggested that the right to a lawyer judge is concomitant with the right to counsel. The court believed that since the Supreme Court was obviously aware that some of the proceedings in the right to counsel cases are frequently conducted by nonlawyer magistrates, the Supreme Court's silence as to the justice's qualifications demonstrates that such a right does not exist. The Kentucky court concluded that "[d]ue process, as regards the tribunal hearing a case, usually has been considered to require only that the tribunal be fair and impartial."35

The assumption that the Supreme Court never addressed the issue of the tribunal's legal qualifications overlooks the Court's position in *Powell v. Alabama.*34 The Court in *Powell* acknowledged that due process requires that, at least in cases involving serious offenses, the judge be learned in the law. The Court unequivocally states in *Powell* that:

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction in the case, constitute basic elements of the constitutional requirement of due process of law.35

The Court clearly recognizes that competency in the law as well as impartiality and fairness on the part of the judge is essential in meeting the due process standard. The procedural safeguards together with the fundamental right to be heard would be diminished in value if the guardians of those rights were ignorant of them or relied upon the state to advise the court of their application and scope.

The court in *Ditty* erred in separating fairness and impartiality from legal competency and then holding that due process requires impartiality but not competency. The petitioner in *North* correctly perceived legal competency as a prerequisite for fairness and impartiality. Someone must fill the void created by the lack of legal knowledge on the part of the nonlawyer judge and the prosecutor will most likely perform this function. The question then becomes how impartial will a trial remain where the tribunal relies upon the state for legal counseling.

2. The Extension of the Right to a Legally Competent Tribunal from Capital Offenses to Misdemeanors

Since *Powell* involved the charge of rape which carried the death sentence, it could be argued that the seriousness of the offense prompted the Court to require a legally competent judge. There is no doubt that a defendant is entitled to a lawyer judge, one may contend, where the charge is a capital offense carrying the death sentence or long-term imprisonment. For relatively minor criminal

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33 490 S.W.2d at 774 (emphasis supplied), citing *In re Murchison* 349 U.S. 133 (1955).
34 287 U.S. 45 (1932).
35 *Id.* at 68 (emphasis added).
offenses penalized by a brief jail term, however, the need for competency lessens. One may therefore conclude that it is constitutionally acceptable to allow non-lawyer judges to hear misdemeanor cases.

The line of right to counsel cases initiated by *Powell* and leading to *Argersinger v. Hamlin*\(^{36}\) indicates, however, that any trial where imprisonment in fact occurs is serious enough to demand a lawyer judge. As the right to counsel has been extended from capital cases to any criminal case where imprisonment results, the right to a legally competent tribunal should similarly be extended.

The two general considerations which support the right to counsel are the complexity of criminal trials and the grave consequences imprisonment has on the defendant. These two factors make the right to a lawyer judge equally imperative. Focusing on the complexity of criminal cases the Court in *Powell* stated:

> 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. . . . 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.\(^{37}\)

This analysis is equally applicable to the lay judge. The lay judge would lack the skill in the science of law to determine for himself whether the indictment is good or bad, or whether evidence is admissible. Confronted with this complicated procedure, the justice will either make erroneous rulings or turn to the guiding hand of the prosecutor to aid him. The justice's erroneous rulings deprive both the state and the defendant of a fair trial and his reliance on the prosecutor tends to destroy the impartiality of the tribunal thereby depriving the defendant of a fair trial.

It cannot be maintained that misdemeanors, as distinguished from capital offenses and felonies, are void of complex procedures and substantive constitutional rights. As the Court noted in *Argersinger*:

> We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more. The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions.\(^{38}\)

The gravity of the offense does not necessarily measure the legal intricacies of the trial for even minor crimes may present formidable legal questions. To be capable of reaching a legally sound resolution of these difficult problems, the judge like the counsel must be trained in the law.

As to the second consideration, the Supreme Court in *Argersinger* quoted


\(^{37}\) 287 U.S. at 69.

\(^{38}\) 407 U.S. at 33 (citations omitted).
from *Baldwin v. New York* which commented on the adverse ramifications of imprisonment:

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation.

The stigma and disruption in the defendant's life which imprisonment causes render adequate justification to require the states to provide the defendant with a fair and properly conducted trial. To achieve this objective, the trial must be presided over by a judge who is knowledgeable in the procedural safeguards and the substantive rights of the accused.

When the potential complexity which even a minor misdemeanor case may contain is combined with the serious repercussions of imprisonment, the need for a lawyer counseling the accused is apparent to the Supreme Court. These two concerns should likewise prohibit a lay judge from hearing such a case. The untrained judge is apt to err concerning the complex and complicated trial procedure which may prejudice either the defendant or the state, and the defendant's wrongful imprisonment will be equally damaging.

Due process does require the states to afford the accused a lawyer judge in a trial which results in his imprisonment. Historically, the notion is embedded in the English and American traditions that a defendant should be tried before a tribunal which knows the law. Though in the United States it was initially impossible for the states to fully effectuate this right, the improvements and changes in the society have removed the excuses for failure to comply with the people's expectations. Analytically, it is significant that in the first major right to counsel case the Supreme Court also noted that the tribunal should be legally competent. Though the Court did not expressly extend the right to a lawyer judge as it broadened the right to counsel, the considerations which lead to the expansion of the right to counsel would likewise dictate that the right to a lawyer judge be extended. Criminal trials are too complex and serious to be left in the hands of the untrained and unskilled, regardless of whether they are defending or judging a defendant. As Roscoe Pound indicates in his *The Spirit of the Common Law*, in the Anglo-American tradition, the security of one's liberty and property rests upon compliance with established procedures and principles. For these rights and principles to be respected, the tribunal itself must be conversant as to their application.

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39 399 U.S. 66, 73 (1970). *Baldwin v. New York* was a right to jury case and not a right to counsel case; however, the basic notion of the adverse effect imprisonment has on the defendant applies equally to both types of cases.

40 407 U.S. at 37.

41 *R. Pound, The Spirit of the Common Law* (1931). Pound relates the confrontation between James I and Sir Edward Coke to illustrate this point:

> "But," said the king (James I), "I thought law was founded upon reason and I and others have reason as well as judges." "True it was," Coke responded, "that God had endowed his Majesty with excellent science and great endowments of nature; but his Majesty was not learned in the law of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by artificial reason and judgments of the law, which law is an art which requires long study and experience before that man can attain cognizance of it."

*Id.* at 61.
C. The Gordon Perspective: The Right to a Lawyer Judge as an Incidental Right

As mentioned in the introduction, the California Supreme Court in Gordon v. Justice Court For Yuba J.D. of Sutter County,42 considered the propriety of nonlawyer justices of the peace hearing criminal cases from an additional perspective. In one of its arguments, the court focused on the recognized constitutional rights of the accused applicable to the states and concluded that the right to an attorney justice necessarily flows from these rights.

The right to counsel perhaps best exemplifies how the effectiveness of established constitutional rights hinges upon the trial being held before a lawyer judge. First, the justice of the peace may not even know that the defendant, according to Argersinger v. Hamlin, is entitled to counsel. In North v. Russel the justice of the peace was ignorant of the defendant’s right to a lawyer. Second, even if the justice of the peace is cognizant of the defendant’s right to counsel, he still may be incapable of understanding and utilizing counsel’s arguments to resolve the dispute. The judge, for example, must make sophisticated determinations regarding for cause challenges of jurors during voir dire. If counsel objects to the introduction of evidence claiming it is tainted, how well-equipped will an untrained judge be to determine whether the evidence is fruit of the poisonous tree? If scientific evidence is offered by the state and the defense counsel challenges its accuracy or the qualifications of those administering the test, it is “probable a non-attorney judge would have been unable to rule properly on the admissibility of the evidence.”43 Finally, the judge must rule upon the jury instructions submitted by the defense counsel and the prosecutor. These are only a few of the complex and technical problems the nonlawyer judge must deal with even where the defendant is represented by counsel.

The responsibility of the justice court judge dramatically increases if the defendant is not represented by counsel. What protection is derived from the privilege against self-incrimination if the judge does not know that the defendant need not take the stand in his own defense or that the prosecutor may not comment on his failure to do so? In accepting uncounseled guilty pleas, the lay judge must decide whether the accused understands the charge, the elements of the crime and the consequences of his plea. He must also be satisfied that there exists a basis in fact for the plea and that it is freely and voluntarily made. The Supreme Court has instituted complicated criminal procedures applicable to state criminal trials and it is doubtful that untrained judges are capable of giving them their full effect.

The procedural rights of the accused are not the only rights at stake; the defendant’s substantive rights may also suffer. The Supreme Court in Argersinger acknowledged the complex substantive constitutional issues involved even in misdemeanor cases and the California Supreme Court believes there is little guarantee that the background of the nonlawyer judge will prepare him to dis-

43. Id. at 331, 525 P.2d at 76-77, 115 Cal. Rptr. at 637.
cover and resolve these issues. Gordon itself is a good example of how an ordinary misdemeanor could have fundamental constitutional implications. The defendant was charged with disturbing the peace and failure to disperse at a political demonstration in front of a local sheriff’s office. There were relevant first amendment issues involved and a lay judge “would have difficulty determining whether Gordon had engaged in protected activities.”

Colten is a more lucid example of how misdemeanors give rise to constitutional questions. In Colten, the defendant was convicted of disorderly conduct. The defendant, along with others, had gathered at the Blue Grass Airport outside of Lexington, Kentucky to show their support for a gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon. When leaving in a procession of six to ten cars, the lead car was stopped for having an expired Louisiana license plate. All of the other cars pulled off the road and Colten went to the lead driver. The police officer told Colten to leave several times and when he failed to move on, he was arrested for disorderly conduct. Justice Douglas in his dissenting opinion felt Colten’s first amendment rights of free speech and redress of grievances were violated by such an arrest. Again, a simple misdemeanor case contained questions of constitutionally protected activities. Disturbing the peace and disorderly conduct by no means exhaust the list of misdemeanor cases which may present constitutional issues. Other charges frequently brought, such as vagrancy and juvenile delinquency, may also “bristle with thorny constitutional questions.”

Many other procedural and substantive constitutional rights and safeguards could be used to demonstrate how their value significantly decreases where the judge, who must ultimately give them effect, is not required to be trained in the law. There is a futility in designing an elaborate system of rights for the defendant which are applicable to the states, if the states may have nonlawyer judges hear criminal cases—judges who at best have a faint and incomplete understanding of the system. As the court in Gordon noted, none of the cases holding non-attorney judges being consistent with the demands of due process:

convincingly resolved the inherent inconsistency in guaranteeing a defendant an attorney to represent him without providing an attorney judge to preside at the proceedings. As we have seen, a defendant’s right to a fair trial may be substantially abridged by the use of a non-attorney judge.

The judge is a key element in a criminal trial and the fairness and soundness of the verdict usually rest with his ability to apply the law in conducting the trial.

III. Due Process and Trials De Novo

The next step is to determine whether due process requires a trial by an
attorney judge in the first instance or whether due process is satisfied if there exists the absolute right to a de novo trial before a lawyer judge. In attempting to resolve this question, the Supreme Court's treatment of trials de novo in Colten v. Kentucky50 and Ward v. Village of Monroeville51 must be examined.

A. Colten v. Kentucky

1. Trials De Novo and the Threat of a Greater Sentence

The Kentucky Court of Appeals in Ditty v. Hampton relied on the Supreme Court's approval of the two-tier procedure in Colten v. Kentucky to uphold the use of nonlawyer judges as justices of the peace. The court in Ditty reasoned that if this practice was constitutionally objectionable, the Supreme Court in Colten would have so ruled.52

In Colten, the defendant was arrested for disorderly conduct, tried and fined ten dollars. Under the two-tier system in Kentucky, the defendant exercised his right to a de novo trial. He was tried again, convicted and fined fifty dollars. The defendant then challenged the constitutionality of the judiciary scheme claiming that the possibility of a more stringent penalty in the de novo trial unconstitutionally inhibited the exercise of his right to the de novo trial.53 Kentucky justified its de novo trial system by asserting that the peace courts are necessary to relieve the burden on the state judiciary and that they make available speedy and inexpensive adjudications. Finally, in any event, the accused has an unconditional right to a new trial where the full range of constitutional guarantees exist.54

As indicated, the petitioner considered the procedure constitutionally defective because the defendant may receive a harsher sentence if convicted at the de novo trial. In support of the contention, the petitioner cited North Carolina v. Pearce.55 The Pearce court held that upon successful appeal and reconviction a greater sentence may not be imposed upon the defendant unless the judge's reasons for doing so affirmatively appear on the record. This rule was established because the practice of imposing harsher penalties on those who successfully appeal and are reconvicted would deter the defendant from appealing in fear of reprisals from the trial judge at resentencing. The petitioner in Colten argued that such a prophylactic rule should be extended to de novo trials as well as retrials after appeals.

The Supreme Court refused to extend the rule, admitting that in Pearce it was necessary to insulate the defendant after a successful appeal from the vindictiveness of the trial judge if reconvicted at the second trial. The Court, however, differentiated Pearce from Colten in that the Kentucky system did not involve appeal and retrial, but a completely new trial.56 Since a new determination

51 409 U.S. 57 (1972).
52 490 S.W.2d at 775-76.
53 407 U.S. at 115.
54 Id. at 114.
56 407 U.S. at 119.
of guilt or innocence is being made, a new sentence, harsher or more lenient, may be given. The failure of the petitioner in Colten to show a reasonable probability that the judge of the de novo trial would be prejudiced against the defendant who availed himself of the new trial after being found guilty by the justice of the peace distinguishes it from Pearce.\(^57\)

2. Justice Marshall's Dissent in Colten

This distinction which the Court draws in Colten is not convincing as Justice Marshall maintained in his dissenting opinion.

Specifically, the Court faults the appellant for failing to present evidence that the danger of vindictiveness is as great here as in the precise context presented in Pearce. But Pearce did not rest on evidence that most trial judges are hostile to defendants who obtain a new trial after appeal. Pearce was based, rather, on the recognition that whenever a defendant is tried twice for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from seeking a second trial.\(^58\)

The rule in Pearce focuses on the second trial and the inherent danger of vindictive sentencing which will deter the defendant from attaining a second trial. This danger does not disappear merely by changing the form in which the second trial is obtained. The defendant receives a full and complete second trial by either appellate reversal or the de novo trial system and he may be deterred from seeking this second trial in either case fearing the second court’s hostile reaction to his rejection of the first court’s disposition.

3. Unfairness of Peace Court Trials and the Prophylactic Rule in Pearce

Failing on the first argument, the petitioner in Colten suggested that the sentencing strictures imposed by Pearce are essential to minimize the unfairness to the defendant who must endure a trial with less than adequate constitutional safeguards in order to secure a trial complying with the due process standard.\(^59\) Since the defendant may be unjustly convicted in the justice of the peace court, he is being forced to either accept this penalty or run the risk of a greater punishment in the de novo trial.

The Supreme Court was not persuaded by the defendant’s contention. The Court did not believe that:

the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or less than trials conducted in a court of general jurisdiction in the first instance as long as that latter are always available.\(^60\)

The defendant has the option of either accepting the sentence of the lower court

\(^{57}\) Id. at 116-17.

\(^{58}\) Id. at 126.

\(^{59}\) Id. at 118.

\(^{60}\) Id.
or rejecting "what in effect is no more than an offer in settlement of his case and seek judgment of judge or jury in a superior court" where his guilt or innocence will be redetermined.\textsuperscript{61}

The Court appears to be approving of the two-tier system as adequately meeting the due process requirement, and apparently agrees with Kentucky that the justice of the peace courts are merely screens to which the state may subject the defendant before providing him with trial comporting fully with the due process mandate. According to \textit{Colten}, the Kentucky arrangement of the justice of the peace courts with nonlawyer justices passes constitutional muster as long as the court of general jurisdiction is later available to the defendant.

\textbf{B. Ward v. Village of Monroeville}

\textit{Ward v. Village of Monroeville} casts doubt upon the \textit{Colten} Court's approval of the trial \textit{de novo} system as an acceptable method of meeting the due process standard. In \textit{Ward}, an Ohio statute authorized mayors to sit as judges in cases of ordinance violations and certain traffic offenses. The petitioner claimed that since the mayor has the duty of revenue production and law enforcement, he was denied a trial before a disinterested and impartial judicial officer as guaranteed by the due process clause of the fourteenth amendment. The Supreme Court held that the due process clause is violated where trials are held before a mayor who is responsible for village finances and whose court, through fines and other costs, provides a substantial portion of the village funds.\textsuperscript{62}

The state of Ohio then proposed that any unfairness at the trial level could be corrected on appeal and trial \textit{de novo} in the county court. It urged, tracking the Supreme Court's position in \textit{Colten}, that the constitutional deficiencies of the inferior court may be overlooked if a superior court providing constitutional safeguards is always available to the defendant. The Court disagreed:

This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.\textsuperscript{63}

Though \textit{Ward} involved a prejudiced and interested tribunal and not a legally incompetent one, the rationale of the Court would likewise apply to the question of nonlawyer judges. A trial \textit{de novo} will not make the nonlawyer judge less susceptible to erring in the law, and the state trial court procedure may not be deemed constitutionally acceptable simply because the state eventually offers a defendant adjudication by a competent judge.

\textsuperscript{61} \textit{Id.} at 119.
\textsuperscript{62} 409 U.S. at 60.
\textsuperscript{63} \textit{Id.} at 61-62.
C. De Novo Trials: Permissible Screen or Unconstitutional Obstacle?

The Supreme Court appears to be sanctioning the trial *de novo* system in *Colten* while finding it inadequate in *Ward*. In reconciling these two conflicting viewpoints, the statement by the Supreme Court in *Colten* that the trial *de novo* arrangement does not disadvantage the defendant "any more or less than a trial conducted in the court of general jurisdiction in the first instance" deserves closer scrutiny. If concrete disadvantages for the defendant are present in the trial *de novo* system, then the state cannot constitutionally compel the accused to incur these burdens as a prerequisite to obtaining his due process right to a lawyer judge.

The California Supreme Court in *Gordon* rejected the attorney general's argument that the defendant's right to appeal is a sufficient guarantee of due process. The court referred to *Maine v. Superior Court* which states:

Availability of appeal often falls short of sufficient protection (of a defendant's fundamental right to a fair trial), since the "burden, expense and delay involved in a trial renders an appeal from an eventual judgment an inadequate remedy." Though differences exist between an appeal and a trial *de novo*, the objection made in *Maine* is equally applicable in the trial *de novo* context. The availability of a *de novo* trial falls short of protecting the defendant's right to a fair trial because it places the burden and expense on the defendant in obtaining a fair trial which the due process clause guarantees to him.

The initial burden on the defendant is to decide whether to request the *de novo* trial. This may seem to be a trivial burden because the accused would presumably always choose a new trial if he was found guilty in the justice of the peace court. But it must be recalled that *Colten* left open the possibility that the accused may receive a harsher sentence at the second trial. This threat may preclude the defendant from exercising his right to a *de novo* trial even though the greater sentence in the *de novo* trial is not the result of the vindictiveness of the judge. The anxiety will exist regardless of the source of the more stringent sentence thereby creating a definite cost to the defendant.

The additional monetary expense which the defendant may incur in the *de novo* trial prompted Justice Stewart during oral arguments of the *North* case to question the state of Kentucky about the financial costs to the defendant who pleads guilty in the police court and then brings his case to the circuit court. The assistant attorney general was unable to respond to that question. Under certain circumstances, the defendant may face substantially increased costs. If the defendant hired counsel for both the peace court trial and the *de novo* trial, his legal fees could be significantly higher than for one trial in the circuit court. Also, time necessarily spent away from his employment would increase if he must appear in two separate proceedings instead of one.

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64 12 Cal. 3d 323, 331-332, 525 P.2d 72, 77, 115 Cal. Rptr. 633, 637.
66 Id. at 378, 438 P.2d at 374. 66 Cal. Rptr. at 726.
The Supreme Court in *Colten* proposed that the defendant could plead guilty immediately and then demand a trial *de novo*, thereby saving time and expense. The Court readily presumed that one would be willing to plead guilty to a crime punishable by imprisonment which he may not have committed in order to secure a trial with full constitutional safeguards. It is a distorted criminal system which encourages the innocent to plead guilty to crimes so that they may in a later trial prove their innocence.

Individually, these burdens and expenses may be considered minor, but when added to the fact that the accused must bear them before he has been convicted by a legally competent court, they become formidable. In *Colten*, the Supreme Court minimized the genuine burden that the trial *de novo* system places on the defendant before he has received a fair trial. The trial *de novo* arrangement may be a convenient screen for the state, but it is an unconstitutional obstacle hindering the defendant's access to a fair trial. The due process clause should not allow the states to subject the accused to a trial with less than adequate safeguards and then compel the defendant to either accept the unjustly imposed punishment or, at his own expense, obtain a fair trial in the circuit court. The state and not the defendant is responsible for insuring that criminal prosecutions comply with the due process requirements, and the trial *de novo* system does not fulfill this responsibility.

IV. Conclusion

The principle that a defendant should be tried before a learned judge is one deeply embedded in the Anglo-American tradition. The practical obstacles present in the early years of the United States, however, simply made the fulfillment of the right impossible. As the court in *Gordon* remarked, today the historical justification for not implementing this right no longer exists. The states are now capable of providing the defendant with a lawyer judge in the first instance. The complex system of procedural safeguards is worthless unless the judges within that system are familiar with its operation. The trial *de novo* system is not an acceptable method of fulfilling this due process mandate because such an arrangement places the burden of acquiring a fair trial on the defendant. It is for the state and not the defendant to insure that the state's judiciary scheme comports with the due process standard.

Brian P. Moehn

68 407 U.S. at 118-19.