The Right to Counsel in Minnesota:  
Some Field Findings and  
Legal-Policy Observations

Gideon v. Wainwright and Douglas v. California, the landmark right to counsel cases of March, 1963, may have supplied a few answers, but they raise or reopen many questions: Do these cases cover prosecutions for "driving under the influence"? Overparking? Do they apply to post-conviction proceedings? Probation revocation hearings? Do they require that the poor man be furnished counsel as soon as the rich man enjoys the advantage of his? And when should the rich man first enjoy this advantage? Whatever the meaning and impact of these decisions, is the defender's office or the court appointed system the better way to effectuate them? Whatever the system, is the person who has no ready cash, but a good job an "indigent"? The man who can raise bail?

The need to gather information about the practice and attitudes bearing on these and related matters led the American Bar Association to launch a state by state audit of the representation of indigent defendants in the United States. Professors Choper and Kamisar were designated co-reporters for Minnesota. Between interviews with state supreme court justices, trial judges, county attorneys and public defenders, the Reporters found themselves asking each other more and more questions. This Article is the result.†

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† Field work for this Article was done by the authors as Reporters for Minnesota in connection with the American Bar Association's nationwide study of representation of indigent defendants, see 1962 A.B.A. REP. 468, under the research supervision of the American Bar Foundation. The au-
INTRODUCTION

A. THE MINNESOTA BACKGROUND

Historically, comparatively, the State of Minnesota has been rather sympathetic to the plight of the indigent criminal defendant. As the Chief Justice of the Minnesota Supreme Court recently observed, “we have had some provision for the appointment of counsel in felony and gross misdemeanor cases at least since 1869.” Throughout the state every indigent who wants to be is represented by counsel at arraignment, trial, and sentencing. Over the years, the point at which state-furnished counsel could enter the case has been moved back in time until, with a 1959 amendment, an indigent defendant is entitled to appointed counsel “prior to his preliminary examination by a magistrate.”

Two years after the legislature expanded the “beginning” of the
right to assigned counsel, and two years before the Supreme Court’s historic “right to counsel” decisions of March 18, 1963, the state’s highest court, in a declaration of “policies and principles” designed to control and facilitate the disposition of applications for appointed counsel on appeal, extended the point at which the appointment of counsel “ends.” Expressly patterning the new system after California’s, under which, after an independent examination of the record, appellate courts appointed counsel where it “would be helpful to the defendant or the court” and denied such appointment only if counsel “would be of no value to either,” the Minnesota Supreme Court directed the trial courts to prepare sufficiently detailed synopses in all felony and gross misdemeanor cases so that it could “adequately determine whether there is any justification for . . . appointment . . . on appeal.”

Minnesota has never been content with a mere declaration of the right to “have the assistance of counsel.” Since territorial days, it has effectuated this right by “requiring not only that defendant be informed of his right . . . but that he be asked if he desires to avail himself of that right.” Last year, the Minnesota Supreme Court held that this “affirmative duty . . . to alert the defendant” applies to misdemeanor prosecutions in justice or municipal courts as well as to felony and gross misdemeanor cases in district courts. The decision, and some language utilized by the court in arriving at it, might have presaged the extension of the right to assigned counsel to misdemeanor cases, independent

11. Ibid.
13. No one, least of all the defendant or the state, would disagree that this is a criminal prosecution concerned with a most serious offense . . . . In such proceedings it is elementary that the defendant has a right to all the constitutional and statutory safeguards which would be painstakingly accorded him were he being prosecuted for a felony.
State v. Moosbrugger, 263 Minn. 56, 60, 116 N.W.2d 68, 71 (1962).
of radiations from the landmark cases subsequently handed down by the Supreme Court of the United States.

Developments have also occurred in proceedings not generally regarded as meriting the usual criminal procedural safeguards. Until recently, in keeping with the majority view, Minnesota did not afford a probationer even the right to be represented by retained counsel at revocation proceedings. Last year, however, the Advisory Committee on Revision of the Minnesota Criminal Law recommended a new provision — since adopted into law entitlement a probationer facing revocation "to be heard and to be represented by counsel." Whether or not the new statutory requirement bestows the right to assigned counsel on indigent probationers, at the very least it furnishes them an appealing argument for such counsel as a matter of fourteenth amendment equal protection.

B. The Recent Supreme Court Decisions

Although Minnesota has not been standing pat, the historic decisions of March, 1963 demonstrate that she — and her sister states — have not been moving nearly fast enough.

1. Potential Impact

Just how far and how fast the Court has actually moved is a question that defies a confident answer. At the very least, Douglas v. California necessitates the appointment of counsel for every indigent convicted of a serious crime who wishes to perfect


16. Some of the judges interviewed believe this is the intent of the provision. See text accompanying notes 390–92 infra.

17. See text accompanying notes 394–98 infra.


Over the sharp protest of Mr. Justice Harlan, the Court, for the time being, has declined to address itself to the question of the retroactive effect of the "right to counsel" cases, Pickelsimer v. Wainwright, 32 U.S.L. Week 9136 (U.S. Oct. 15, 1963). The retroactive effect of Gideon is a matter of great concern in Florida, from whence Pickelsimer arose. Over half of the 8,000 prisoners in the Florida prison system were not represented by counsel. See Council of State Governments, Increased Rights for Defendants in State Criminal Prosecutions 28 (1962). Prior to Gideon, however, the statutes or rules in 37 states and the almost invariable practice in six others was to provide counsel for all indigent felony defendants regardless of "special circumstances." See 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, 17–20 (1963) & App. I. Thus, in Minnesota, as in most states, the more significant
a first appeal. As for *Gideon v. Wainwright*, it appears equally clear, Mr. Justice Harlan's concurring opinion to the contrary notwithstanding, that fourteenth amendment due process now “incorporates” the sixth amendment right to assigned counsel “in all criminal prosecutions” — whatever this clause means for purposes of right to counsel. Are prosecutions for such misdemeanors as petty larceny, simple assault, issuance of “worthless checks” and “driving under the influence,” “criminal prosecutions” for purposes of *Gideon*?

Even if *Gideon* were limited to felony cases, perhaps *Douglas* could not be similarly contained. Inasmuch as the defendant with sufficient funds is able to appear with counsel in misdemeanor cases, it may be that the “equal protection approach” reflected in *Douglas* demands that the indigent be afforded the same advantage. Indeed, *Douglas* may signify that the indigent misdemeanor defendant not only has an absolute right to counsel at the trial level, but at the appellate level as well.

The overruling of *Betts v. Brady* hardly came as a surprise. The old rule had been that in noncapital cases “exceptional circumstances” must “render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair.” But in the waning years of the *Betts* reign the requisite showing of question is whether *Douglas* should be given retroactive effect.

Since the Court deemed the assistance of counsel at the trial and on the first appeal essential to insure the reliability of the guilt-determining process, *Douglas* and *Gideon* would seem deserving of retroactive application. *Cf.* *Eskridge* v. Washington State Bd., 337 U.S. 214 (1958), giving retroactive effect to *Griffin* v. Illinois, 351 U.S. 12 (1956). On the other hand, a strong argument may be—and has been—made for applying *Mapp* v. Ohio, 367 U.S. 543 (1961) prospectively only. As Chief Justice Weintraub observed in State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962), *Mapp* does not deal with “a denial of a right which bears upon the truth of a conviction, as for example, the right to counsel or to appellate review.” Consider, too, Justice Traynor, concurring in *In re Harris*, 366 P.2d 305, 16 Cal. Rep. 889 (1962): “The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement . . . . That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal.” A definitive treatment of the retroactive effect of a holding of unconstitutionality is beyond the scope of this Article. See generally *Lockhart*, *Kaminsar & Choper*, *Supplement to Dobbs's Cases on Constitutional Law* 672-75 (1963), and authorities collected therein.

21. See text accompanying notes 296-308 infra.
22. 316 U.S. 455 (1942).
“exceptional circumstances” or “prejudice” had diminished to the vanishing point.24 When, in granting certiorari in the Gideon case, the Court requested counsel to discuss whether Betts should be “reconsidered,”25 the old precedent already “revealed itself as overruled by its manifest erosion.”26

Douglas v. California27 is something else again. In forbidding a state to limit the instances in which appellate counsel will be assigned to indigents, the Court, according to protesting dissenters, suggested that the equal protection clause “prevents the State from adopting a law of general applicability”28 (at least one dealing with “applied justice”)29 “that may affect the poor more harshly than it does the rich.”30 Writing for a six to three majority, Mr. Justice Douglas observed:

In either case [denial of a transcript or the assistance of counsel on appeal] the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys “depends on the amount of money he has.” Griffin v. Illinois [351 U.S. 12, 19 (1956)]. The present case . . . shows that the discrimination is not between “possibly good and obviously bad cases,” but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel’s [work] . . . while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.31


29. Basic legal services are not of the same order, in our theory of government, as basic medical services. The provision of applied justice is an essential function of the state even under the most conservative political theory. . . . [A] state which does no more than to provide all its citizens with applied justice is not extending the role of government to novel fields but rather only giving all men that which is the most basic function of government, the provision of legal process.

Willcox & Bloustein, The Griffin Case—Poverty and the Fourteenth Amendment, 48 CORNELL L.Q. 1, 16 (1957).


If *Gideon* only toppled "a bridge shaky and ready to come down,"\(^2\) *Douglas* may have dynamited some rather sturdy-looking ones. If *Gideon* only raised indigent state defendants to a point their federal counterparts had reached a full generation earlier,\(^3\) *Douglas* may have endowed state indigents with rights not yet won in federal criminal litigation. For the Court has yet to decide whether an indigent has an unqualified right to counsel when he files papers collaterally attacking a *federal* conviction,\(^4\) or even when he prepares a petition for certiorari on direct review.\(^5\) Indeed, only a short time ago, a careful student of the problem found "no instance . . . where the Supreme Court appointed counsel before the grant or denial of certiorari, so as to afford the unrepresented indigent effective assistance of counsel in the preparation of either the petition for certiorari itself or a memorandum to support it."\(^6\) Yet, the *Douglas* Court laid the foundation for bestowing these rights,\(^7\) and more, on state indigents. The unqualified right to counsel at the trial level was a long time in coming, but when that day finally arrived it may have found the Court in a most expansive—explosive, if you will—mood.

Nor—reading the case for all it may be worth—does *Douglas* stop at discretionary review and post-conviction proceedings. Indigent persons may find that they also have been awarded absolute

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\(^{35}\) See Boskey, *supra* note 34, at 796–97.

\(^{36}\) Id. at 797. "[T]his is exactly the stage in the direct appellate review of a federal criminal proceeding where the largest counsel gap now exists." *Ibid*.

\(^{37}\) The thrust of Chief Justice Knutson's reflections, in a bar association address the head of the Minnesota Supreme Court delivered a few days after the *Douglas* case was handed down, appears to be that fourteenth amendment equal protection now requires the appointment of counsel in post-conviction applications. Knutson, *supra* note 2, at 14–15:

We come then to the question that all this leads to. What are the requirements with respect to furnishing counsel for indigent defendants . . . to assist in presenting applications for post-conviction remedies, such as habeas corpus and coram nobis? Here the [Supreme Court of the United States] has not specifically said that appointment of counsel is necessary, but from the discussion of the Indiana case [Lane v. Brown, 372 U.S. 477 (1963)], where the Court struck down a provision permitting the public defender to determine whether the transcript of a post-conviction proceeding should be ordered it would seem to follow that *Griffin v. Illinois* [351 U.S. 12 (1956)] applies, and if *Griffin* . . . applies so, too, does *Douglas* . . . .
rights to assigned counsel in justice courts, juvenile proceedings, probation revocation hearings — everywhere a rich man may appear with counsel!

To say the "equality demanded by the Fourteenth Amendment" requires a state to provide counsel before it may revoke what, a generation ago, the Supreme Court called "an act of grace to one convicted of a crime,"38 "a matter of favor,"39 is to come a long way. But even at this distant point, the force of Douglas may not be spent. The case may signify that an indigent defendant is entitled to be furnished various forms of aid other than counsel.

Twelve years ago, a federal appellate court all but guffawed at the suggestion that "one accused of crime is entitled to receive at public expense all the collateral assistance needed to make his defense."40 Few judges would find anything amusing about such a contention today:

Although the Constitution does not guarantee the right to appeal and although the defendant was not precluded, by lack of counsel, from prosecuting his appeal, the Court argued [in Douglas] that counsel on appeal is necessary to achieve some degree of equality. The same reasoning is equally persuasive as support for a constitutional right to aid other than counsel at the trial level.41

Indeed, on reflection, the need for an investigator or psychiatrist or handwriting expert is likely to be more compelling than the need for counsel on a second appeal, let alone on collateral attack. Conceptually, such trial assistance may be viewed as a distant consequence of Douglas, but practically it almost seems to follow from Douglas a fortiori.42 Moreover, by thus removing any obstacle to a fair trial before the trial, not afterwards, in the

40. United States ex rel. Smith v. Baldi, 192 F.2d 540, 547 (3d Cir. 1951), aff'd, 344 U.S. 561 (1953). The court manifested "great difficulty" in accepting a line of reasoning which "would entitle [the accused] to consultation with ballistic experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant." Ibid.
42. Such assistance might include, for example, payment of fees to secure the assistance of expert witnesses in preparing the defense or payment of investigatory costs to locate important missing witnesses. Frequently, such assistance may be more important than counsel. An accountant may be more helpful than an attorney to a person accused of tax fraud, while a handwriting expert could be more essential than a crim-
long run the state may be spared much expense and the judicial system much inconvenience.\textsuperscript{43}

2. Possible Limitations

Have we been conjuring up "hypothetical situations ... by gradations producing practical differences despite seemingly logical extensions"?\textsuperscript{44} Is it not plain that the Douglas principle cannot be "authoritatively enforced without adjustment or concession and without let-up"?\textsuperscript{45} That radiations from the case "must be modulated by pragmatic compromises"?\textsuperscript{46} To approach the problem by a somewhat different route, does not the principle on which Douglas rests "carry within itself its own flexibility ... flexibility on its own terms"?\textsuperscript{47}

Perhaps not — if this principle represents "a new concept of equal protection which will require a state to alleviate inequities even when they are not the product of discriminatory policies"\textsuperscript{48} or if the relevant inquiry is "whether defendant is getting the same brand of justice as the man with means to employ skillful counsel."\textsuperscript{49} But even those who foresaw the application of Griffin v. Illinois to counsel on appeal pointed out:

Discrimination is a part of denial of due process, just as it is a part of denial of equal protection. Denial to all equally of a privilege which due process does not in absolute terms exact, may come to violate due process if the denial is arbitrarily applied to some persons but not to

\textit{Id.} at 1055.

Only last Term the Supreme Court of the United States heard argument that an indigent state defendant has a constitutional right to be furnished the services of an independent psychiatrist. Bush v. Texas, 372 U.S. 580 (1963). Since the state agreed to a retrial when a post-conviction psychiatric examination indicated that petitioner might have been "only partly or not at all responsible for his acts, for very many years," \textit{Id.} at 589, the Court postponed evaluation of the constitutional argument.


\textsuperscript{44.} Rochin v. California, 342 U.S. 165, 174 (1952) (Frankfurter, J.)

\textsuperscript{45.} Cf. Bickel, The Least Dangerous Branch 59 (1962).

\textsuperscript{46.} \textit{Id.} at 58. Consider Qua, Griffin v. Illinois, 25 U. Chi. L. Rev. 143, 147 (1957): "Practical considerations may impinge heavily and divert the development of theory from its straight logical course. We all know that this occurs from time to time in our own courts and sometimes to the great advantage of the law and the community. Similar forces operate in Washington."

\textsuperscript{47.} Cf. Bickel, op. cit. supra note 45, at 58.

\textsuperscript{48.} The Supreme Court, 1955 Term, 70 Harv. L. Rev. 88, 127 (1956).

others. And yet arbitrary discrimination is the traditional way of violating the equal protection clause. Thus, the two concepts overlap.\textsuperscript{50}

The root idea of the \textit{Griffin} and \textit{Douglas} cases may not be that every inequality of any consequence in the criminal process is taboo, but only that due process incorporates a basic notion of equality. It may be that the \textit{Griffin-Douglas} principle does not come into play unless and until "discriminations" based on wealth work an inequality so significant in the criminal process as to amount to "fundamental unfairness."\textsuperscript{51} The \textit{Griffin} line of cases reveals that completely shutting off the means of appellate review or collateral attack to indigent defendants produces the requisite great disparity, as does the failure to provide counsel on the first appeal, under the \textit{Douglas} holding. Yet the absence of legal representation in other circumstances—for example, in post-conviction proceedings when petitioner had been represented by counsel

\textsuperscript{50}. Willcox & Bloustein, supra note 29, at 22, referring \textit{inter alia}, to Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Wieman v. Updegraff, 344 U.S. 183 (1952). See also Note, 1959 DUKE L.J. 484, 489–90, pointing out that even taking the "due process" approach, the \textit{Griffin} result might well be extended to counsel on appeal in order to eliminate "basic unfairness."

\textsuperscript{51}. Note, 47 MINN. L. REV. 1054, 1072 (1963).

I submit that the basis for that holding is simply an unarticulated conclusion that it violates "fundamental fairness" for a State which provides for appellate review . . . not to see to it that such appeals are in fact available to those it would imprison for serious crimes. \textit{Griffin} v. Illinois, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting).

The real question in this case, I submit, and the only one that permits satisfactory analysis, is whether or not the state rule . . . is consistent with the requirements of fair procedure guaranteed by the Due Process Clause . . . . Refusal to furnish criminal indigents with some things that others can afford may fall short of constitutional standards of fairness. \textit{Douglas} v. California, 372 U.S. 353, 363 (1963) (Harlan, J., joined by Stewart, J., dissenting).

In "equating the test for allowing a pauper's appeal [from a federal conviction] to the test for dismissing paid cases," \textit{Coppedge} v. United States, 360 U.S. 448, 447 (1962), the Court felt "impelled by considerations beyond the corners of the statute . . . . to assure . . . . equal treatment for every litigant before the bar." \textit{Id.} at 446–47, citing the \textit{Griffin} case. As has been pointed out, this suggests that if the statute were read so as to impose a greater burden of proof on the pauper seeking appeal, the distinction might give rise to a discrimination of constitutional proportions. For although the fifth amendment contains no equal protection clause, discriminatory federal legislation can amount to a denial of due process. See the discussion in Hyser v. Reed, 318 F.2d 225, 255 \& n.24 (D.C. Cir. 1963) (Bazelon, C. J., joined by Edgerton, J., concurring in part and dissenting in part); \textit{The Supreme Court, 1961 Term}, 70 Harv. L. Rev. 54, 172 (1957). \textit{Cf.} Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Under this analysis, \textit{Coppedge}, as much as \textit{Griffin}, may have presaged \textit{Douglas}. 
at every preceding stage\textsuperscript{52} — may not. Analyzing the “equality demanded by the Fourteenth Amendment” in these terms, those traditionally relevant to problems of due process, \textit{Douglas} rests on “principle with flexibility built in.”\textsuperscript{53}

The \textit{Douglas} Court took pains to point out what it “need not now decide”:\textsuperscript{54}

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have \textit{once been presented by a lawyer and passed upon by an appellate court}. We are dealing only with the \textit{first appeal}, granted as a matter of right to rich and poor alike . . . . But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an “invidious discrimination.” \textit{Williamson v. Lee Optical Co.}, 348 U.S. 483, 489 [(1955)] . . . . But where the merits of the \textit{one and only appeal} an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

The \textit{Williamson} passage alluded to by the Court recognizes that “evils in the same field may be of different dimensions and proportions, requiring different remedies”—that “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute.” The first appeal, the only appeal of

\textsuperscript{52} As the Supreme Court noted in the \textit{Douglas} case, 372 U.S. at 355, some years earlier, Judge Traynor had maintained that denial of counsel on appeal to an indigent “would seem to be a discrimination at least as invidious as that condemned in \textit{Griffin}.” \textit{People v. Brown}, 55 Cal. 2d 64, 71, 357 P.2d 1072, 1076 (1960) (concurring opinion). However, on the same occasion, Judge Traynor ventured to say that “the reasons for appointment of counsel on appeal . . . do not extend to habeas corpus or other collateral attacks . . . unless the defendant presents a \textit{prima facie} case for relief,” in part because a collateral proceeding imposes no “burden of complying with technicalities; it simply demands of [the indigent] a measure of frankness in disclosing his factual situation.” \textit{Id.} at 74, 357 P.2d at 1078. Nor, Judge Traynor indicated, does it necessarily follow that misdemeanor defendants are entitled to counsel even on the first appeal. He noted that “the misdemeanant suffers no loss of civil rights,” and pointed, \textit{inter alia}, to “the substantially less serious nature of misdemeanors and their corresponding lighter penalties,” frequently only punishment by fine. \textit{Id.} at 74–75, 357 P.2d at 1078–79.

See also \textit{United States ex rel. Coleman v. Denno}, 318 F.2d 457 (2d Cir.) (decided two months before \textit{Douglas}), \textit{cert. denied}, 373 U.S. 919 (1963) (two months after \textit{Douglas}). The Second Circuit ruled that the furnishing of counsel at all stages of the state appellate system—but not in the preparation of an application for writ of certiorari to the Supreme Court—satisfied the \textit{Griffin} principle.

\textsuperscript{53} \textit{Cf. Bickel, op. cit. supra} note 45, at 59.

\textsuperscript{54} 372 U.S. at 356–57. (Emphasis added in first instance.)
right, appears sufficiently more important than any subsequent phase of review — the need for counsel at this step of the appellate process seems sufficiently more "acute" than at other stages —that the line may rationally be drawn here.

This proposition draws support from several notions: "[J]ustice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial" but only one such assessment; when a state deems it so "wise and just that convictions be susceptible to review by an appellate court" as to grant such review as a matter of right "it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review"; "beyond the first appeal, counsel would appear less vital both because the incidence of reversal is presumably less and because the courts to which such later appeals are addressed are probably already aware of the broad policy questions that the cases usually pose."

*Douglas* could be more confidently limited to the first appeal if *Griffin* had been similarly contained. *Griffin* itself held only that "destitute defendants must be afforded as adequate [direct] appellate review as defendants who have money enough to buy transcripts." But as *Lane v. Brown* illustrates, the principle is no less applicable when the state has effectively foreclosed appellate review of a *coram nobis* hearing:

To be sure, this case does not involve, as did *Griffin*, a direct appeal from a criminal conviction, but [*Smith v. Bennett*, 365 U.S. 708 (1961)] makes clear that the *Griffin* principle also applies to state collateral proceedings, and [*Burns v. Ohio*, 360 U.S. 252 (1959)] leaves no doubt that the principle applies even though the State has already provided one review on the merits.

But for the *Douglas* case, *Griffin* and all its progeny could be

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One measure of [the criminal appeal's] importance is the frequency of reversals in criminal cases. Thus between 1949 and 1954 nearly thirty percent of Illinois criminal appeals resulted in reversals of convictions. Similarly high percentages of reversals have occurred in some of the other states.

58. 351 U.S. at 19.
59. 372 U.S. 477 (1963) (decided the same day as *Douglas*).
60. Id. at 484-85.
— and has been — narrowly viewed as not affecting the “right to counsel.” The argument runs along these lines: The Griffin principle is not concerned with the quality of appellate review, merely the availability of such review. So long as a defendant is allowed access to the courts (whether or not he has a lawyer), “fourteenth amendment equality” does not require that he be furnished counsel as well, simply because such assistance would be “helpful.” He is entitled to such aid only if without it the criminal proceedings are “so apt to result in injustice as to be fundamentally unfair”— the old Betts rule. “[T]he presence of counsel is not a sine qua non to access to the courts, as was the availability of the transcript in the Griffin case,” or, one might add, in Lane— or the payment of a filing fee in Burns v. Ohio and Smith v. Bennett.

Under this analysis, Betts and Griffin are easily reconcilable: “The state, having provided a road, need not guarantee that every man have equally as good a car to drive down it.”

After Douglas, however, the “access” interpretation of Griffin must be substantially revised, if not abandoned. “In either case” — denial of a free transcript on appeal or denial of free counsel on appeal — “the evil is the same: discrimination against the indigent.” Douglas may mean, then, that wherever an indigent person is permitted access to the courts, he is entitled to counsel in order to make that access meaningful. Douglas, coupled with Griffin, may well demand at every post-trial stage “more than that the state simply place the defendant upon the ‘road’; it must see that he has some vehicle— counsel— to use in traveling the ‘road.’

3. Future Considerations

Or must it? Are all “roads” the same? Once the indigent has come to the end of the “highway” and is proceeding on “side roads,” is the need for a vehicle of the same magnitude?

The Douglas and Griffin opinions are hardly the last word;

64. 360 U.S. 252 (1959).
more likely they are merely the first and second. Thus, whether it is profitable to dwell on their meaning at greater length is doubtful. If nothing else is clear, this much seems to be: The breadth and vagueness of the “equality demanded by the Fourteenth Amendment” terminology is such that the principles lurking in this area will be brought into sharp focus only by “new prodding of the new facts”\(^{69}\) and — for many Griffin-Douglas cases to come — by “never failing, each time, to take at least one fresh look”\(^{70}\) at the overall problem.

In the “full cry” over “today’s sensations”\(^{71}\) — Gideon and Douglas — other problems may be overlooked. But as has been pointed out, “if the federal courts ever overrule Betts v. Brady,” the inquiry as to “the times during the chain of criminal proceedings at which the right to counsel accrues . . . may become the most significant in the area.”\(^{72}\) Although the issue of “when the right to counsel begins” was not specifically considered in either Gideon or Douglas, these cases do not leave the matter unaffected. In disposing of the problem of the right to counsel at trial, did the Court’s reiteration of the necessity of “the guiding hand of counsel at every step in the proceedings,”\(^{73}\) signal the new battleground? Does the Douglas principle require the state to provide counsel for indigents at as early a point in the case as retained counsel makes his appearance?

C. THE NATURE AND SCOPE OF THE FIELD STUDY

The need to gather information about the practices and attitudes bearing on all of these problems led the American Bar Association to launch a nationwide state by state audit of the representation of indigent accused persons. The project was supervised by the American Bar Foundation and ABA associate state subcommittees. The authors were designated Reporters for Minnesota and this Article is an outgrowth of that effort.

The survey in Minnesota was conducted in June, July, and August of 1963. Seven counties of various sizes were selected by

\(^{69}\) Cf. Llewellyn, op. cit. supra note 32.

\(^{70}\) Ibid.


random sample. In each of these counties, the authors personally interviewed at least one of the presiding district judges and the county attorney, sometimes accompanied by one or more assistants. Although not originally contemplated, personal interviews were also held with four municipal judges because of their expertise with misdemeanors and the early stages of felony and gross misdemeanor proceedings. In addition, the public defenders in

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<th>Largest City in County and Population (1000 Census)</th>
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<td>9</td>
<td>State capital</td>
</tr>
<tr>
<td>St. Louis</td>
<td>231,583</td>
<td>Duluth 106,884</td>
<td>6</td>
<td>Declining economy</td>
</tr>
<tr>
<td>Stearns</td>
<td>80,345</td>
<td>St. Cloud 38,815</td>
<td>4</td>
<td>St. Cloud is a small college town</td>
</tr>
</tbody>
</table>

The population of these counties constitutes over half of the population of the entire state.

75. The judges, by county, were: Rollin Johnson (Chisago); Roy Nelson (Dakota); Warren F. Plunkett, O. Russell Olson (Freeborn); John A. Weeks, Irving R. Brand, Dana Nicholson (Hennepin); Clayton Parks, John W. Graff, Leonard J. Keyes (Ramsey); Mark Nolan, Sidney E. Kaner, Donald Odden (St. Louis); E. J. Ruegemer (Stearns).

76. The county attorneys, by county, in the above order, were: Howard Johnson, J. Jerome Kluck, Robert C. Tuveson, George Scott, William B. Randall, John C. Arko, Roger J. Nierengarten.

77. The assistant prosecutors, by county, were: Harlan Goulett (Hennepin); Peter J. Maloney, Stephen L. Maxwell (Ramsey); William C. Johnson (St. Louis).

78. They were, by city: John R. Peterson (Albert Lea), Donald Anderson (Duluth), Bruce Stone (Minneapolis), Thomas Henning (St. Cloud).

79. Kermit A. Gill of Hennepin County and Thomas E. Moore of Ramsey County.
those two counties which utilize such a system were personally interviewed. Finally, the authors spoke with Chief Justice Oscar R. Knutson and Associate Justice Robert J. Sheran of the Minnesota Supreme Court.  

The authors' original plan was to conduct the first few interviews jointly and then to split the remainder of the task. However, after several interviews were completed in which both of the authors were present, it seemed that the sessions would be more productive if two interviewers took part. As a result, both authors participated in most of the interviews. This enabled us to maintain a greater continuity of discussion, to assure ourselves as to the accuracy of much of what was reported, and to probe the thinking of our subjects more thoroughly, thereby avoiding recording first impressions only.

Because of this interviewing technique, the source of most of the information relied upon in this Article is the personal interviews. This has been supplemented by replies to mail questionnaires received from the prosecutors of 55 additional counties, from 15 other district judges, and from 24 lawyers who acted as assigned counsel in the sample counties. In most instances, the mail replies follow the pattern of the personal interviews; in those in which they do not, the authors prefer to rely upon the interviews themselves as reflecting the consensus of opinion in the state.

Included also in the Article, mainly by footnote, are the results of a docket study made, in five of the counties, of a total of 212 criminal defendants in 1962. These too were selected by random sample and were recorded by several student assistants. The

<table>
<thead>
<tr>
<th>County</th>
<th>Number of Persons Charged with Felonies</th>
<th>Number Included in Docket Study</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>45</td>
<td>20</td>
</tr>
<tr>
<td>2</td>
<td>256</td>
<td>46</td>
</tr>
<tr>
<td>3</td>
<td>111</td>
<td>46</td>
</tr>
<tr>
<td>4</td>
<td>581</td>
<td>80</td>
</tr>
<tr>
<td>5</td>
<td>56</td>
<td>20</td>
</tr>
</tbody>
</table>

80. The authors wish to express their deep gratitude to all of those named above, many of them personal friends, for their enthusiastic cooperation. The forthrightness of their comments and the generosity of their grant of time was more than could reasonably be expected.

81. For example, a much smaller percentage of those judges who replied by mail believed that counsel should be provided for indigent misdemeanor defendants, see data in note 289 infra, than did those judges who were personally interviewed. However, many in the latter group who initially responded "no" when asked if counsel should be provided in misdemeanor cases, modified their views when questioned further by the authors or when it was suggested to them that coverage might not be an "all-or-nothing" proposition.

82. The number of persons charged with felonies is the number included in the docket study.
findings of the docket study, in large measure, are consistent with opinions expressed in the interviews. Variations are noted where they exist. Unless otherwise designated, different identification numbers were assigned to the counties in each of the tables showing the results of the docket study.

D. The Scope of the Article

Since Minnesota has long provided indigents prosecuted for felonies and gross misdemeanors with counsel at trial and sentencing, as might be expected, this Article focuses on those matters remaining unsettled and raising controversy: (1) the standards and administration of "indigency," the point at which counsel (2) "begins" and (3) "ends," (4) the right to assigned counsel in misdemeanor cases, and (5) an evaluation of the "public defender" and "appointed counsel" systems. Pursuit of these inquiries necessarily led to many problems transcending, yet significantly affecting, the right to counsel issue. For example, the question of indigency could not be disentangled from bail and probation practices; nor could the matter of when the right to counsel begins be torn from police interrogation and all it entails — powers of arrest, self incrimination, prompt commitment, coerced confessions; nor could the misdemeanor problem be considered without regard to the brand of justice dispensed by the inferior courts.

I. "INDIGENCY": STANDARDS AND ADMINISTRATION

In a recent study of the representation afforded indigents in the federal courts, it was reported that "the most widely felt abuse of the assignment system is the false claim of indigency to obtain free counsel." Although several of those interviewed in Minnesota shared this view, the general reaction was not nearly that strong. This was not because few Minnesota criminal defendants claim to be indigent, for in no county was the estimate of indigent felony defendants put at less than 50 percent, and the more com-
mon approximations were between 70 and 90 percent.\textsuperscript{85}

Since "cost" probably presents the most formidable obstacle to a full realization of equality of treatment for the impoverished in criminal cases, much turns on (a) the basic standard of indigency, and (b) the manner in which it is administered. The survey disclosed that in some respects the counties' approach to these problems was quite similar, notably in the procedures used to determine indigency. On the other hand, sharp differences were uncovered in regard to (a) whether the indigent should later be required to reimburse the county for its expenditure and (b) what factors ought to be considered — and how much significance they should be given — in establishing who is an indigent. For example, the reaction to the defendant's ability to raise bail varied from those who dismissed it as irrelevant to those who viewed it as decisive.

A. Determination of Indigency

Despite the prevalence of claims of indigency, only three of the [County District Judges] County Attorney Public Defender

<table>
<thead>
<tr>
<th>County</th>
<th>District Judges</th>
<th>County Attorney</th>
<th>Public Defender</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>70</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>50*</td>
<td>60-75</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>75</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>67; 85</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>60; 90</td>
<td>50-75</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>75; 80; 90</td>
<td>50</td>
<td>70-75</td>
</tr>
<tr>
<td>7</td>
<td>70; 70-80; 90</td>
<td>70</td>
<td>70</td>
</tr>
</tbody>
</table>

*This judge pointed out that the percentage of indigent defendants is highest in the 18 to 21 year old age group.

In the docket study, 62% of all defendants selected were found to be indigent, the range in the five counties being from 60 to 65%. The results of the mail questionnaires on this point were as follows:

<table>
<thead>
<tr>
<th>Estimated Percentage of Indigents</th>
<th>No. of District Judges</th>
<th>No. of County Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>20</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>25</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>35</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>50</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>60</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>70</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>75</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>80</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>85</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>90</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>95</td>
<td>6</td>
<td>6</td>
</tr>
</tbody>
</table>
seven county attorneys interviewed felt that the system for determining indigency was too lenient. But these three felt quite strongly about the matter, one going so far as to claim that “half of the ‘so-called indigents’ could afford a lawyer because that many are working.” Another prosecutor, from a small county, complained that since the accused knew that appointed counsel would probably be from the same law firm as retained counsel, the attitude was, “might as well let the county pay for it.” All three prosecutors protested that “a claim of indigency is accepted at face value.”

The remaining four county attorneys, as well as the two public defenders, considered the system for determining indigency to be “about right.” “Most of these people just have no money,” was a typical reaction from this group. Several recognized that their judges were quite lenient but felt that “all doubts should be resolved in the defendant’s favor.” Two found comfort in the thought that a defendant facing a felony charge would, as a matter of self-interest, retain his own lawyer if he could afford it. A third felt that the system might be “tightened up” by advising the defendant that he would be better off with retained counsel—a questionable approach.

The method of ascertaining indigency does not differ significantly in the seven counties surveyed. The determination is made either by a magistrate at the first appearance before him or by the district judge at the arraignment stage, the only difference of any

86. Less than one-third of the prosecutors replying to the mail questionnaire complained that the system for determining indigency was too lenient. Thirty-six out of 52 felt that it was “about right.”

87. One complained that he was very unhappy about what he called the “promiscuous appointment of counsel.”

88. But one prosecutor, with over ten years experience in a rural county, was confident that he had never seen a case in which counsel was appointed where the defendant could have paid for counsel himself.

89. Here, as elsewhere, the matter of avoiding a defendant’s subsequent attack on his conviction, on the ground that counsel was denied, played a significant role in the thinking of those interviewed. See text accompanying note 153 infra.

90. If this advice acted only to prevent false claims of indigency, it would not seem to be legally objectionable. However, it may well operate to impose an undue hardship on certain defendants; that is, it may cause some accused persons, or their relatives or friends, to go into debt, or extend themselves in some other way, beyond the point at which they would have been legitimately considered as indigents. And this result is even more unfortunate in light of the fact that, in a number of counties surveyed, the advice would simply not be true. See text accompanying notes 485-42 infra. Furthermore, such advice would tend to undermine the confidence of the “true” indigents in their appointed counsel.
note being that some magistrates do not put the accused under oath.

All judges question the accused in open court—and that is about all.91 In one county, law enforcement authorities and defense counsel, who may have already consulted with the defendant without formal appointment, also disclose any information they may have about the accused's financial status.92

The inquiry in open court concerns the defendant's assets—salary, real or personal property, wages due from last employer. Most judges inquire into the financial resources of parents and relatives,93 but two judges made the point that if these persons were to refuse to retain a lawyer for the defendant, counsel would be appointed.94 If the accused had sufficient equity in an automobile to cover an attorney's fee for this particular kind of case, he would probably be forced to sell it—but this is a rare case.95

B. "Borderline" Indigency: The Practice and Some Proposals

What about the person who has some money or property but not enough to pay the entire fee for retained counsel? All persons

91. One judge, in a rural county, pointed out that since most of the criminal defendants were not residents of the county, no one had very much information about them.

92. One county attorney asserted that he would oppose a claim of indigency if he were convinced the defendant were guilty and had been uncooperative.

93. Contrast the procedure reported from the District of Columbia. There, if the defendant requests assigned counsel and swears to an affidavit of poverty, the court makes no further inquiry into his ability to retain counsel, nor is his family or employment situation investigated. . . . The defendant's ability to retain counsel is not investigated or measured by any meaningful standard, and there are indications that counsel are sometimes assigned to represent defendants who could, in fact, afford to retain and pay counsel.


94. It would seem that here, too, there is a certain unfairness in placing pressures on parents or relatives to retain counsel. The result might well be that the defendant whose relatives were "callous" would be represented by a better lawyer than the defendant whose relatives were sympathetic and conscientious. And the better lawyer will be provided at state expense.

95. One judge reported that if it appears that the accused might be able to raise $300–$500, and if it seems that the case might be handled by retained counsel for this amount, he continues the case for three or four days—"let's give the private attorneys a crack at it." This judge estimates that in about half of such cases the defendant retains a lawyer.
interviewed were asked to comment on this problem. For various reasons, about two-thirds maintained that the defendant should not have to pay at all. The comment, "If all he has in the world is a couple hundred dollars, he should not be stripped of it," was the sentiment expressed by many. Others felt that the defendant should be allowed to use this money for investigation; 90 that obtaining partial reimbursement was just "too cumbersome"; that the question should turn on whether the defendant's family needed the money.

Although several people said that for most offenses, if the defendant had some money, he could obtain representation, 97 one judge stated flatly that no lawyer in his county would take a felony case without a 500 dollar retainer in hand. A public defender from another county pointed out that the issue is complicated by the fact that many lawyers "deliberately price themselves out of criminal cases."

The remaining one-third was of the view that the defendant should be required to contribute whatever he could to the county. One prosecutor, describing most of those persons found indigent as "not indigent, just insolvent," suggested that they should repay the county on the installment plan. 98

The problem of defining indigency is a serious one, not only as it affects the public treasury but also as it bears on the equal administration of justice. To say that "any extensive investigation of indigency would cost more than it would be worth" 99 might well

96. One county attorney, however, was of the opinion that if the defendant had cash, it should be paid to the county, but that he should not have to liquidate everything else he had.

The matter of funds for investigation raises some nice questions. If the defendant has admitted his guilt and is ready to so plead or if preparation of the defense requires no special investigation, the argument that the defendant needs the money for investigation fails. On the other hand, if the defendant has inadequate funds for necessary investigation or has no funds at all, the argument that he is entitled, perhaps constitutionally, to financial help is reasonably persuasive. See generally Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054 (1963).

As to whether the defendant should be permitted to use this money for bail, see text following note 124 infra.

97. One district judge commented that the defendant would be assured of keeping a retained lawyer once he appeared at arraignment because this judge would not permit the lawyer to withdraw after that stage. Of course, if this practice were well known, it would seem unlikely that a fee-conscious attorney would ever accept an arraignment retainer without the assurance that the defendant could pay for any additional proceedings required.

98. Cf. text following note 105 infra.

be accurate and undoubtedly accounts for the willingness to accept the defendant's word at face value. Although this may well dictate the ultimate resolution of the issue, as it apparently has done in the counties surveyed, it only addresses itself to the "public treasury" aspect of the problem.

Cost, however, must always be measured by the benefits purchased. Not only would the possible additional public expense of ferreting out false claims of indigency avoid discrimination in favor of liars, it might also cause those who oppose affording free services to indigent criminal defendants to be more receptive to both the present system and forthcoming proposals for extending further aid. Moreover, the "public treasury" argument overlooks the possibility of the significant deterrent force of selective investigation. Here, as elsewhere, a small sampling with adequate publicity might well cause a would-be violator to regard detection as a substantial risk.  

To reach the broader question: what ought to constitute indigency? "Or, to avoid the deep sands of semantics," as Judge Prettyman has put it:

under what financial circumstances is a person accused of crime entitled to legal service at no cost to himself? . . . [S]uppose that, although he has no ready cash, he has a good job. Or suppose he has assets such as a car, a television set or a refrigerator. Suppose he has a good job and some cash but has a wife and children. Suppose he has no readily convertible asset but has an equity in a home. Suppose he has in his pocket a hundred dollars but owns not another sou. Suppose he earns plenty but spends more and so is always in debt. . . . Suppose he can make no present payment but could make a satisfactory installment arrangement. . . . Suppose his wife works and really supports the family and is willing, if need be, to shoulder the burden of his defense . . . .

Should the defendant who owns an automobile worth 500 dollars be forced to render himself penniless if a lawyer might be retained in his case for exactly that amount, while a similarly situated defendant who owns a 400 dollar car obtains perhaps even better counsel at state expense? It seems evident that such arbitrary results should be avoided.

If workable, a much more desirable technique than the "all or nothing" approach, would seem to be a case-by-case judgment as to how much each defendant can reasonably afford for counsel,


102. "Medical indigency" exists when a patient is without sufficient funds to pay the expenses incident
considering such matters as his family obligations and need for investigation funds. \(^{103}\) "Poverty must be viewed as a relative concept." \(^{104}\) If the defendant is unable to retain counsel of his choice for this amount, state appointed counsel should be provided and the defendant should be required to reimburse the county in the amount it is determined he can afford. Such a plan would appear to substantially reduce the possibility that the borderline indigent, who is forced to retain counsel, receives less adequate representation than the total pauper, who has counsel appointed for him. \(^{105}\)

C. REIMBURSEMENT TO COUNTY AS CONDITION OF PROBATION

As was noted above, one prosecutor proposed that those persons who are employed pay for counsel “on the installment plan.” This suggestion is carried out, to a limited extent, in four of the counties studied. The practice of certain judges in some of these counties and of all judges in others is to require, as a condition of

Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054, 1074 (1963).

103. Legislatively established guides would be extremely valuable here in attaining the ends of uniformity and equality.


105. Professor Trebach has suggested as a test of indigency whether the accused has “funds sufficient to interest a competent attorney in the community to handle his case.” Trebach, A Modern Defender System for New Jersey, 12 Rutgers L. Rev. 293, 325 (1957). Use of this test might result in either (1) the defendant having a lawyer whom he really does not want, or (2) the defendant having assigned counsel without charge despite the fact that he has some money which could be used for this purpose.
probation,\textsuperscript{106} that the convicted indigent repay the county's expenditure for his lawyer.\textsuperscript{107} The probation officer usually informs the judge of the amount the defendant should be expected to repay each week.\textsuperscript{108} The survey indicates that this condition of probation is rarely, if ever, violated.

Although one judge challenged the statutory authority to place

\textsuperscript{106} Statistics gathered from the seven counties revealed that a high percentage of all defendants found guilty of felonies and gross misdemeanors are placed on probation. They are as follows:

<table>
<thead>
<tr>
<th>County</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>47</td>
</tr>
<tr>
<td>2</td>
<td>30</td>
</tr>
<tr>
<td>3*</td>
<td>66 1962</td>
</tr>
<tr>
<td>4</td>
<td>55 1961</td>
</tr>
<tr>
<td>5*</td>
<td>42 1962</td>
</tr>
<tr>
<td>6*</td>
<td>40 1961</td>
</tr>
<tr>
<td>7*</td>
<td>83</td>
</tr>
<tr>
<td></td>
<td>38 1962</td>
</tr>
<tr>
<td></td>
<td>31 1961</td>
</tr>
</tbody>
</table>

*Counties which follow the practice.

A judge in one of these counties stated that he usually follows the probation department reports that, except in the cases of crimes endangering human life, recommend probation.

The docket study revealed the following:

<table>
<thead>
<tr>
<th>COUNTRIES*</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>T\textsuperscript{a}</th>
<th>T\textsuperscript{b}</th>
<th>%\textsuperscript{c}</th>
<th>%\textsuperscript{d}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>12</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>3</td>
<td>28 6</td>
<td>4 2</td>
<td>56 19</td>
<td>75 43 23 35</td>
</tr>
<tr>
<td>Probation</td>
<td>14</td>
<td>4</td>
<td>9</td>
<td>4</td>
<td>4</td>
<td>13 18</td>
<td>5 2</td>
<td>45 32</td>
<td>77 34 40 30</td>
</tr>
<tr>
<td>Combination</td>
<td>3</td>
<td>3</td>
<td>14</td>
<td>1</td>
<td>1</td>
<td>5 8</td>
<td>13</td>
<td>4 10</td>
<td>6</td>
</tr>
<tr>
<td>Not sentenced</td>
<td>1</td>
<td>5</td>
<td>10</td>
<td>6</td>
<td>4 1</td>
<td>6 7</td>
<td>4 3</td>
<td>25 22</td>
<td>47 19 27 22</td>
</tr>
</tbody>
</table>

*The number of the county conforms to the number in the table immediately above.

**Indigent

***Nonindigent

\textsuperscript{a} Total number of indigents and nonindigents in each category.

\textsuperscript{b} Combined total of indigents and nonindigents in each category.

\textsuperscript{c} Percent of indigents and nonindigents in each category.

\textsuperscript{d} Combined percentage of indigents and nonindigents in each category.

\textsuperscript{107} In two of these counties, collection is made in the probation office; in the other two, in the clerk of court's office. See also text accompanying note 181 infra.

\textsuperscript{108} The defendant's potential income and family obligations are among the factors which bear on this determination.
such a condition on probation, this system is defensible, if properly administered. In practice, it does not apply to those defendants who are acquitted; this certainly seems to be a rational distinction, especially if the defendant has already been taxed for the amount that he can reasonably afford. In fact, it seems anomalous to compel an indigent person to contribute his future earnings to the county as reimbursement for a defense that has been sustained. Furthermore, it does not seem unduly harsh to require a person found guilty of a crime punishable by imprisonment, to repay the county for expenditures in his behalf. For if the convicted person had been sent to prison, his earning capacity would have been cut off completely.

This system would be most undesirable if probation were to depend on whether a person makes reimbursement, irrespective of 109. The provision of Minn. Stat. § 610.38 (1961) that “the court shall in each case set forth the reason for the order of probation and may make such terms and conditions of probation as are deemed suitable . . . .” seems to vest the district judges with a rather broad discretion. But cf. State v. McCarthy, 259 Minn. 24, 104 N.W.2d 678 (1960). See generally Hink, The Application of Constitutional Standards of Protection to Probation, 29 U. Chi. L. Rev. 488, 498-91 (1962); Note, A Trial Judge’s Freedom and Responsibility in Administering Probation, 71 Yale L.J. 551 (1962).

A bill recently introduced in the California legislature would have specifically granted trial judges this power. 22 Cal. Assembly Interim Comm. Rep. 96 (1961). The Public Defender of Los Angeles County stated that the courts already had such power. Id. at 102. The Assembly Interim Committee on Criminal Procedure felt “that the adoption of this procedure would be unwise.” Id. at 103.

110. Requiring an indigent to pay the cost of his defense after being found guilty of a crime may be considered as part of the “penalty” for committing the crime, particularly if such a provision is publicized. If reimbursement is to be encouraged, perhaps the more desirable approach would be to grant the county a civil action for its recovery. Cf. National Probation and Parole Ass’n, Guides for Juvenile Court Judges 81 (1957).

111. Compare the system in Norway, Sweden, and Denmark where counsel is provided to all accused persons, irrespective of financial means, in the first instance; if there is an acquittal, no effort to obtain reimbursement is made. In Norway, even if the defendant is convicted, no inquiry is made as to his ability to pay. Committee on Poverty 82. Professor Cahn has stated that a fair-minded society will not only provide and pay independent counsel to defend all indigent persons who are arrested on serious charges; it will also pay the necessary and reasonable defense costs of all accused persons, whatever their economic condition, who are eventually found to be not guilty. As matters now stand in the United States and most other democratic countries, the state, by recognizing no duty of reimbursement after an acquittal, can compel an innocent man to choose between unjust conviction and personal bankruptcy.

his ability to pay. The hardship it would work against those unfortunate, typically unemployable persons seems so unjust as to arguably raise constitutional objections.\textsuperscript{112} There is no reason to believe that this was the case in the counties surveyed.\textsuperscript{113}

Apart from the public compensation factor, a deep-seated question bearing on the desirability of this practice is its effect on the rehabilitation of the probationer. Although the stringent requirements of compulsive repayment might constantly remind him of his past mistake and thus "make a better man of him," it might well be that the financial hardship imposed would adversely affect rehabilitation by, for example, embittering the probationer who views this use of probation as extortion or threatened imprisonment for debt.\textsuperscript{114} Further exploration of this matter, of course, lies beyond the scope of this Article. Perhaps the ultimate legislative answer can be formulated most effectively by those who are students of probation.

A final point merits consideration. Several judges who employ this system disclosed that defendants first learn of it after sentence has been imposed. If only because "failure to give notice" runs contrary to our general legal principles, this practice should be abandoned, particularly when the defect may be so easily cured by simply giving notice before counsel is appointed.\textsuperscript{115} Moreover, if such notice were given at the outset, it might significantly deter

\begin{itemize}
\item \textsuperscript{112} But compare the frequently offered alternative of "$100 or 30 days": In Illinois, for example, fines must be discharged by imprisonment for a period of one day for each one dollar and fifty cents of fine and costs. Ill. Rev. Stat. ch. 38 § 391 (1953). A fine of ten thousand dollars requires from a penniless defendant over seventeen years of imprisonment in a county jail. Petitioners [in \textit{Griffin v. Illinois}] do not suggest that this differentiation between solvent and insolvent convicted persons is invidious within the constitutional concepts of 'equal protection' or 'due process of law.'
\end{itemize}

\begin{itemize}
\item \textsuperscript{113} One district judge stated that probation has never been revoked for the sole reason of failure to meet the periodic payments. \textit{Cf.} United States v. Taylor, 321 F.2d 339 (4th Cir. 1963), indicating that it may be an abuse of discretion to revoke probation for failure to satisfy the condition that substantial fines be paid within a specified period, if the probationer made a bona fide effort to do so, but failed simply because he was too poor.
\end{itemize}

\begin{itemize}
\item \textsuperscript{114} It has been reported that, in Michigan, the use of this system in all cases has produced the result "that the rehabilitative aspects of their probation program have badly deteriorated, with the probation officers becoming mere collection agents." 22 Cal. Assembly Interim Comm. Rep. 103 (1961).
\end{itemize}

\begin{itemize}
\item \textsuperscript{115} The explanation of one judge for lack of advance notice was that the relevant financial information is not known until the presentence report is compiled. This fact would not seem to preclude a judge from giving general advance notice before appointment of counsel.
\end{itemize}
those who might otherwise falsely claim indigency. A substantial
number of them might retain counsel, reasoning that if install-
ment payments might have to be made, they might as well be
made to counsel of their own choice.

What of those defendants, if any, who would rather waive
counsel than be forced to pay for it later? To permit an “intelli-
gent” waiver by those who are equipped to make one might be
theoretically justifiable. As a practical matter, however, most indi-
gent defendants may not be in a position to assess adequately
the consequences of waiver. For these, counsel should be provid-
ed. Although there is, of course, an element of unfairness in forcing
a man to pay for something he does not want, compelled financial
support of one’s legal defense is surely no more objectionable than
“compelled financial support of group activities” to which the
member is indifferent or even opposed.

D. FINDING OF NONINDIGENCY

As indicated above, rejected claims of indigency and discov-
eries of defendants’ ineligibility after counsel was appointed were
extremely rare events everywhere. When either of these inci-
dents does occur, the defendant is usually advised or, more ac-
curately, “told” by the judge to retain his own lawyer. In one
county, evidently, counsel is appointed anyway and if the defend-
ant is found guilty and placed on probation, collection is made
in the manner described above—an illustration of how the

116. “The ordinary indigent defendant is incompetent intelligently to
waive the assistance of counsel. He needs the assistance of counsel to enable
him to know how great is his need of counsel.” Potts, Right to Counsel in
Criminal Cases: Legal Aid or Public Defender, 28 TEXAS L. REV. 491, 500
(1950).

referring to Railway Employees’ Department v. Hanson, 351 U.S. 225 (1956)
(union shop case)).

118. Two counties reported that there was no experience at all with such
situations.

119. In those counties in which the county attorney or clerk of court
may informally appoint counsel prior to arraignment, see text accompanying
notes 159–60 infra, these officials may advise a nonindigent person that he
must retain his own lawyer. Although this “nonjudicial determination of indi-
gency” is subject to review by the district judge if the defendant refuses to
comply (and thus appears without counsel), this practice should be discouraged
if it causes some “obedient” defendants to retain their own lawyers when they
in fact qualify as indigents.

120. This appears to be an inequitable program since it quite clearly dis-

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“payment as a condition of probation” system breeds laxity in the determination of indigency.

In the two counties utilizing the public defender system, it is understood that if the defender discovers that his client is financially able to retain counsel, he is to so advise the client and then have his appointment revoked. The defendant then obtains a lawyer for himself. There is no reason to believe that this “non-judicial determination of indigency” is abused. It should be discouraged, however, because the salaried defender’s self-interest in fewer clients clashes, in theory, with the public’s interest in effective representation for the indigent accused.

E. RELATIONSHIP OF RAISING BAIL TO INDIGENCY

An easily administered device for deterring false claims of indigency is to withhold the assignment of counsel to all persons who raise bail. Three of the counties surveyed adhere to this

121. One public defender commented that this happens about 10 times a year. The other reported that in one such case the “indigent” defendant retained private counsel for $5000.

122. In one of the counties, there is in the jail a list of private lawyers whom the defendant may call and retain.

123. See also note 119 supra.

124. In all counties surveyed, bail is set by the magistrate at the first appearance. District judges have authority to alter the amount of bail. In six of the counties, the recommendation of the county attorney carries great weight, particularly when the defendant is unrepresented, although in one of the larger counties some magistrates set it independently. In the seventh, the prosecutor conceded that the municipal judge, a man of 28 years experience, ignores his recommendation.

Only one county attorney has a prepared bail schedule for all offenses. The minimum recommendation for felonies of other prosecutors varied from $1000 to $2500. One stated that bail of less than $500 is rarely set (in low bail cases, the defendant ordinarily is unable to meet it anyway, cf. Foote, Foreword: Comment on the New York Bail Study, 106 U. Pa. L. Rev. 685, 690 (1958)) and that $5000 bail is usually asked in felony cases involving physical violence. Another reported that a minimum $5000 is asked if the defendant has prior convictions. One prosecutor remarked that he usually recommends an amount just above what he feels the defendant is able to pay — except when he knows that the district judge will not be in the county for some time and that inability to meet bail will therefore result in the defendant’s staying in jail for a prolonged period of time.

Among the additional factors reported as being important in determining the amount of bail were whether the accused was a resident of the county and what the likelihood was of repetition of the offense.
rule quite rigidly.\textsuperscript{125} Since few defendants who claim indigency are able to meet the bail set, however, the issue does not arise often.\textsuperscript{126}

Both the judge and prosecutor in one of these counties stated unequivocally that irrespective of how the bond is raised, no defendant who is out on bail is provided counsel at state expense.\textsuperscript{127}

125. The docket study produced the following statistics:

<table>
<thead>
<tr>
<th>County</th>
<th>Total Number of Indigents</th>
<th>Number of Indigents Released Pre-Trial</th>
<th>Total Number of Nonindigents</th>
<th>Number of Nonindigents Released Pre-Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>1*</td>
<td>48</td>
<td>5</td>
<td>32</td>
<td>18</td>
</tr>
<tr>
<td>2*</td>
<td>30</td>
<td>3</td>
<td>16</td>
<td>8</td>
</tr>
<tr>
<td>3</td>
<td>28</td>
<td>10</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>4</td>
<td>13</td>
<td>3</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>5</td>
<td>12</td>
<td>2</td>
<td>8</td>
<td>6</td>
</tr>
</tbody>
</table>

*Counties which adhere to the rule.

Counties

<table>
<thead>
<tr>
<th>Amount of Bail on Which Indigent Was Released</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal recognition or less than $250</td>
<td>2</td>
<td>2</td>
<td>5</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>$250–1000</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>$1000–2000</td>
<td></td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>$2000–3000</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>$5000–10,000</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

It is interesting to note that of all those indigents released, only about 10% were released prior to arraignment in district court. (About half of the nonindigents bailed were released prior to arraignment.) One public defender truthfully tells his clients that they will not be released on bail if they avail themselves of his services and that retained lawyers can probably get the original bail reduced. He reported that this provides an incentive to a number of defendants to retain their own lawyers.

In some of the remaining four counties, the rule might be employed with greater frequency were it not for its administrative inconvenience. Here, counsel is often appointed prior to the time defendant is released on bail. Several judges commented that it was then "too late" to do anything about the problem.

126. Both public defenders estimated the percentage of all felony defendants unable to make bail to be the same as the percentage of all felony defendants who are indigent.

127. This, of course, does not apply to persons released on their own recognizance. In this county, in 1962, 28% of those persons arrested on a felony charge were released on bail. Half of these were on personal recognizance—a seemingly high percentage. One-third of those released deposited cash bond, while the remainder were released on a surety bond signed by a professional bondsman.

In one of the other three counties in which this data was available, less
In the other two counties, an estimated three percent of those defendants out on bail are furnished counsel. There are at least two reasons for this: (1) In one county, some judges do not enforce the rule strictly. This lack of uniformity, particularly within the same county, seems eminently unfair. It is accentuated by the fact that some magistrates in this county enforce the rule so rigidly that if it appears that the defendant will request the appointment of counsel, the matter of bail is not mentioned; others deliberately set it beyond his reach to avoid the problem. 128 (2) Defendants who have been out on bail appear at the arraignment and, for the first time, state that they are unable to afford counsel. In most cases, the judge feels compelled to appoint counsel and protect the record. Thus, the “cunning” defendant enjoys liberty as well as free counsel while the “unknowing” defendant remains in jail. 129

The practice in the other counties regarding the relationship between bail and the appointment of counsel is varied. In two, the fact that the defendant is out on bail is a minor factor — “since bail is usually provided by personal surety of friends and neighbors, the defendant is still indigent.” 130 One judge insisted, however, that if relatives were willing to post bail, they should also retain counsel and that if they can do only one or the other, they should do the latter.

In another county, the fact that the defendant is out on bail is of considerable importance in determining whether he is indigent. If an “indigent” has posted cash bail and is later convicted and

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128. In the other county, it was reported that the bondsmen would not post bail for any person who is represented by appointed counsel because such persons are considered poor risks. Thus, the bondsmen provides as effective a check on false claims of indigency here as do the judges.

129. In a few cases, the amount of cash required to be posted for bail is considerably less than the amount of money that would be required to obtain representation. In these cases, counsel is provided at state expense.

130. If defendant himself provides cash bail in these counties, he will probably be ineligible for appointed counsel, unless the bail premium is much less than the amount necessary to retain counsel.
placed on probation, some of the bail money is remitted to the county regardless of its source. In the final county surveyed, because the judges fear reversal if counsel is not appointed, counsel is always furnished to those who claim indigency, regardless of the bail factor and the source of the premium. This county also follows the practice of conditioning probation on reimbursement of counsel fees.

Obviously, a person who has raised bail is less likely to be indigent than one who has not. It hardly follows, however, that all persons out on bail are nonindigent. Friends or relatives or employers who may have furnished the bail premium may be unwilling or unable to pay for a lawyer. Or the defendant’s own funds for a low bail premium may be inadequate to retain counsel. In such cases, an inflexible rule seems most inequitable.

This injustice emerges more graphically when one considers the long period of time — as long as seven or eight months in some counties — that may and does pass between arrest and plea or trial. More than one person interviewed acknowledged the strong incentive this provides for “jail case” defendants to plead guilty. The fairer solution would seem to be to enlarge the scope of the indigency inquiry to include these factors.

The defendant who can either raise bail or retain counsel but

181. Compare this practice with that discussed in text accompanying notes 106-17 supra.

182. This is the same county discussed at note 120 supra.


184. This would be true if the court is not in session or the criminal term of the particular session is over. In only one county surveyed was there a continuous criminal term. While we were told, in one county, that many defendants in this situation are released on bail or personal recognizance, some are not. See also note 180 infra.

The time that elapses between arraignment and trial varies considerably from county to county. When the court is sitting, delays may be occasioned by the defendant’s requests and by the number of preliminary motions filed. One prosecutor pointed out that a defendant who has decided to plead guilty will stand in much better stead if he makes restitution before he pleads.

One county reported that the trial is usually held less than a week after arraignment; another, 8-14 days; another, 7-60 days; another, 2-3 weeks; another, 2 weeks to 4 months (but sometimes as quickly as 2 days if the session is about to end); another, 2-4 weeks (for “jail cases,” which are given priority). In only one county is there a greater delay for a jury trial than for a nonjury trial. There, the court will hear nonjury cases all summer.

185. This incentive is especially acute when the defendant knows that he is likely to be placed on probation or that his sentence will be less than the time he will have to spend in jail awaiting arraignment or trial.
not both arguably "should not be made to choose between freedom pending trial and representation by counsel during the trial." In several of the Minnesota counties surveyed, however, the latter choice is made for him, a practice that "seems clearly unwise."

Existing bail practice assumes the fourteenth amendment does not require that one unable to raise bail be freed pending trial. Otherwise, the rationale is, there would be little "to insure the defendant's appearance and submission to the judgment of the court." But this interest of the state is satisfied if the defendant posts bond. To release the defendant and then provide counsel for those few who have exhausted their funds for bail would not appear to involve much cost to the state.

Even if it did, the wrong done by denying release to a presumptively innocent defendant is of such magnitude that, on balance, pre-trial release would seem to be warranted. The effects of detention are not limited to the denial of freedom alone. If a not guilty verdict is returned, the defendant will have been incarcerated unjustly. In addition,

pre-trial detention almost invariably results in termination of income, and often in loss of employment, at a time when unusual and urgent demands on the resources of the accused are being made. The consequences are that the defendant is deprived of funds that might contribute to the costs of defense and is rendered incapable of providing support for his family. . . . Pre-trial detention . . . often impedes the lawyer's contacts with his client. Detention facilities are frequently located at places remote from the attorney's office. . . . Moreover, the facilities available for interviewing in many jails are not conducive to effective consultation.

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140. It would seem to be a fairly uncommon situation where the accused has just enough money to raise bail and no more. Moreover, it has been pointed out that the denial of bail to an accused who is employed may result in a greater expense for the county—for example, relief payments for the accused's family—than the cost of assigning counsel. 22 CAL. ASSEMBLY INTERIM COMM. REP. 101 (1961).
141. Cf. McKay, Poverty and the Administration of Justice, 36 U. COLORADO L. REV. 825, 827 (1965). "[I]n the first group of 111 [most of whom would have remained in jail under ordinary procedures prior to a resolution of their cases] disposed of by the courts after recommendation for bail by the Vera study group, 66 were either acquitted or dismissed; 33 received suspended sentences; 7 received fines; and only 5 went to jail."
142. COMMITTEE ON POVERTY 70-71.
Furthermore, "the defendant enters court in the company of a
guard, a fact not lost on jurors. If convicted, he is unable to point
to employment and good conduct while on bail as grounds for
probation."\textsuperscript{143}

Indeed, since pre-trial detention works an even greater hardship on the completely indigent defendant,\textsuperscript{144} one who can neither make bail nor retain a lawyer — and there appears to be "no evidence of any consistent correlation between financial incapacity and the risk of nonappearance"\textsuperscript{145} — the recommendation that a more liberal use be made of releases on personal recognizance\textsuperscript{146} merits serious consideration by both the state legislature and judiciary.

II. WHEN DOES THE RIGHT TO ASSIGNED COUNSEL "BEGIN"?

One of the major constitutional issues in the right to counsel area, if not the most important one, remaining as unilluminated after the Supreme Court's recent decisions as before, is the question of "when the right to counsel begins." That is, at what stage in the proceedings between arrest\textsuperscript{147} and trial must the state provide an indigent person with a lawyer. Here, the great controversy — how soon after a man is taken into custody must he be advised of his right to counsel or, put another way, how much "leeway" police interrogators should be allowed — far transcends the right to counsel problem. It may well be the most pervasive question in the field of constitutional-criminal procedure today, both at the constitutional and normative levels. Heated resistance


\textsuperscript{144} The defendant who has a small amount of money, and who chooses to forego bail in order to have counsel appointed for him, may use that money to finance a pre-trial investigation of his case. But, if the accused has no funds whatever, he must conduct the full investigation himself — an impossible task if he is incarcerated. See \textit{Committee on Poverty} 71.

\textsuperscript{145} \textit{Committee on Poverty} 77–78. One prosecutor reported that the bail schedule in his county had been recently cut in half and that there were no adverse effects. See generally Ares, Rankin & Sturz, \textit{The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole}, \textit{38 N.Y.U. L. Rev.} 67 (1963).


\textsuperscript{147} Although it has been suggested to us that perhaps counsel ought to be provided even before an arrest has been made, this possibility appears too far removed from current practices and present judicial and legislative thinking to merit serious consideration.
to the "McNabb-Mallory rule"\textsuperscript{148} and widespread persistence in "arrests for investigation"\textsuperscript{148} both subsume this matter. It also has played an inextricable role in the coerced confession field\textsuperscript{150} and suggests an independent solution to many of the problems in that area.\textsuperscript{151}

The seven-county survey disclosed wholehearted approval of the availability of counsel at the stage of arraignment in district court. Significant differences in practice and attitude appeared with increasing frequency, however, as the inquiry was directed back in time toward the point of arrest.

Before proceeding to the center of the dispute — whether counsel should be provided immediately or soon after arrest — it is appropriate to examine the current practice at those pre-trial stages where the availability of counsel generates little or no controversy.

A. ARRRAIGNMENT IN DISTRICT COURT

In every county studied, the district judges were painstakingly careful in providing counsel before accepting a plea,\textsuperscript{152} although fear of reversal on appeal or of later collateral attack, rather than

148. This rule, fashioned by the Supreme Court in the exercise of its general supervisory power over the administration of justice in the federal courts, derives its name from the cases of McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957). It provides that, in federal prosecutions, all confessions or admissions are inadmissible if elicited during a period of time when a suspect is being unreasonably detained, instead of being brought before a magistrate "without unnecessary delay," Fed. R. Crim. P. 5(a), so that he may be advised of his right to counsel and his right to remain silent.


149. See note 203 infra and accompanying text.


152. In Minnesota, only district judges may take pleas in felony and gross misdemeanor cases. In all seven counties surveyed, the procedure at arraignment is essentially the same. The defendant appears and is informed of the charge against him. Unless waived, the indictment or information is read. All counties use informations almost exclusively. Grand jury indictments are mandatory for offenses which carry a sentence of life imprisonment, the most severe penalty under state law. Occasionally, indictments are employed when
concern for the rights of the accused, as such, not infrequently
seemed to be the dominant motivation. This scrupulousness is
sometimes carried to the point of simply not permitting a defend-
ant to waive the assistance of counsel at arraignment. One dis-

One district judge acknowledged that some defendants appearing before
him admit their guilt and implore: “I don’t want any lawyer or
any delays. I want the clock to start running right now.” This
judge “talks the defendant into availing himself” of counsel. On
the other hand, another judge in the same county reported that in
his five years on the bench he had never witnessed an attempted
waiver; but if the situation were to arise, he would permit it if “in-

If the defendant pleads not guilty, it is assumed that he wishes a jury trial
unless he requests otherwise. He is not even asked if he wants to waive, al-
though this matter is often settled informally between defendant’s counsel and
the county attorney prior to the plea. In one county, if the defendant wishes
to waive, he is required to do so in writing.

The comment of one judge was rather colorful, but representative of
the prevailing attitude: “Generally, we appoint a lawyer to protect the record.
We are simply furnishing the defendant a pallbearer.” Several persons inter-
viewed expressed the view that most of the defendants who attempt to waive
do so to lay a foundation for a later attack on the conviction. For the expres-
sion of a similar feeling in Pittsburgh, Pennsylvania, see Kamisar, The Right
to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Per-

An empirical basis for this attitude exists in some counties. In one, a
recent guilty plea was vacated on state habeas corpus on the ground that the
trial judge’s explanation to the defendant of the need for counsel was inade-
quate. A new arraignment was held, counsel was appointed, and defendant
again pleaded guilty. In another, the judge explained that he had received
many habeas corpus petitions from the prison in his district which revealed
an incomplete trial record “as to whether the defendant’s rights were ob-
erved.” Thus, in order not “to leave any doors open,” when a defendant has
sought to waive counsel before this judge, he asks, “If the court appoints
counsel, will you confer with him?” No one has ever refused.

One judge, however, felt that counsel was essential when a plea is made
because unrepresented defendants sometimes believe that they are guilty of
an offense when they are really not.

One prosecutor made the point that the judges in his county “bend
over backwards” so far for indigent defendants as to “almost urge them to
plead not guilty.” It should be noted that the degree to which waivers are
permitted sometimes varies among judges in a single county, as well as from
county to county.
telligently” made — “you can’t force a lawyer on him.”

A tactic employed by some courts to cope with the waiver problem is simply to appoint a lawyer who sits at counsel’s table and is available for consultation with the defendant. Most defendants placed in this position have conferred with counsel; some have not. Those judges who will permit a defendant to waive assure themselves that the “waiver is intelligent” and take arduous steps to insure that “a good record is made.”

In all seven counties, the attempted waiver is the exceptional case. Although one prosecutor estimated that almost 10 percent of the accused attempted to decline counsel — especially if they expected to be granted probation — this figure was atypical. Most estimates ran under three percent, and even this minute figure

155. Some other typical comments: “We don’t let an indigent waive. He has nothing to say about it.” “I tell the defendant that he must have a lawyer.” “I would insist on the appointment of counsel.”

Although the Supreme Court has suggested that a trial court may not force counsel upon a criminal defendant who wants to represent himself, see, e.g., Moore v. Michigan, 355 U.S. 155, 161 (1957); Carter v. Illinois, 329 U.S. 173, 174–75 (1946); Adams v. United States ex rel. McCann, 317 U.S. 260, 272 (1942), the Court has never held that due process would be violated by appointing counsel contrary to the wishes of the defendant. See also Anderson v. Kentucky, 288 F.2d 393, 395 (6th Cir. 1961). Compare United States v. Private Brands, Inc., 250 F.2d 554, 557 (2d Cir. 1957), cert. denied, 355 U.S. 957 (1958). And, although a number of states have constitutional or statutory provisions stipulating that an accused who is sui juris and mentally competent has a right to conduct his own defense, see Annot., 77 AL.R.2d 1233 (1901), there appears to be no case in which a conviction has been reversed for this reason alone. Cf. State v. Thomlinson, 100 N.W.2d 121 (S.D. 1960) (alternative holding).

The argument that a criminal defendant may, in certain circumstances, be so prejudiced by being barred from conducting his own trial that due process has been violated is not wholly unpersuasive. See United States v. Mitchell, 137 F.2d 1006, 1012 (2d Cir. 1943) (Frank, J., dissenting) (the right of an accused not to be represented by a lawyer he does not want approaches an “absolute”). Perhaps only the accused fully understands the factual complexities of the issues; perhaps only the self-representing accused may best invoke jury sympathy. See Brief for Alabama as Amicus Curiae, pp. 9–10, Gideon v. Wainwright, 372 U.S. 335 (1963); Note, 76 HAV. L. REV. 579, 585 (1963). The argument is probably strongest when the lawyer sought to be appointed is “inexperienced and incompetent.” See MacKenna v. Ellis, 203 F.2d 35, 41 (5th Cir. 1953). Yet it is difficult to see how an accused who wishes to plead guilty and does so in any way prejudiced by the court’s insistence that the accused first confer with appointed counsel.

156. No indigent defendant included in the docket study went unrepresented. The results of the mail questionnaire on this point were as follows:

<table>
<thead>
<tr>
<th>Estimated Percentage of Indigents Waiving</th>
<th>No. of District Judges</th>
<th>No. of County Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>11</td>
<td>47</td>
</tr>
<tr>
<td>5</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>20</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>
is greatly fractionalized when the judge fully explains the important role a defense lawyer may play.\(^{157}\) On the basis of these findings, any appellate court would seem justified in begrudgingly treating a state's claim that counsel has been intelligently waived.\(^{158}\)

Uniformity was also manifested in affording appointed counsel ample time to confer with their clients prior to a plea. In one county where counsel is not generally provided until after the indigent is brought into district court for arraignment, most judges immediately appoint counsel at this point and then grant a one-week continuance of the arraignment. The other judges automatically enter a not guilty plea for the defendant, then appoint counsel and continue the case. In several of the other counties, the practice is to furnish counsel at some pre-arraignment stage. In the exceptional case when this is not done, the arraignment is continued for several days.

The extraordinary judicial caution exercised in this matter is carried to an extreme by the practice in one of the remaining counties. Under state law,\(^{159}\) only district judges may formally appoint counsel. A problem arises when — as is often the case in the geographically large but sparsely populated judicial districts — the judge is not sitting in the county. In this county, as in two other rural counties studied, the meeting of attorney and client is expedited by an "informal" appointment of counsel, either by the county attorney or clerk of court one or more days before arraignment.\(^{160}\) Nevertheless, when the already represented defendant

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\(^{157}\) Compare the much higher percentage of waivers reported from some federal district courts. *Committee on Poverty* 10; Note, 76 Harv. L. Rev. 579, 584 (1963).

A recent Wisconsin survey revealed that "the judges' estimates on the percentage of eligible indigent defendants who waived their right to have counsel appointed varied from five percent up to one hundred percent, with the bulk of the estimates spread rather evenly upward from fifty to ninety or ninety-five percent." Winters, Preliminary Report on Counsel for the Indigent Accused in Wisconsin 38 (1963) (unpublished preliminary report in Minnesota Law School Library).

\(^{158}\) See, e.g., Moore v. Michigan, 355 U.S. 155, 161 (1957): "Where the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made." Cf. Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951) (discussion of "waiver" or "consent" in search and seizure cases).

\(^{159}\) Minn. Stat. § 611.07 (1961).

\(^{160}\) This might be done either before or after the county attorney has filed the information. In one of these counties, the information is first filed at the arraignment; in another, less than three days before arraignment; in the last, from four to seven days before arraignment. In the remaining four coun-
appears at arraignment, the district judge, after "formally" appointing counsel, grants a recess and, before accepting a plea, insists that the defendant consult further with his lawyer.161

B. FIRST APPEARANCE BEFORE THE MAGISTRATE

Moving back a step in time, the pre-arraignment stage at which counsel is provided varies substantially among counties. Although it was reported that at the first appearance before them, municipal judges and justices of the peace always advise felony defendants of their right to free counsel, the symmetry ends there. Counsel is regularly appointed at the first appearance stage in only two of the counties, and in a third, he often is. In the remaining four, the information is either filed at the arraignment or within three days before it.

161. This practice caused one county attorney to say that "the courts are absolutely frightened on this counsel matter. If a man is accused of chicken theft and comes into court with the sack of chickens on his back, the judge will not accept a guilty plea without appointing counsel and ordering a recess, even though counsel has consulted with the defendant earlier."

162. All proceedings prior to arraignment are conducted before either municipal judges, who preside in urban centers, or justices of the peace, who are situated in the rural sectors of the counties. All municipal judges in the counties surveyed were attorneys while most of the justices of the peace were laymen. With the exception of one county, almost all first appearances in felony and gross misdemeanor cases were held before the municipal judges. In the excepted county, the justice courts handle most of this work because the municipal judge prefers not to. Several county attorneys reported that, as a practical matter, they conduct the proceedings held before justices of the peace.

163. This is usually done pursuant to Minn. Stat. § 611.07 (1961), which provides that

when a defendant . . . shall request the magistrate to have counsel appointed to assist in his defense . . . the county attorney shall immediately certify to the judge of the district court of the county wherein the preliminary examination is had that the defendant is without counsel and that he has sworn, under oath, that he is financially unable to procure counsel. The district court shall then appoint counsel . . . .

In at least one county, the district court has signed a blanket order permitting the municipal court to appoint counsel for indigent persons. This county has a public defender system and a public defender is present in court when first appearances are conducted.

In the two counties which regularly appoint counsel at the first appearance stage, counsel does not appear for the defendant until the "second appearance" before the magistrate, there having been a postponement of all proceedings until counsel has conferred with his client.

Compare the situation existing in the federal courts where indigent defendants rarely have counsel provided prior to the arraignment in district court. Note, 76 Harv. L. Rev. 579, 591 (1963). For persuasive criticism of
appointed counsel rarely appears until after the indigent has been bound over to district court. 164

Evidently, the basis for the diversity stems from the different attitudes and emphases of the judicial officers conducting first appearances. 165 This buttresses the theory 166 that indigent defendants are unlikely to waive appointment of counsel if all the facts are squarely presented to them. The important inquiry is whether this dissimilarity in practice significantly affects the indigent defendants’ rights.

When a preliminary hearing 167—the major pre-arraignment proceeding—is held for an indigent defendant, counsel is almost always appointed in every county. 168 With the exception of one county, however, they are held only infrequently. 169 The fact that

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164. Three of these follow the “informal” appointment of counsel practice. See text accompanying note 160 supra. In the fourth county, counsel is almost always first appointed at the arraignment in district court.

165. In one of the two counties where counsel is regularly appointed by the municipal court, the county attorney remarked that the magistrate urges the defendant to accept counsel and, if the defendant persists in declining, “he is given a few days to think it over.”

166. See text accompanying notes 157–58 supra.

167. The proceedings at preliminary hearings are basically the same in all seven counties. The magistrate effectively conducts a full-fledged trial, a practice that drew sharp criticism from one county attorney. Witnesses for both sides testify and are cross-examined. A court reporter usually makes a record of the proceedings, although in four of the counties this must be requested. The record is provided to indigent persons without cost.

The county attorney may reduce the charge to a lesser offense, but one county attorney stated that he never did this because he “never charges too high.” The magistrate may alter the amount of bail but may not accept a plea unless the charge is reduced to a misdemeanor. See note 152 supra.

168. Appointed counsel is always given adequate time to prepare for the preliminary hearing.

169. The docket study showed the following:

<table>
<thead>
<tr>
<th>County</th>
<th>Total Number of Indigents</th>
<th>Number of Indigents With Preliminary Hearing</th>
<th>Total Number of Nonindigents</th>
<th>Number of Nonindigents With Preliminary Hearing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>12</td>
<td>3</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>13</td>
<td>4</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>3</td>
<td>28</td>
<td>4</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td>30</td>
<td>1</td>
<td>16</td>
<td>3</td>
</tr>
<tr>
<td>5</td>
<td>48</td>
<td>4</td>
<td>32</td>
<td>3</td>
</tr>
</tbody>
</table>
most prosecutors employ an “open-file policy”—negating defense counsel’s need to use a preliminary hearing as a discovery device—may account for this. But the “open-file policy” does not explain why indigent defendants are granted preliminary hearings more often in those counties where counsel is most frequently appointed in the municipal court.

The inference seems fair that if counsel is provided prior to the preliminary hearing, more will be held. This observation is supported by the fact that in the five counties that hold preliminary hearings least regularly, indigent defendants are usually permitted to waive them before counsel is appointed. In fact, one municipal judge does not even offer the preliminary hearing to indigent defendants. Furthermore, those interviewed in these five counties

One smaller county reported 26 felony arrests in 1961–62 and no preliminary hearings. Another reported 55 felony arrests in 1962 and one preliminary hearing. Other estimates ranged from “rarely held,” to “ten percent of the time,” to “about thirty percent of all cases.”

The excepted county reported 60 felony arrests in 1962 and 34 preliminary hearings. (This is county number 1 in the above table which shows a much smaller percentage—20%.) This was one of the two counties in which counsel was regularly appointed in the municipal court. The other county with this practice reported the next highest frequency—“about thirty percent.” (This is county number 4 in the above table which shows a much smaller percentage—9%.)

Preliminary hearings are never held for crimes punishable by life imprisonment because these require grand jury indictment. One county attorney reported that preliminary hearings are held with particular frequency for sex offenses because counsel wish to pre-test the demeanor of witnesses.

170. Three of the prosecutors interviewed stated categorically that they revealed their entire files, including the weak points, to counsel of unquestioned integrity and that this included most defense lawyers. A representative comment was, “We’re not playing any games here. This is all going to come out in open court.” An attempt was made to confirm this with defense counsel in two of the counties. One agreed generally with the county attorney’s description, but stated that the county attorney holds back some in cases that are going to trial; the other said that the county attorney “objected to any use of the material in his files.”

One county attorney conceded that, on occasion, he will withhold a “surprise” if he feels the case demands it. The other three stated that, generally, they disclose no more than they have to—they might withhold an unfavorable autopsy or psychiatric report—but would reveal their strength to a reputable lawyer if they believed it might induce a plea of guilty. Cf. Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 CALIF. L. REV. 58, 69 & n.6 (1961). One said that he has carried this so far as to almost lose a case on preliminary hearing because he “held back.” All of these agreed that they would make no disclosures to “untrustworthy lawyers.”

171. This judge only grants a preliminary hearing if the defendant “is really screaming about a case of mistaken identity.” Yet this county, number 3 in the table in note 169 supra, shows that a much greater proportion of indigents receive preliminary hearings than do nonindigents.
all recognized that, although persons with retained counsel do not often request preliminary hearings, they do so more frequently than do paupers.\textsuperscript{172} This is less true in one of the other two counties and not true at all in the second.\textsuperscript{173}

The fact that a waiver of preliminary hearing is not irrevocable—several judges remarked that they have remanded cases to the municipal court prior to accepting a plea—does not seem to have affected this finding. Apparently, appointed defense counsel are less inclined to hold preliminary hearings after the accused has left municipal court than when they are appointed before the magistrate. Moreover, even in those few cases remanded for preliminary hearing, it cannot be said that the defendant has “been made whole.” Not only may the passage of time have hampered his factual investigation but if the defendant is released after the preliminary hearing,\textsuperscript{174} he will have been incarcerated for some time, unless he was out on bail—an uncommon status for indigent persons.\textsuperscript{175}

C. IMMEDIATELY OR SOON AFTER ARREST

1. The Practice

In no county surveyed is counsel provided for the indigent prior to the “first appearance.” Yet it has been urged that “the time a defendant needs counsel most is immediately after his arrest,” and that “representation must be provided early if it is to be effective.”\textsuperscript{176} In theory, the Minnesota practice should accord

\textsuperscript{172} Three of these five counties were included in the docket study (numbers 2, 3, and 5 in the table in note 169 supra). Only in number 2, is the above statement clearly borne out by the sampling.

\textsuperscript{173} Again, the docket study in these counties (numbers 1 and 4 in the table in note 169 supra) does not fully confirm this statement.

\textsuperscript{174} “Of 246 preliminary hearings assigned to [District of Columbia Legal Aid Agency] staff attorneys in 1961–62, thirty were discharged by the commissioner.” Murray, Defender System in the District of Columbia, 21 The Legal Aid Brief Case 64 (1962).

\textsuperscript{175} See text accompanying notes 124–32 supra. Furthermore, the “presence of counsel [early in the proceedings] may importantly affect the levels at which bail is set.” Committee on Poverty 24.

with these exhortations since, by statute, arresting officers are required to bring the accused before a magistrate “forthwith.” If this provision were complied with, the indigent defendant would at least be informed of his right to counsel shortly after being taken formally into custody. And, depending on the interpretation of “forthwith,” compliance might require informing the defendant of this right almost immediately after arrest.

The practice does not conform to the theory. The amount of time that elapses between the formal charge and booking of a person by the arresting authorities and the accused’s first appearance before a magistrate varies, in the counties surveyed, from less than 12 hours to over three days. Moreover, there is an even wider gap between theory and practice than the data appearing in the records indicates; in nearly every county, the individuals surveyed generally admitted that a person taken into custody is not “officially” arrested “until the authorities have enough on responding [to a questionnaire on the representation of indigent criminal defendants in federal district courts] indicated merely that representation should be afforded as soon as possible.”

177. MINN. STAT. § 629.42 (1961).

178. Because Minnesota has no rule similar to the “McNabb-Mallory rule,” see note 185 infra, there has been little opportunity for an authoritative judicial definition.


180. Two of the counties reported “12 hours or less and, in any event, not later than the next day”; two more, “within 24 hours or over the weekend”; two, “25 to 48 hours”; one, “49 to 72 hours.”

Nor, as has been indicated, does the defendant’s first appearance before a magistrate insure that he will in fact have counsel appointed then. See text at notes 168-64 supra. In the county (number 8 on the table below) in which counsel is rarely appointed before the arraignment in district court, as many as seven days may elapse between “formal arrest” (booking) and arraignment, although it was reported that it is usually three days or less. In the three counties that have counsel appointed informally shortly before the arraignment, the time elapsing between booking and arraignment varies considerably. One reported 8 to 14 days; another, 4 to 7 days (number 2 on the table below), except when the district judge is not sitting in the county the delay may be much longer unless the accused requests to be taken to another county for arraignment; the third, three days or less when the judge is sitting in the county. If he is not, it might be as long as six months, when a new criminal term begins, unless the defendant wishes to plead guilty, in which case he is taken to a county in which a judge is sitting.

In the county (number 4 on the table below) in which counsel is often appointed at the first appearance stage, it was reported that the arraignment in district court usually takes place about three days after booking — unless a preliminary hearing is held, in which case as many as eight days might elapse. In the two remaining counties, those in which counsel is regularly appointed at the first appearance stage, the times that elapse between booking and ar-
him," or "for a half day or so," or "for up to forty-eight hours," or "for from two to six days."\footnote{181} This practice continues despite the admonishments of several municipal judges. Furthermore, it appears that many of those persons brought before a magistrate with relative dispatch, are very often so treated because they have "talked" with relative dispatch.

Although arresting officers who "willfully and wrongfully delay" taking an arrested person before a magistrate are guilty of a gross misdemeanor,\footnote{182} this remedy seems to have had little or no impact on police practice.\footnote{183} This suggests that the most effective deterrent to these delays would be judicial or legislative exclusion of all statements made by the defendant during this period\footnote{184} — the federal "McNabb-Mallory rule." Yet neither the courts nor

raignment were reported to be about four to seven days in one and eight to fourteen days in the other (number 1 in the table below).

The docket study showed the following:

<table>
<thead>
<tr>
<th>County</th>
<th>Median Number of Days Between Arrest and Arraignment</th>
<th>Maximum Number of Days Between Arrest and Arraignment in Non-Bail Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Overall</td>
<td>Bail Cases</td>
</tr>
<tr>
<td>1</td>
<td>23</td>
<td>23-28</td>
</tr>
<tr>
<td>2</td>
<td>16</td>
<td>38</td>
</tr>
<tr>
<td>3</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>7</td>
<td>9-10</td>
</tr>
</tbody>
</table>

\*This indigent defendant was found not guilty of a bad check charge.


\footnote{182} \textit{Minn. Stat.} § 613.52 (1961). See also \textit{Minn. Stat.} § 461.10 (1961), discussed at note 253 infra.

\footnote{183} There appear to be no recent reported criminal prosecutions under \textit{Minn. Stat.} § 613.52 (1961).

\footnote{184} At a recent panel discussion dealing with the impact of \textit{Mapp v. Ohio}, 367 U.S. 643 (1961) on Minnesota police procedures, the point was made that arrests and searches made without "probable cause" had always been in violation of both the federal and state constitutions. Nonetheless, \textit{the fact that the Minnesota courts admitted the fruits of illegal searches into evidence caused one city attorney to conclude that it was not "really proper" to say that the}
2. Attitudes of Those Interviewed

This need to afford "some time" for police interrogation before the accused is provided with counsel, the feeling that "questioning is an indispensable instrumentality of justice," was recognized by a majority of those interviewed. As a group, the prosecutors were probably the most restrictive. Two of them felt that indigent persons should not be provided with counsel until arrest, police had been violating the law. It caused a detective to remark that "the mores of society dictated" such police conduct; "that this is okay, it's been going on in Minnesota since it became a state . . . . The Supreme Court of Minnesota sustained this time after time . . . . Now, your judiciary okayed it; they knew what the facts were." Minnesota ACLU Panel on "Police Searches and Arrests in Relation to Civil Liberties," May 18, 1963 (emphasis added), rebroadcast on KUOM, July 25, 1963, recording on file in audio-visual extension service, University of Minnesota.

185. See Bench and Bar of Minn., Nov. 1962, p. 30, 43-44.
186. As asserted recently by the Supreme Court of Oregon:
This court has declined to adopt the McNabb-Mallory rule. [citing cases.] The McNabb-Mallory rule apparently has not been adopted in any state. Michigan seemed to adopt the rule in People v. Hamilton, 359 Mich. 410, 105 N.W.2d 738 (1960), but that holding has been severely limited by subsequent cases. People v. Harper, 365 Mich. 404, 113 N.W.2d 808 (1962); People v. Hannum, 362 Mich. 660, 107 N.W.2d 894 (1961).


187. Detention for the purpose of eliciting statements has been held to constitute an “unnecessary delay.” Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957). But see Turberville v. United States, 303 F.2d 411 (D.C. Cir. 1962) (defendant questioned for 30 minutes); United States v. Vita, 294 F.2d 524 (2d Cir. 1961) (defendant questioned for nine hours by FBI); United States v. Ladson, 294 F.2d 535 (2d Cir. 1961) (defendant questioned for one hour); Holt v. United States, 280 F.2d 273 (8th Cir. 1960) (defendant held 2½-3 hours); Metoyer v. United States, 250 F.2d 30 (D.C. Cir. 1957) (defendant held two hours to write his confession); United States v. Naples, 192 F. Supp. 29 (D.D.C. 1961) (defendant held to re-enact the crime); Larkin v. United States, 144 A.2d 100 (D.C. Mun. App. 1958), rev’d on other grounds, 281 F.2d 72 (D.C. Cir. 1960) (defendant held about 2½ hours). In all of these cases, the damaging statement was held admissible as not having been obtained during an “unreasonable delay.” See generally Note, 68 YALE L.J. 1003, 1018-20 (1960).

188. For some generalization as to what constitutes “some time,” see text accompanying note 224 infra.
raignment in district court. To do it any earlier would seriously impair law enforcement... We are only solving 20 to 25 percent of major felonies now and 90 percent of these turn on getting a statement from the defendant. We wouldn’t get these if lawyers were provided right after arrest." Three others stated that the defendant should not be advised of his right to counsel until the “first appearance” although one felt that the police should advise the defendant of his right to remain silent.

In addition to underscoring the need for interrogation time, one prosecutor pointed out that the rule against admitting coerced

190. One felt that counsel should not even be provided then “if guilt is patent.” One of the judges interviewed was also concerned about the appointment of counsel in this situation. The other prosecutor stated that his “open-file policy” made counsel at the preliminary hearing stage superfluous.

191. Statistics in Minnesota for 1962 support this assertion. Only one-fourth of all major offenses (murder, negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny, and auto theft) were reported to be “cleared.” The percentages within this group, however, were highest for the more serious crimes, e.g., murder-78%, negligent manslaughter-91%, rape-55%.

192. See Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring): To bring in a lawyer means a real peril to solution of the crime, because under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

But see COMMITTEE ON POVERTY 38 (1963): “We are informed that [the California] public defender often enters a case while the accused is in police custody and before preliminary hearing and that these practices have in no way disrupted or adversely affected the orderly prosecution of criminal cases in that state.” Interestingly, the Committee “concluded not to recommend a similar provision for the federal law at this time [because] such a proposal would be vigorously opposed by those who fear its consequences on law enforcement.” Ibid.

193. For a discussion and collection of authorities on the matter of police interrogation and the privilege against self-incrimination, see LOCKHART, KAMISAR & CHOPPER, SUPPLEMENT TO DODD’S CASES ON CONSTITUTIONAL LAW 607-08 (1963): “The police are not constitutionally obliged to warn a suspect either that he need not make any statement or, if he does so, that it may be used against him.”

Compare the statement of former United States Attorney Gasch to District of Columbia police:

It would be my advice to [warn before questioning] ... Let’s look at the military service — that is standard operating procedure ... The FBI follows this practice. Congressman Dowdy, who was a prosecuting attorney in Texas for 8 years ... found that it was no impediment to effective and intelligent law enforcement ... It would be in the inter-
confessions afforded the accused adequate protection. The impetus for the "McNabb-Mallory rule," however, was the Supreme Court's concern that "unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of 'the third degree,'" and its recognition of "the tremendous problems of proof raised by the 'coerced confession' issue." Since "the prestige of police testimony usually carries the day," the safeguards upon which the traditional confessions rule rest have been branded "illusory."

Two county attorneys felt that fairness to the defendant demands that counsel be provided immediately after arrest. While conceding that such a rule would cause law enforcement officials to "become a little more disheartened," one maintained that a great many confessions would still be obtained.


194. This point was also made by a district judge. He said that, although he had never known of a coerced confession in his county, counsel subsequently appointed could redress this violation of the defendant's rights. See also People v. Garner, 37 Cal. 2d 185, 166, 867 P.2d 680, 699, 18 Cal. Rep. 40, 59 (1961) (Traynor, J., concurring). On the matter of police intimidation to obtain a confession, compare Wilcox & Bloustein, Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime, 59 COLUM. L. REV. 551, 558–59 (1959).


197. Douglas, The Means and the End, 1959 WASH. U.L.Q. 103, 114. Cf. McCormick, Evidence 233 (1954): "[A]n officer who is willing to use methods which he knows are unlawful is frequently (by no means always) willing to deny the wrong under oath"; NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 189 (1931) (Wickersham Report): "Officers who have obtained a confession by force and who offer the confession in evidence are virtually bound to deny that force was used."


199. This was also the opinion of one of the district judges in the group discussed immediately below. He believed that the police could obtain many statements without having to take people into custody. He recalled his experience as a personal injury lawyer in which he found that "hostile" persons would often talk freely to him and did not even object to having their statements taped.

This is a technique widely used by the FBI. See Hearings on H.R. 11477, supra note 193, at 409:
This view as to when the right to counsel should begin was shared by six of the 14 district judges interviewed and by one of the two public defenders. This group agreed that counsel should be provided “as soon as humanly possible after arrest” and “before the interrogation begins.” Although they recognized that implementation of their views might cause increased difficulties for law enforcement, those who took this view generally believed that the desirability of effectuating individual rights was an overriding consideration.

One of them, a judge, suggested that the problem could be solved if the police would expand their pre-arrest investigation and amass greater evidence of guilt at that early stage. Not only would this reduce the need for post-arrest interrogation, but confront-

[An instructor at the FBI school] told me that . . . they go into a man's home and say to him, “I just want to talk to you about this situation. You’re not under arrest, you are free to go, but I have talked to a few people and maybe you can help me solve this crime.” Now the instructor . . . a man of about 15 years’ experience told me that that technique has been found quite productive by their men in many different types of cases.

Mr. Gasch further stressed the necessity for a “voluntary” interview:

However, it is possible that a man might be under arrest even though the magic words, “you are under arrest” are not used. Suppose, for example, the police officer takes a man by the arm and escorts him up the street and says, “I would like to invite you up to police headquarters for a little questioning.” That would be an arrest . . . .

Id. at 418.

See also Mueller, The Law Relating to Police Interrogation Privileges and Limitations, 52 J. Crim. L., C. & P.S. 2, 12 (1961), for the position that “the police ought to work more with [pre-arrest] interviews.”

200. One of these six had previously been on the prosecution side for over 10 years. Although about 70% of those appointed lawyers who responded to the mail questionnaire felt that they had been appointed in time to represent the accused adequately, 14 out of 24 recommended that counsel be appointed at an earlier stage of the case.

201. See also Allison, supra note 176.

202. This has, in fact, occurred in the District of Columbia which has the “McNabb-Mallory rule.” See the statement of former United States Attorney Oliver Gasch:

Due largely to the conscientious cooperation of our Chief of Police and in accordance with the teaching of the decisions and our lectures on it, the police are making better cases from the evidentiary standpoint. Extensive investigation prior to arrest of suspects has resulted. The accumulation of other evidentiary material has become standard operating procedure . . . . Reliance upon confessions generally has been minimized. It must be mentioned, however, that in some instances we have been unable to go forward with cases wherein we felt that we were largely dependent upon a confession . . . .

Address by Oliver Gasch, Twelfth Annual Conference, National Civil Liberties
ing the accused with weighty evidence of guilt would have a strong tendency to induce confessions.

The survey disclosed that many arrests are made "for investigation" or "on suspicion," i.e. where the police have acted on less than probable cause. In such cases, the need for interrogation time is at its greatest, but the justification for the arrest is at its weakest. To allow the police more interrogation time later because they made an illegal arrest earlier is strange logic indeed. Moreover, under the recent decision of Wong Sun v. Union Clearing House, March 25, 1960, in Washington Post, March 26, 1960, p. D1.

One former prosecutor interviewed was of the opinion that "the weakest part of police work is their insufficient use of surveillance and interviewing before they 'pop the arrest.'"


This discussion assumes that an arrest is not lawful unless there is sufficient evidence to charge the suspect, a premise that underlies the Mallory case. 354 U.S. at 454, 456. However, it has been forcefully argued that the arrest norms allow, or at least ought to allow, a taking into custody on evidence insufficient for charging. See Remington, The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, in Police Power and Individual Freedom 11 (Sowle ed. 1962); LaFave, supra note 203, at 344-53.

Where sufficient grounds for making an arrest do not exist, the practice of briefly "detaining" a person at precinct headquarters, but not recording the detention as an arrest, seems much less justifiable than the practice of stopping a suspect on the street and making inquiries then and there, usually denominated "field interrogation" by the police. As Professor Foote has suggested, in many respects compulsory detention at a police station carries a stigma equivalent to that of an actual arrest. Foote, supra note 203, at 37. Moreover, as a commentator, not unsympathetic to the problems confronting police interrogators, has recognized a convincing argument can be made that even brief detention at the station, unlike on-the-street questioning, is substantially like custody after actual arrest, as it makes possible similar investigative methods — detailed search, questioning of unreasonable intensity, and interrogation behind closed doors.

LaFave, supra note 203, at 362. Professor LaFave notes, too, that "it is far from clear" that even the Uniform Arrest Act contemplates police station detention on grounds insufficient for arrest. Id. at 361.

The contrary argument was made by Judge Prettyman in Mallory v. United States, 236 F.2d 701, 703 (D.C. Cir. 1956). This evoked a strong dissent by Judge Bazelon, id. at 706-07, who was vindicated by the Supreme Court on review.
the statements obtained from defendants in these cases may well be inadmissible regardless of the failure to provide counsel.208

This still leaves a substantial number of cases in which the police have lawful cause to arrest but in which there is insufficient evidence to prove guilt beyond a reasonable doubt.209 Under such circumstances several questions remain unanswered. Should law enforcement officers be permitted some short period of time for noncoercive interrogation210 without the inhibiting—influence of defense counsel?211 Here, too, a confession by the accused may be of extreme importance.212


208. This case holds that at least in a federal prosecution, and at least under certain circumstances, verbal evidence following an unlawful arrest or search must be excluded as the “fruit” of police illegality. For the conclusion, after an exhaustive analysis of the case, that it applies to state as well as federal officers and is neither limited to incriminating statements obtained immediately after an illegal arrest nor to those obtained under “oppressive circumstances,” see Broder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 519–32 (1963).

209. Even where law enforcement officers possess sufficient information to arrest—a suspect, as a matter of practice a charge will usually not be forthcoming absent “admissible evidence showing a high probability of guilt.” Barrett, supra note 181, at 30. Recent statistics from the District of Columbia indicate that probable cause to arrest for a specific offense actually existed in something over 50% of all “arrests for investigation,” yet only five per cent of those arrested were ultimately charged. Commissioners’ Comm. on Police Arrests For Investigation, supra note 203, at 58, 69.

210. One might object to the stipulation that general police interrogation may be characterized as noncoercive. See text accompanying notes 194–98 supra. But many reasonable suggestions have been offered to cure the objection. See Note, 107 U. Pa. L. Rev. 286, 288 (1958); Note, 72 Yale L. J. 1434, 1454–58 (1963).

211. Perhaps one of the judges who urged the immediate appearance of counsel would answer “yes” here. He was troubled because “the great percentage of those arrested are guilty. If only you could separate the clearly guilty ones.”

212. One experienced prosecuting attorney stated that, in many cases, irrespective of the extrinsic evidence, “juries want to know what the defendant said.” A possible reason for this was offered by Weisberg, supra note 176, at 169: “When the search for confessions becomes a principal tactic in police work and a large percentage of prosecutions depend on confessions, juries may come to feel that a charge unsupported by a confession is weaker than it really is.”

For a related problem, see Culombe v. Connecticut, 367 U.S. 568, 571 (1961) (Frankfurter, J.): “Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And
If the accused's liberty and privacy are not being curtailed without due cause and if the interrogation techniques utilized are neither offensive nor likely to cause an innocent man to confess, what is the objection?\textsuperscript{213} Why is not lawful cause to incarcerate a sufficient basis for interrogation as well? Is it that once the authorities possess sufficient information to charge a person, he "has become an accused, rather than a suspect" and this "requires cloaking him with added protections from official inquiry"?\textsuperscript{214} Does this advance the analysis?

Is it that at this point there is a "declaration of war . . . the police . . . are no longer . . . the neutral inquirer whom the good citizen ought to assist" but now "the prosecution . . . without right . . . to further help from the accused"?\textsuperscript{215} Does this approach liken law enforcement to little more than a sporting contest?

Is it the possibility—or the likelihood—that an innocent man will make an "incriminating" statement or resort to damaging tactics that will supply a crucial link in the chain of evidence against him? Is it not likely that an innocent man, alarmed because he has been arrested, may give a false alibi?\textsuperscript{216}

Or is it the entire philosophy that underlies the privilege

where there cannot be found innocent human witnesses to such offenses nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions . . . .


\textsuperscript{213} Unless it can be said that the police procedures for preliminary questioning are so outrageous that the police cannot be trusted, there must be some middle ground that will give reasonable protection against improper procedures and still permit fruitful police inquiry." Lumbard, The Administration of Criminal Justice: Some Problems and Their Resolution, 49 A.B.A.J. 840, 843 (1963).

\textsuperscript{214} LaFave, supra note 203, at 374.


\textsuperscript{216} "An innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs." Commonwealth v. Webster, 59 Mass. (6 Cush.) 290, 317 (1810) (Shaw, C.J.). "Proof that an alibi . . . was false, though in fact the accused had nothing to do with the crime, was extremely prejudicial, if not fatal, in several cases." Borchard, Convicting the Innocent 373–74 (1932).
against self-incrimination? Prof. McNaughton, after an exhaustive analysis of the dozen policies advanced as the justification for the privilege, 8 Wigmore, Evidence 295-318 (McNaughton rev. 1931), has concluded that its two significant purposes are (1) "to remove . . . abusive tactics by a zealous questioner" and (2) "that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself." Id. at 318. In the situation at hand, "abusive tactics" and "less than good reason" have been removed by hypothesis.

219. "Over 90 percent of those picked up and charged are guilty — at least that many plead guilty. Those arrested usually cough up their guts and do so voluntarily. I can't believe the system would work if, as soon as arrested, the suspect was told of his right to counsel and his right to remain silent.

The notion that many arrested persons, particularly the "amateur criminals," are "contrite" and "talk freely" was expressed by a number of persons. But see the statement of former District of Columbia United States Attorney Gasch that confessions or admissions are of controlling importance in probably less than 5% of our criminal prosecutions. Gasch, supra note 202, at 3.

220. "By the time counsel is appointed, it is too late to do the defendant any good. The 'late' appearance of counsel is decisive in many cases."

221. Another dimension to this point has been suggested by Barrett, supra note 181, at 45:

Our system for the trial of criminal cases would be burdened to the verge of collapse if the percentage of guilty pleas were substantially reduced. This survey suggests that a substantial percentage of these pleas results from confessions or admissions given as a result of minimal police interrogation.

Cf. text following note 233 infra. But the compelling need for confessions has been questioned by Weisberg, supra note 176, at 166:

The police official characteristically reasons from individual cases, frequently those in which questioning produced a confession and which, in retrospect, he does not believe could have been solved in any other way.
these are crucial because most officers "really know very little
about scientific criminal investigation — I doubt that some can
even take fingerprints properly — but they often become tremen-
dously effective
interrogators."\(^{222}\)

The remaining six district judges and one public defender all
believed that counsel should initially be provided for indigent per-
sons at the first appearance before the magistrate.\(^{223}\) Although
they recognized the need for interrogation time, their general feel-
ing was that "a half day or so" was adequate\(^{224}\) because of the tend-

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It is not, of course, possible to determine what might happen if the po-
lice were effectively denied the power to engage in secret questioning
and thus compelled to stress or develop other methods of investigation.
There is some empirical evidence that a confession is not as crucial an ingre-
dient for a conviction as would be supposed. Of the 22 state convictions over-
turned by the Supreme Court on coerced confession grounds, the state
successfully retried half of the defendants. See Ritz, State Criminal Confession
Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme
Court and Some Current Problems, 19 WASH. & LEE L. REV. 202, 208-09
COLUM. L. REV. 744, 748 n.32 (1962).

\(^{222}\) Is this not "treating the sore by encouraging the infection"? Roth-
blatt & Rothblatt, Police Interrogation: The Right to Counsel and to Prompt
Arraignment, 27 BROOKLYN L. REV. 24, 68 (1960). A large part of the solution
would seem to be the improvement of the quality, training and facilities of
law enforcement officers.

\(^{223}\) All but one of these agreed that it would be unfair to the indigent
defendant not to furnish counsel at state expense at this stage. "Some very
substantial rights come into play here." The dissenter on this point stated
that, due to the county attorney's "open-file policy," the preliminary hearing
was unimportant, but that "it provides a convenient time to appoint counsel."

The responses on the mail questionnaire to the query as to when in the
proceedings a lawyer should first be made available to an indigent person were
as follows:

<table>
<thead>
<tr>
<th>Stage</th>
<th>District Judges</th>
<th>County Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Between arrest and first appearance before a magistrate</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>At first appearance before a magistrate</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Between first appearance and preliminary hearing</td>
<td>3</td>
<td>13</td>
</tr>
<tr>
<td>At preliminary hearing</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>After preliminary hearing but before the filing of an indictment or information</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>After the filing of indictment or information but before arraignment thereon</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>At arraignment on indictment or information</td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>

\(^{224}\) The public defender stressed the need of the defendant for prompt
arraignment before the magistrate if counsel were to be first provided there.
He felt, however, that the defendant's rights might be compromised to satisfy
the need for law enforcement.
ency of many suspects to "talk freely." This reaction is confirmed by the impressive statistics gathered by Professor Edward L. Barrett, Jr. His study of two California cities showed that 50 percent of all confessions and admissions came within eight hours or less after the suspect was arrested and 81 percent in 24 hours or less. Whatever the ultimate answer to the question of when the right to counsel begins, the argument that successful prosecution necessitates long detention is not very compelling.

Many of those interviewed found a mechanical difficulty in providing indigent persons with counsel immediately after arrest. Some typical remarks were: "Do you want the police to determine indigency?" "The sheriff can't determine indigency because an oath is required." A solution suggested by one public defender was simply to exclude all statements made by the defendant prior to the time he is brought before a magistrate to determine indigency. This would encourage prompt first appearances to be sure, but it would be even more restrictive than the "McNabb-Mallory rule."

A viable approach to this problem was offered by one of the district judges whose county has a public-defender system. After first recalling that judicial determination of indigency is a rather perfunctory procedure, he suggested that any person who claims to be indigent at the time of arrest should be assigned counsel from a list of younger lawyers. The designated lawyer will insure protection of the accused's rights and secure a prompt arraignment before the magistrate. If the lawyer or judge discovers that the defendant is not indigent, the lawyer should be reimbursed for his time and may have a client. If the magistrate finds that

225. Cf. 3 Wigmore, EVIDENCE § 851, at 319 (3d ed. 1940):
Every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested . . . . The nervous pressure of guilt is enormous . . . . and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction . . . . To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature.
See generally REIK, THE COMPULSION TO CONFESS (1959); ROGGE, WHY MEN CONFESS (1959).

226. Barrett, supra note 181, at 41-44. Also interesting is the fact that almost 90% of all suspects arrested were interrogated for no more than two hours.

227. This plan would be similar to the system, formerly used in Hennepin County, of having the junior bar section of the bar association represent indigent defendants at those stages in felony proceedings held in municipal court. See Jones, MINNESOTA CRIMINAL PROCEDURE § 15, at 29 n.181 (1955).
the defendant is indigent, the public defender will take over. The burden imposed on the bar seems slight and the protection accorded the accused seems substantial. And there appears to be no reason why a similar system could not operate in those counties that have an appointed counsel system rather than the public defender.228 Conversely, a member of the public defender’s staff could be similarly utilized, if not more efficiently,229 with reimbursement for his services being made to the county if it is subsequently discovered that the accused was not indigent.230 If mechanics were the only objection to appointing counsel immediately after arrest, the problem would not seem to be a very vexing one.

Cost was another obstacle raised. Some of those questioned felt that many more publicly financed attorneys would be required if counsel were appointed immediately or soon after arrest.231 The reply of some was this: Indigent defendants are offered counsel as soon as they are brought before the magistrate; if counsel were provided soon after arrest, the first appearance would follow “forthwith” and the time and effort spent by appointed counsel would be essentially the same.

This explanation is not really responsive to the point, raised by several, that since the early provision of counsel would curtail the “opportunity” of many defendants to confess, many more trials would be held and much greater public expense would be incurred.232 Two judges met this argument by challenging the premise. They believed that many of those arrested, particularly persons with prior offenses, would not ask for counsel even if informed of their rights and that most defendants would continue

228. The proposal of a district judge in a rural county was somewhat similar: As soon as a person is arrested, have the clerk of court appoint the next lawyer on the list to represent the defendant until a change of counsel, for one reason or another, may be made.

229. The “advantage of a public defender office is that a staff member will be readily available, thus ensuring early representation for the indigent.” Note, 76 HARV. L. REV. 579, 603 (1963). See also Murray, supra note 174, at 68.

230. For a similar suggestion, see STAFF OF HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPRESENTATION FOR INDIGENT DEFENDANTS IN FEDERAL CRIMINAL CASES 39 (Comm. Print 1960).

231. A district judge, whose county has a public defender system, speculated that the size of the defender’s staff would have to be doubled. Another judge in this same county said that, whatever the increased cost, it would be more economical if done through the public defender’s office. A judge in a nonpublic defender county agreed.

232. See quote from Barrett note 221 supra.
to plead guilty. Two others conceded an increased cost but contended that this would not be serious. "Until the county spends as much for indigents as it does for the county attorney, cost should not be considered a problem."

3. Constitutional Dimensions

As mentioned above, whether fourteenth amendment due process requires the appointment of counsel immediately or soon after an indigent person is taken into custody is not at all clear. Over 30 years ago, in Powell v. Alabama, the Supreme Court stated, in dictum, that in capital cases the accused "requires the guiding hand of counsel at every step in the proceedings against him." Yet, in a 1958 decision, Crooker v. California, the Court, by a five-four decision, upheld a death sentence despite the fact that Crooker's confession, secured by the police after Crooker's re-

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233. The docket study revealed a very high number of guilty pleas:

<table>
<thead>
<tr>
<th>COUNTIES</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>Ta</th>
<th>Tb</th>
<th>%c</th>
<th>%d</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pleased guilty</td>
<td>11</td>
<td>8</td>
<td>9</td>
<td>3</td>
<td>18</td>
<td>10</td>
<td>28</td>
<td>12</td>
<td>28</td>
</tr>
<tr>
<td>Found guilty by jury</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>3</td>
<td>8</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Found guilty by court</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Acquitted guilty by jury</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>6</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Nolle prosequi</td>
<td>1</td>
<td>4</td>
<td>3</td>
<td>9</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>16</td>
<td>6</td>
</tr>
<tr>
<td>Directed verdict of acquittal</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dismissed</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Unknown</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Indigent
**Nonindigent
aTotal number of indigents and nonindigents in each category.
bCombined total of indigents and nonindigents in each category.
cPer cent of indigents and nonindigents in each category.
dPer cent of all defendants in each category.

If it is assumed that nonindigents often get a lawyer immediately or soon after arrest, the fact that almost as many nonindigents plead guilty as do indigents (in fact, the percentage is the same if the "unknowns" are excluded) supports the contention that the early provision of counsel will not significantly affect guilty pleas.

quests for counsel were repeatedly denied, was admitted into evidence.

In light of the opinions of almost every person interviewed and the estimates of convictions based on confessions, it seems difficult to deny the Crooker dissenters’ claim that the accused’s interrogation period is “the most critical period of his ordeal.”\textsuperscript{236} In finding no “fundamental unfairness” to Crooker resulting from the denial of counsel the Court observed that he was “a college-educated man with law school training who knew of his right to keep silent.”\textsuperscript{237} Even if Crooker were not “prejudiced” by the failure of the police to provide him with counsel because he knew of his right to remain silent, this cannot be said of the less sophisticated defendant.\textsuperscript{238} Yet evidently the Court would have found no “fundamental unfairness” if the accused, not unlike most persons arrested, had received little more than a grade school education.\textsuperscript{239} For, on the very day that Crooker was decided, the same five man majority, in Cicenia v. Lagay,\textsuperscript{240} upheld a plea of non vult based on a confession made after the police refused Cicenia’s request to see his lawyer and the lawyer’s request to see Cicenia.

Although Cicenia was a noncapital case, the Court’s approach to the problem was no different than it was in Crooker. In both cases, the Court stressed both the need for and constitutionality of noncoercive police interrogation.\textsuperscript{241} Although the Court could have likened Cicenia to Crooker by pointing out that Cicenia had consulted counsel before the interrogation began and thus, presumably knew of his right to remain silent,\textsuperscript{242} it failed to do so. Rather it chose to proceed on the broader ground. Thus, there

\textsuperscript{236} 357 U.S. at 444. The dissenting opinion was written by Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Brennan concurred.

\textsuperscript{237} 357 U.S. at 440.

\textsuperscript{238} It has been pointed out that “prejudice” may perhaps most easily be established by proving that the accused failed to request counsel, thus buttressing his argument that he was ignorant of his rights. Weisberg, supra note 176. at 48.

\textsuperscript{239} This was the fact in Cicenia v. Lagay, 357 U.S. 504 (1958). Brief for Petitioner, p. 3.

\textsuperscript{240} 357 U.S. 504 (1958).

\textsuperscript{241} 357 U.S. at 441; 357 U.S. at 509. See also Culombe v. Connecticut, 367 U.S. 568, particularly at 588-92 (1961) (Frankfurter, J.). Mr. Justice Stewart joined the Culombe opinion and Mr. Justice Harlan, Mr. Justice Clark, and Mr. Justice Whittaker agreed with its “general principles governing police interrogation of those suspected of, or under investigation in connection with, the commission of a crime.” 367 U.S. at 642.

\textsuperscript{242} Cicenia was so distinguished in Griffith v. Rhay, 282 F.2d 711, 717 (9th Cir. 1960), cert. denied, 364 U.S. 941 (1961).
seems to be a fairly clear constitutional answer to the question of whether the right to counsel begins soon after arrest.

Yet there have been some new developments since 1958. In two recent capital cases involving pleas without the assistance of counsel, Hamilton v. Alabama and White v. Maryland, the Court has unanimously held that the right to counsel in such cases extends to any "critical stage in a criminal proceeding," whether it be arraignment or preliminary hearing, irrespective of "whether prejudice resulted." And in Gideon v. Wainwright, the Court unanimously obliterated the distinction between the right to counsel in capital and noncapital cases, at least as far as the trial is concerned.

Does Crooker remain unshaken after Hamilton and White? Does the fact that Hamilton and White involved the stage at which defendant pleaded, a stage at which defendant is already in court and seemingly more akin to trial, render the language "critical stage in a criminal proceeding" inapplicable to the non-judicial stages—the period soon after a person is arrested? Despite the fact that four Justices, still on the Court, described this latter stage in Crooker as "the most critical period of [the arrested person's] ordeal"? How much constitutional importance must be attributed to the fact that this is also "the most critical period" for law enforcement officials How significant is it that Mr. Justice Douglas wrote both of these phrases—dissenting in Crooker, for the Court in Hamilton? Is this phrase to be given greater weight than the language "every step in the proceedings" in Powell?

If "fundamental unfairness" remains the test, even in capital cases, for early stages of the proceedings, and if this requires greater prejudice than was established in Crooker, does the requisite prejudice exist when a less sophisticated, uncounseled defendant confesses? Even if Crooker stands, will the Court now find "fundamental unfairness" in a case like Cicenia? Or in a case in which the confessor never consulted with counsel prior to making his statement?

244. 373 U.S. 59 (1963).
245. 368 U.S. at 54; 373 U.S. at 60.
246. 368 U.S. at 55; 373 U.S. at 60.
248. Even Mr. Justice Douglas has observed that the "right of counsel at the moment of arrest is a proposal that would be opposed by police everywhere. It takes an advantage from them . . . ." Douglas, Foreword to Right to Counsel: A Symposium, 45 Minn. L. Rev. 693, 694 (1961). See also quote from Committee on Poverty note 192 supra.
If Crooker has been debilitated, does Gideon erase the distinction between capital and noncapital cases at all pre-trial stages?  
In short, has Cicenia also fallen? What is the significance of the fact that the per curiam opinion in White, decided a full six weeks after Gideon, specifically mentioned that White was a capital case and specifically relied on Hamilton? Does it presage a revival of the capital-noncapital dichotomy for pre-trial proceedings? Was it to preserve a unanimous Court? Or was it just the most persuasive way to write the opinion?

Only the Supreme Court has the authoritative answers to these and, undoubtedly, many more important and perplexing related questions. But we venture to say that many of the considerations advanced by those interviewed in Minnesota will ultimately be among the determinative ones. This will be true not only in the United States Supreme Court’s constitutional decision; it will also operate in the Minnesota Supreme Court’s decision whether to adopt a “McNabb-Mallory rule” or something akin to it and in the Minnesota legislature’s decision whether to impose “a flat rule that a certain period of interrogation without counsel is within police powers, but that [an appearance before a magistrate] and a right to consultation must take place within a short time, perhaps twenty-four hours [or twelve hours? or four? or two?] of arrest.”

249. Significantly, perhaps, Mr. Justice Black ended the Court’s Gideon opinion by relying on Powell v. Alabama, 287 U.S. 45 (1932), and citing the language from that case stated in text accompanying note 234 supra.

250. If failure to provide counsel soon after arrest is held to violate due process, will the Court go beyond the remedy of excluding confessions and admissions? Might the Court someday hold that failure to provide counsel shortly after arrest is an absolute bar to conviction? The majority in Crooker found this possibility totally untenable. 357 U.S. at 441. However, the dissent stated that the denial of counsel, rather than the introduction of the confession, was “a denial of that due process of law guaranteed the citizen by the Fourteenth Amendment.” Id. at 442. For analogous situations, illegal arrest, unlawful search and seizure, violation of the “McNabb-Mallory rule,” in which the courts have declined to impose such a stringent remedy, see Kamisar, What is an “Involuntary Confession”? A Commentary on Inbau and Reid’s “Criminal Interrogation and Confessions,” 17 Rutgers L. Rev. 728, 749 n.148 (1963).

251. Beaney, The Effective Assistance of Counsel, in FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 52 (Harding ed. 1959). Cf. D.C. CODE ANN. § 2-2202 (1961), which charges courts to “make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable.” For a collection of the various state provisions, see LaFave, supra note 203, at 332–33. Section 43-3 of the Proposed Illinois Code of Criminal Procedure (Tent. Final Draft 1969), patterned after Uniform Arrest Act § 2, empowers police to “detain for investigation for a reasonable period of time . . . under reason-
Another point concerning this general problem merits consideration. Several district judges interviewed firmly believed that if counsel is requested by an indigent accused immediately or soon after arrest, this request should be promptly honored. 252 Under Minnesota law, any officer who denies an arrested person's request to consult with counsel "as soon as practicable, and before other proceedings shall be had" 253 is guilty of a misdemeanor. 254 This statute may well apply to retained counsel only, 255 and the statute pertaining to the provision of counsel for indigent defendants is phrased in terms of a request being made to a magistrate who determines indigency while the defendant is under oath. 256

As Griffin and Douglas amply demonstrate, if due process does not require the prompt provision of counsel, this is not the end of the matter. For it can be forcefully argued that if Minnesota law permits a financially able person promptly to secure a lawyer, but does not permit an indigent person to do so, "there is lacking that equality demanded by the Fourteenth Amendment." 257 On its face, "the evil is . . . discrimination against the indigent." 258

The mechanics of doing so posed a problem to some of these judges. See text accompanying notes 2-02-30 supra. 255. MINN. STAT. § 611.07 (1961). One district judge suggested that counsel could be provided by having the sheriff report the accused's request to the county attorney who, in turn, would seek appointment, on the accused's behalf, from the district judge. Even if within the legislative intendment (and this seems doubtful) this appears to be a rather cumbersome and, more importantly, time-consuming procedure.

258. Id. at 355.
and, although it is plain that the Supreme Court has not gone so far as to read the fourteenth amendment to eliminate every social and economic disadvantage suffered by the indigent criminal defendant, as has been pointed out, the early appearance of counsel is a major, often decisive, protection. It certainly seems to be a more valuable safeguard than the right to a transcript or lawyer on appeal.

Regardless of whether the federal constitution demands equality in this matter, the indigent’s equal right to obtain counsel at his request warrants serious consideration by court or legislature. That closer examination is in order is evidenced by the recognition, as a fact, by several judges and prosecutors that the defendant who is able to retain a lawyer may secure one much earlier in the proceedings than may the indigent.

Other questions naturally follow from what has just been discussed: (1) If due process does not require the appointment of counsel immediately or soon after arrest in every case, does it nevertheless require the appointment of counsel on request? (2) Is it constitutionally permissible to provide counsel immediately or soon after arrest only when requested?

The answer to the first question would seem to be “no.” Although the Court considered a request for counsel to have special significance when it stated that “to be sure, coercion seems more likely to result from state denial of a specific request for opportunity to engage counsel than it does from state failure to appoint counsel immediately upon arrest,” we are here concerned not with the matter of coerced confessions but with the right to counsel. Just last year, the Supreme Court said of the right to counsel at trial that “it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.” Irrespective of the additional law enforcement problems created by providing counsel soon after arrest, it does not seem that any greater significance should be at-

259. See id. at 356–57.

260. An interesting question presented here is what remedy would be fashioned if this were held to be a constitutional violation. See note 260 supra.


262. A study made in New Jersey disclosed that defendants with retained counsel were able to make contact with an attorney in less than one-fifth the time required by indigents for the same purpose. Trebach, A Modern Defender System for New Jersey, 12 Rutgers L. Rev. 289, 300 (1957).


attached to the request for counsel at that earlier stage. If the right is deemed sufficiently important to be a due process requirement, why is it not sufficiently important to be made available to the unwary, ignorant and inexperienced as well as to the informed, sophisticated, and professional?

If due process does not require the immediate provision of counsel, may a state, consistently with the fourteenth amendment, provide it only on request—to rich and poor alike? On its face, this approach would appear to involve no violation of fourteenth amendment equality. Seemingly, it would not be an "invidious discrimination" for a state to offer something only to those who ask for it, if that something is not so valuable as to be part of due process. However, if it could be demonstrated that such a system operates to provide only retained counsel—that most financially able persons know of their right to a lawyer without being informed while most indigent persons do not—perhaps the answer to the second question may not be an unequivocal "yes"—particularly on recalling that the availability of counsel immediately or soon after arrest is regarded by those on both sides to be of great consequence.

But see Advisory Committee on Criminal Rules, Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the U.S. District Courts (1962), which does not require that a defendant be informed of his "right to request the assignment of counsel" until he appears before the commissioner [proposed Rule 5(b)] but provides that an indigent "shall be entitled, if he so requests, to have counsel assigned to represent him within a reasonable time after such request." [proposed Rule 44(a)]; State v. Bell, 24 Conn. Sup. 94, 186 A.2d 805, 807 (1962), which suggests a distinction between the necessity to request counsel in felony cases and misdemeanors. Cf. Douglas v. California, 372 U.S. 353, 354 (1963), in which the Court specifically mentioned "that petitioners requested, and were denied, the assistance of counsel on appeal." See also Bannerman v. The Right to Counsel in American Courts 104–06 (1955), and cases cited therein.

For the scrupulousness with which some state courts have interpreted statutes requiring that defendants be informed of their right to counsel, see, e.g., State v. Moosbrugger, 263 Minn. 56, 116 N.W.2d 68 (1962), 47 Minn. L. Rev. 281; State v. Greco, 271 Wis. 54, 72 N.W.2d 661 (1955); In re Newborn, 168 Cal. App. 2d 472, 355 P.2d 948 (1959).


Compare the matter of appellate review of a criminal conviction. The Supreme Court's decision in McKane v. Durston, 153 U.S. 684 (1894), that due process does not require a state to provide an appeal at all, still stands. See Griffin v. Illinois, 351 U.S. 12, 18 (1956). Yet, the Court has held that, since appellate review is of sufficient consequence, at least as to "the one and only appeal an indigent has as of right," the state must provide counsel. Douglas v. California, 372 U.S. 353, 357 (1963). See the discussion at notes 48–58 supra.

Suppose that an indigent's appointed trial counsel terminated his relation-
III. THE RIGHT TO ASSIGNED COUNSEL IN “CRIMINAL PROSECUTIONS”: WHERE TO DRAW THE LINE?

When petitioner Betts sought the absolute right to assigned counsel for indigent noncapital state defendants, he furnished the Supreme Court no stopping point and the Court saw none: 260

To deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: “Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it.” And, indeed, it was said by petitioner’s counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner, logic would require the furnishing of counsel in civil cases involving property.

The demands of petitioner Gideon were more modest. Like Betts, he urged the abandonment of the “special circumstances” test in noncapital cases — but only in prosecutions for “a serious criminal offense.” 270 Indeed, he reminded the Court of its own holdings to the effect that the right to trial by jury “in all criminal prosecutions” — the opening phrase in the sixth amendment which qualifies the right to the “assistance of counsel” and all other rights enumerated in the amendment — “does not extend to ‘petty’ offenses.” 271

ship with the defendant as soon as sentence was imposed, and, as a result, the indigent failed to file notice of appeal within the prescribed time. Despite the fact that no specific information as to appeal time is given to either rich or poor defendants, a persuasive argument may be made that the indigent defendant’s right to equal protection has been violated. Cf. Coffman v. Bomar, 220 F. Supp. 343 (E.D.N.Y. 1963).

Is this any different than allowing counsel after arrest only to those who request it? Arguably, “yes,” because in the “appeal hypothetical” the financially able defendant would know of his obligation to request an appeal because he was already represented by counsel while the indigent would not know because he was not represented. But perhaps “no,” because in the “counsel after arrest hypothetical” the disparity in knowledge between the financially able defendant and the indigent defendant may be just as great as in the “appeal hypothetical” irrespective of the presence of counsel.

271. Id. at 44 n.43. See generally Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Minn. L. Rev. 219, 267–70 (1962).
The 23 attorneys general who filed a brief amicus curiae on behalf of petitioner Gideon were more emphatic about a cut-off point:

There will be some administrative burdens imposed upon the bench and bar if Betts v. Brady is reconsidered. But these are not insuperable. By such measures as limiting at this time the constitutional right to counsel to felonies... the problem in respect to the courts can be contained...

We repeat that we are limiting our claim to the constitutional right to representation for felonies. Gideon... is a felony case, and the question of the right to obtain counsel in misdemeanors is not before this Court... As of this time, in any event, the experience of the states justifies the restriction of the right to serious charges...

Petitioner showed the Gideon Court a stopping point and an amicus brief urged another one, but will the Court stop at either place? Mr. Justice Harlan, concurring, agreed that the "special circumstances" rule should be abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.)

However, Mr. Justice Black, in an opinion in which five other members of the Court joined, was somewhat less circumspect:

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. This noble ideal [equality before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

A. DEFINITIONAL PROBLEMS

"Crime" covers a multitude of sins. In Minnesota, it means "conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment or fine." The Gideon majority opinion nowhere considers the "wedge" objection which so pervades the Betts case, but is Gideon nevertheless only the "opening wedge"? Does it signify the assignment of counsel for drunks, speeding and parking violators?

274. Id. at 344. (Emphasis added.) See COUNCIL OF STATE GOVERNMENTS, INCREASED RIGHTS FOR DEFENDANTS IN STATE CRIMINAL PROSECUTIONS 80 (1963): "The language in the Gideon case is sufficiently broad and flexible so as to easily permit the... extension... to all crimes, including misdemeanors."

If so, then in the opinion of all those interviewed, judges, prosecutors, and public defenders alike, the Supreme Court has indeed unleashed a “parade of horrors.” And none of those interviewed seemed to recognize the possible application of Douglas v. California to appeals in misdemeanor cases.

Even those inclined to push ahead on other fronts — for example, assign counsel in habeas corpus proceedings and at probation revocation hearings — balked at extending the Gideon principle to all misdemeanor cases. Typical of the reception such a suggestion met were:

“What? All misdemeanor cases. Absolutely not! You can’t expect society to go that far!”

“That’s an intolerable burden on the bench, the bar and the county treasury!”

“Ridiculous! And no one who has ever sat on a municipal bench and stared down at fifty drunks on a Monday morning could feel otherwise.”

“It’s just nonsensical to provide an attorney at state expense when the man’s defense would cost the government more than the fine involved.”

Should the line be drawn at felonies, (or, in Minnesota’s case, at gross misdemeanors), or should misdemeanors be covered as well? The issue is often framed in such terms, since an obvious place to draw the line is where much of the law already does — at the felony-misdemeanor boundary. This is, however, only a shorthand, and somewhat oversimplified, statement of the issue.

Many state codes contain crimes of “felony” gravity, carrying “felony” penalties, which are nevertheless labeled “misdemeanors.” Conversely, relatively minor offenses, carrying light maximum sentences, are sometimes designated “felonies.”

Thus, a generation ago, the State of Maryland suggested — then quickly rejected — the possibility that the force of petitioner Betts’ reasoning could be limited to “capital cases and felonies”:279

[BUT this line would not be practical in Maryland, and . . . in other States. . . . For instance, the larceny of dogs or cats in this State is a felony yet a conviction for it is subject to confinement in jail for not

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277. See generally text accompanying notes 37–38 & 62 supra.
278. See, e.g., Bennett, Right to Counsel — A Due Process Requirement, 23 LA. L. Rev. 662, 668 (1963): “It is sincerely hoped that future . . . decisions will not extend the indigent defendants’ ‘due process’ right to court-appointed counsel beyond the actual holding of Gideon v. Wainwright, i.e., where the defendant is charged with a felony.”
more than three months . . . while a violation of certain of the motor vehicle laws of Maryland providing a fine of $5,000 and imprisonment for five years is merely a misdemeanor . . . . These instances are only cited to show the anomalies that may result from an application of the mechanical rule . . . .

The answer, of course, is that the rule need not be applied mechanically. Utilization of the basic felony-misdemeanor dichotomy need not preclude a critical recognition of certain "misclassified" offenses. Moreover, it is most doubtful that the states would be allowed to apply such a test mechanically. That is to say, even if the Supreme Court were to draw a halt at the felony-misdemeanor line, it would quite likely remind the states that their characterization of criminal offenses for varied, unrelated state purposes does not bind the federal judiciary when the content of a federal right is at stake. 280

Were it otherwise, an unrepresented indigent defendant could be deprived of his liberty for as much as five or ten years, because the serious crime for which he was found guilty happened to be called a "misdemeanor." 281 Were it otherwise — if the right to assigned counsel were limited to "felony" prosecutions and the con-


[Petitioner] argues that the crime is not, per se, one which involves moral turpitude. A California case is cited . . . . However, there the California court was concerned with whether the crime involved such moral turpitude as to reflect upon the attorney's moral fitness to practice law, a state question. Here we are faced with the federal question of whether the crime involves such moral turpitude as to show that the alien has a criminal heart and a criminal tendency . . . . In the federal law, assault with a deadly weapon is such a crime.


281. In June of 1962, Delaware Deputy Attorney General E. Norman Veasey, a member of a recently appointed Committee of the Superior Court of Delaware directed to study existing and proposed rules for appointment of counsel, reported that his examination of the Delaware Code "indicates . . . in excess of thirty-five statutory misdemeanors" punishable by more than one year's imprisonment, among them narcotic violations classified as "misdemeanors" but punishable by as much as ten years in prison. Veasey, Preliminary Report to the Committee of the Superior Court of Delaware (unpublished report in University of Minnesota Law Library).

The most atypical grading of offenses occurs in New Jersey, where, fortunately, N.J. Rules 1:12-9 provides counsel as of right to all indigents "charged with a crime." Almost all crimes are designated "misdemeanors" or "high misdemeanors" by New Jersey law. For example, kidnapping, punishable by life imprisonment, N.J. Rev. Stat. § 2:143-1 (1937), is classified a "high misdemeanor."
tent of such a right were not a "federal question" — then a state legislature could largely frustrate the purpose of the Gideon case simply by changing the classification of an offense from "felony" to "misdemeanor," the substance and reality remaining the same.\footnote{282}

In short, where the question raised is whether or not the right to assigned counsel should extend to "misdemeanor" cases, we would hope and expect that even if it were answered in the negative, "federal characterization" of the "felony" category for purposes of the Gideon rule would prevent the anomalous results suggested by Maryland in its Betts brief. For these purposes, federal law could achieve something along these lines: The "felony" characterization would (1) subsume at least those offenses — whether designated "felonies" or "misdemeanors" by state law — punishable by a term exceeding one year (the definition of felony now generally employed in most jurisdictions);\footnote{283} and perhaps also include (2) any offense designated a "felony" by a particular state, regardless of the maximum penalty it carries.\footnote{284}

Although the foregoing definitional problem is not present in Minnesota where a "crime for which a sentence of imprisonment for more than one year may be imposed" is designated a "felony," local law does depart from the typical grading of offenses\footnote{285}.

\footnote{282. For example, because juries were reluctant to convict a person of "negligent homicide," in 1947 Michigan designated the offense (until then a felony) a "misdemeanor," and although the maximum penalty was lowered, the "misdemeanor" is still punishable by two years imprisonment. Mich. Comp. Laws § 750.324 (1948). Cf. People v. Lewis, 260 N.Y. 171, 179-80, 183 N.E. 355, 366 (1932) (Crane, J., dissenting) (protesting that an accused may be deprived of procedural safeguards by changing the name of an offense from "burglary" or "larceny" to "juvenile delinquency").}

\footnote{283. See Model Penal Code § 1.05, comment (Tent. Draft No. 2, 1954).}

\footnote{284. "[W]hen a sufficient amount is involved [in stealing, larceny, and its variants] the infamy is that of a felony, which, says Maitland, is '... as bad a word as you can give to man or thing.'" Morissette v. United States, 342 U.S. 246, 260 (1952) (Jackson, J.). The "bitter incidentals" which flow from this categorization "far exceeds" the prison sentence per se "as a measurement of society's determination to chastise and humiliate"; the "felon" or "ex-felon" brand reduces a person to a "handicapped 'twilight' citizen." Teeters, The Loss of Civil Rights of the Convicted Felon and Their Reinstatement, 52 Prison J. 77, 80, 86 (1945). See also Barnes & Teeters, New Horizons in Criminology 544-46 (3d ed. 1959); Tappan, The Legal Rights of Prisoners, Annals, May, 1954, pp. 101-02.}

\footnote{285. Minn. Sess. Laws 1963, ch. 753, § 609.02(2). The new Minnesota Criminal Code, adopting § 17 of the California Penal Code, provides that "notwithstanding a conviction is for a felony" the conviction is "deemed to be for a misdemeanor . . . if the sentence imposed is within the limits provided by law for a misdemeanor" or, under certain circumstances, when the
in another respect. Non-felonies are broken down into two categories: "misdemeanors" and "gross misdemeanors." And present law already entitles indigent defendants to assigned counsel in all gross misdemeanor (any crime punishable by more than 90 days but not more than one year of incarceration) as well as all felony prosecutions. Thus, when the question of whether the Gideon principle should extend to "misdemeanors" is raised in this State, what is meant is whether it should govern those offenses "for which a sentence of not more than 90 days or a fine of not more than $100 may be imposed." Here, the Gideon principle already applies to a number of crimes generally designated "misdemeanors" elsewhere.

While there was unanimity in the Minnesota counties surveyed that not all misdemeanants should be furnished counsel at state expense, there was much discord as to whether any misdemeanant should be afforded such assistance. Six of the seven county attorneys interviewed thought no misdemeanant should be given such aid (although one of the six added: "with the possible exception of driving while intoxicated"), but only two of the 16 district and municipal judges interviewed shared this view.

imposition of sentence is stayed, Minn. Sess. Laws 1963, ch. 753, § 609.13, but it is fairly clear that the crime remains a felony until sentence is imposed. Cf. People v. Weaver, 56 Cal. App. 2d 732, 737-38, 133 P.2d 818, 821 (Dist. Ct. App. 1943).

287. Minn. Stat. § 611.07 (1961). The field study disclosed that in two counties counsel is also appointed — on rare occasions — in misdemeanor cases. At least one judge has been appointing lawyers in a few misdemeanor cases "when a municipal judge or justice of the peace asks me to do so." And the public defender in another county reported that infrequently he "represents a misdemeanor defendant, chiefly those charged with contributing to the delinquency of a minor [Minn. Stat. § 260.315 (1961)], at the request of the presiding judge, who asks that it be done as a favor."

289. Although 17 judges were interviewed, since a meeting with one municipal judge was abbreviated he was not asked for his views on this matter.

A much greater resistance to furnishing counsel in any misdemeanor case is reflected in the mail replies: 51 of 55 county attorneys and 12 of 15 district judges took a flat "no" position. On the other hand, whereas no person interviewed favored appointing counsel in every misdemeanor case, four persons (a judge and three prosecutors) responding to the mail questionnaire did advocate such an absolute approach. We suspect that many, if not most, responding to the questionnaires assumed they had to take a flat "yes" or "no" position because of the way in which the question was asked. Interestingly, eight of the 24 appointed counsel responding by mail volunteered the suggestion that counsel should be provided in additional kinds of cases, such as "serious misdemeanors." For reasons previously noted, see note 81 supra and accompanying text, where the mail replies and the personal interviews vary substantially, we consider the interviews more reliable.
B. THE "PETTY OFFENSE" CONCEPT

The crucial problem, as most judges viewed the matter, and as one of them put it, is to "come up with some rule or principle — if there is one — which covers the serious misdemeanors, but weeds out the really petty stuff." If no such dividing line can be drawn, if the question of assigned counsel in misdemeanor cases resolves itself into an "all or nothing" proposition, then, the thrust of their views was that limited funds and lawyer-manpower and the need for judicial economy dictate that it be "nothing."

There was a variety of theories as to where the line ought to be drawn between felonies and gross misdemeanors on the one hand, and simple traffic cases on the other, but a "core" idea ran through the answers of 11 of the 14 judges (and the one prosecutor) who preferred to extend the right to counsel to some misdemeanors. They thought that the test should turn in large measure on the nature and consequences of the offense, on the way in which friends, neighbors, employers and the general public viewed the matter.

One of the 11 judges put it in these terms: "Is the misdemeanor akin to a felony, as is true of, say, simple assault or petty larceny?" A good starting point for such an inquiry, he suggested, would be whether mens rea was an element of the offense. Two

290. Two district judges from different parts of the state were greatly troubled by their failure to perceive any limiting principle to the Gideon case. One of them commented:

If the basic theory of Gideon is sound — and of course we have to assume it is — there is no logical distinction between a "felony" and any other "crime." All I can say is that when you get down to some offenses, say spitting on the sidewalk, you reach the point of reducunt ad absurdum. You come to a point where no rational man — not even the defendant himself — expects the county boards — pressed as they are — to subsidize the defense.

Cf. Bickel, The Least Dangerous Branch 59 (1962):

[T]he demand for neutral principles . . . is that the Court rest judgment only on principles that will be capable of application across the board and without compromise, in all relevant cases in the foreseeable future . . . . If it sometimes hurts, nothing is better proof of its validity. If it must sometimes fail of application, it won't do. Given the nature of a free society and the ultimate consensual basis of all its effective law, there can be but very few such principles.

291. This judge also advanced the requirement of "intent" as an alternative test and "any misdemeanor where a defendant is likely to be jailed" as another alternative. As to this last approach, see text accompanying notes 309–15 infra.

In holding that omission of any mention of "intent" from 18 U.S.C. § 641
others would focus on "whether the misdemeanor involved 'moral turpitude.'" \textsuperscript{292} A fourth thought that the crucial feature was whether a "public or social stigma attached." "There's no stigma to speeding or going through a stop sign; everybody does that." The remaining seven judges, and the lone prosecutor who favored providing counsel in some misdemeanor cases, stressed the extra-legal as well as the legal consequences. In proposing a "serious misdemeanor"-"trivial misdemeanor" distinction, they felt that such factors as loss of job and higher insurance premiums should be considered.

Although all of these persons formulated their views in a somewhat different fashion, they reached substantially similar results. Of the nine (including the prosecutor) who cited specific examples of misdemeanors covered by their proposed tests, all but

\begin{quote}
\textsuperscript{292} (making it a misdemeanor punishable by not more than one year in prison to "embezzle, steal, purloin or knowingly convert" government property) did not eliminate that element from the crimes denounced, the Court pointed out in Morissette v. United States, 342 U.S. 246, 252, 260 (1952):
\end{quote}

\begin{quote}
[Cl]e orally various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as . . . "criminal intent" . . . "fraudulent intent," "wilfulness," "sciente," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes. Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they . . . stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony . . . . State courts of last resort . . . have consistently retained the requirement of intent in larceny-type offenses.
\end{quote}

For thoughtful discussion of the mens rea concept and the standard for deciding when it ought to be read into criminal statutes, see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70–211, 351–59 (2d ed. 1960); Mueller, On Common Law Mens Rea, 42 MINN. L. REV. 1048 (1958); Packer, Mens Rea and the Supreme Court, in 1962 THE SUPREME COURT REVIEW 107, especially 150–82 (Kurland ed.).

\textsuperscript{292} "The term 'moral turpitude' has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses [and] . . . as a criterion in disqualifying and impeaching witnesses." Jordan v. De George, 341 U.S. 223, 227 (1951). "[I]t is not decisive that the crime is described as a felony, since moral turpitude does not inhere in all felonies. Conversely, some misdemeanors may be held to involve moral turpitude." GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 468 (1959). For a comprehensive classification of specific crimes, see id. at 472–81.
two named petty larceny; five, "driving under the influence," four, simple assault. The only other misdemeanors specifically cited as falling within the coverage of their proposals were "bad checks" (two) and "hit and run" (one).

293. Four of the five cited "driving while under the influence" [DWUI] without qualification; a fifth specifically limited the offense to "DWUI, if it carries a mandatory jail sentence." (In the case of a second conviction for this offense in a three-year span, the penalty is not less than 10 nor more than 90 days imprisonment, Minn. Stat. § 169.121 (1961).)

It is interesting to note that in each of the five instances DWUI (qualified or not) was listed as a "serious" misdemeanor, it was the first misdemeanor so named. One judge went so far as to say that he regarded DWUI (first offense) the only misdemeanor "serious" enough to warrant the assignment of counsel in indigent cases. A second judge went almost as far. He indicated a preference for a "'flat rule' that counsel be provided indigents accused of 'serious' misdemeanors and broad discretion to appoint counsel elsewhere." What misdemeanors fell in the "flat rule" category? DWUI (first offense) was the only one he was "sure about," although a moment later he added, "maybe petty larceny, too."

The two judges who singled out DWUI as perhaps the only misdemeanor warranting the assignment of counsel placed great stress on the "public stigma" which attaches to this offense, the mandatory revocation of a driver's license for even a first offense (not less than 90 days), and the mandatory jail sentence for a second conviction within three years (not less than 10 days). A third judge who listed DWUI and petty larceny, pointed out that the "stigma" is likely to cut more deeply in these cases because "generally a better class of person" commits these offenses. He had in mind not only the otherwise law-abiding drunken driver but the "kleptomaniac housewife or grandma who shoplifts during the Christmas season."

But doesn't this last point cut two ways? Are not those offenders who represent a "better class" more likely to be the beneficiaries of police-prosecution discretion? less likely to have their procedural rights violated? less likely to be given maximum sentences or jail sentences at all? Is not the need for legal representation greatest for those misdemeanor defendants of "the worst type," those from a "lower class," and those with prior histories of minor offenses?

294. The issuance of a check with the intent, at the time of issuance that it not be paid, is punishable by 90 days imprisonment or a fine of $100. Minn. Sess. Laws 1963, ch. 753, § 609.535. Prior to the passage of the new code, there were two statutes on the subject, Minn. Sess. Laws 1931, ch. 243, § 1, ch. 282, the first making the issuance of a "worthless check" a gross misdemeanor, the second making it a misdemeanor. See Proposed Minnesota Criminal Code § 609.535, comment (1962). However, except for "repeaters," "bad check" offenders were almost invariably charged under the misdemeanor provision.

295. Although never once mentioned, probably because the new Minnesota Criminal Code had not yet gone into effect at the time of the interviews, or, in any event, because few persons could be expected to know or recall offhand that the new Code takes this offense out of the "felony" category, "simple arson" is now a leading candidate for "serious misdemeanor" honors. The intentional damaging or destruction of property of less than $100 value "by means of fire or explosives," now only carries a maximum sentence of 90 days imprisonment or $100 fine. Minn. Sess. Laws 1963, ch. 753, § 609.535.
What these judges and prosecutors were groping for, although none articulated it in these terms, is something approximating the "serious misdemeanor"-"petty offense" distinction which now prevails in the sixth amendment trial by jury cases—the stopping point, as already noted, suggested by petitioner in the Gideon case.

Although Johnson v. Zerbst\textsuperscript{298} has been on the books for a quarter of a century, the Supreme Court has never passed on the question of whether the sixth amendment right to assigned counsel "in all criminal prosecutions" includes all—or any—"misdemeanors." However, the "criminal prosecutions" category qualifies not only the right to counsel but all the rights enumerated in the sixth amendment, among them the right to trial by jury. And the Court has illuminated the "criminal prosecution" term in trial by jury cases.

There is no right to a jury for those charged with federal "petty offenses" or "summary offenses"—for example, dealing in second-hand goods without a license, punishable by a maximum sentence of 90 days or 300 dollar fine.\textsuperscript{297} Although there may be a presumption that a maximum punishment of 90 days—the highest penalty for a "misdemeanor" in Minnesota—connotes a "petty" or "summary" character, this factor is hardly decisive. One must

\begin{enumerate}
\item[296.] 304 U.S. 458 (1938) (sixth amendment furnishes indigent right to assigned counsel in all federal "criminal proceedings").
\item[297.] District of Columbia v. Clawans, 300 U.S. 617 (1937).
\item[298.] See id. at 627-29. An early draft of the \textit{Model Penal Code} § 1.05(4) (Tent. Draft No. 2, 1954), defined a "petty misdemeanor" as an offense not punishable by more than three months' imprisonment. The revised definition designates an offense a "petty misdemeanor" if the maximum sentence does not exceed thirty days. \textit{Model Penal Code} § 1.04(4) (Proposed Official Draft, 1962).
\end{enumerate}

The Federal Criminal Code characterizes as "petty" those offenses punishable by no more than six months' imprisonment, $500, or both. 18 U.S.C. § 1 (1958). That the sole criterion is the severity of potential punishment is conceptually unsound. The Clawans opinion first notes that "apart from the prescribed penalty, the offense of which petitioner was convicted is, by its nature, of this ['petty'] class," 300 U.S. at 625, then considers the significance of the maximum penalty. Moreover, the Court has ruled that reckless driving cannot be classified as a "petty offense," notwithstanding a maximum penalty of 30 days or $100. See text accompanying note 300 infra. However, two commentators have concluded that factors other than the severity of potential punishment "have only academic relevance here, for all offenses now in the United States Code which fall within the petty offenses definition appear clearly not to involve any 'obvious depravity' and hence may constitutionally be classed as petty offenses." Doub & Kestenbaum, \textit{Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality}, 107 U. Pa. L. Rev. 443, 469 (1959).
also reckon with the "gravity" of the offense. Thus, the Supreme Court has ruled that the offense of "reckless driving," although subject only to a maximum punishment of 30 days imprisonment or 100 dollar fine (the Minnesota offenses of "reckless driving" and "driving under the influence" are punishable by 90 days imprisonment and 100 dollar fine), could not be categorized a "petty offense," in respect of which Congress may dispense with a trial.  

The offense here charged is not merely malum prohibitum, but in its very nature is malum in se. . . . (It) is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense. If the act . . . had culminated in the death of a human being, respondent would have been subject to indictment for some degree of felonious homicide.  

That the "petty offense" concept does not always produce tidy, neat results may be its weakness, but it is also its strength. In the last analysis, as two astute commentators observed many years ago, this concept invokes judgment and not mechanical tests in the use of common-law history in the life of the law today. We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not . . . . The history of the common law does not solve the problem of judgment which it raises in demonstrating that the guaranty . . . did not cover offenses which, because of their quality and their consequences, had a relatively minor place in the register of misconduct.  

That the "petty offense" concept defies any closed definition, that "commonly accepted views of the severity of punishment . . . may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial," is nicely illustrated by Minnesota's experience with the DWUI misdemeanor. In 1937 the Minnesota Supreme Court regarded it as an offense which "neither involves such moral turpitude as would remove it from that class of cases in which there is no right to a jury trial, nor is it of such a serious nature that it should be given the character of a common-law crime." Two decades later, however, the court re-examined — and rejected — this point of view "in the light of present-day realities." It no longer saw anything "mild" about a maximum punishment of 90

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301. Frankfurter & Corcoran, Petty Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 981 (1926).  
days in prison and, "when the motor vehicle has clearly become a necessity to many people," a mandatory revocation of driver's license for not less than 30 days.

"At any given time," it has been said, due process "includes those procedures that are fair and feasible in the light of then existing values and capabilities." In considering how far the right to assigned counsel extends, perhaps we would do well to take into account the "feeling for judicial economy and dignity, realization of the disproportionate burden upon courts, jurors and defendants of handling all crimes upon the same procedural basis, and . . . moral judgment" reflected in the historic, yet dynamic, classification of "petty offenses" for trial by jury purposes.

**C. Likelihood of Jail Sentence**

The views of the one prosecutor and 11 of the 14 judges who would apply the Gideon principle to some misdemeanor cases have been considered. What was the thinking of the remaining five interviewed — three judges and two public defenders — who also favored such a result?

Three — one judge and both public defenders — minimized the...
significance of the maximum punishment prescribed for an offense "on paper," and focused instead on the "likelihood, if a conviction resulted in a particular case, that the defendant would go to jail—and on the probable length of the sentence."

The judge who advocated this approach was the most articulate of the three:

I don't think it's very useful to label a certain misdemeanor—as an abstract matter—"serious" or "not serious." Whether or not somebody found guilty of a misdemeanor is going to be sentenced to jail turns to a large extent on (1) the particular facts surrounding the individual case—were there mitigating or aggravating elements? (2) the defendant's particular background—his prior offenses, if any.

Now, take "simple assault," for example. We've had cases where somebody slashed or knifed a person, but was only prosecuted for "simple assault." On the other hand, sometimes people are charged with this same misdemeanor when they've done little more than push somebody in the elevator, or shove somebody around a little bit.

If found guilty, the "knifing" assaulter is probably going to be given a maximum 90 day sentence. But it's not likely that the "pushing" assaulter will get a day in jail. Unless, that is, the record shows he's done this sort of thing a number of times before.

Along these same lines, one public defender suggested that the cut-off point for assigned counsel in misdemeanor cases might be those prosecutions "involving a strong possibility of a sentence of 90 days or more." Although the other defender also laid stress on what the "actual punishment" would likely be, he raised another, albeit related, point. He thought that in addition to misdemeanor prosecutions creating a substantial possibility of imprisonment, coverage should be extended to those charged with "misdemeanors not necessarily 'serious' in themselves, but which, if committed again, would carry relatively long jail sentences."

To illustrate his point, he cited the misdemeanor of "indecent exposure." "[A]fter having once been convicted of such an offense in this state," a person committing the offense a second time is guilty of a gross misdemeanor, punishable by imprisonment for

309. As pointed out earlier, note 291 supra, another judge advanced a similar test as an alternative to a "serious" misdemeanor—"trivial" offense approach. Moreover, a third judge, who advocated a "flat rule" in serious cases and wide discretion elsewhere, see note 293 supra, presumably would assign great weight to the likelihood of an actual jail sentence in the exercise of such discretion.

310. For a general discussion of the very substantial victim-police-prosecutor discretion not to invoke the felonious assault laws, see Goldstein, Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543, 573–80 (1960).
one year. And if, within a five year period, he is convicted of the offense a third time, pointed out the defender, he is “guilty of being an habitual offender” and subject to punishment “if a man between the ages of 18 and 30 years, by imprisonment in the state reformatory,” and if older, “by imprisonment in the state prison . . . for a term . . . not exceeding three years.”

Those who attached great significance to the likelihood of actual incarceration in a particular misdemeanor case contributed a valuable insight to the problem. It is interesting to note that the same notion that the actual punishment imposed is the best evidence of the seriousness of the offense—but from another perspective—is reflected in the new Minnesota Criminal Code. It provides that “notwithstanding a conviction is for a felony” it is “deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor. . . .”

However, this sensitive case-by-case approach to assigned counsel in misdemeanor cases may well be too fine, too subtle, to prove workable. There is much to be said for a broader, simpler rule—a blunter rule, if you will. A rule which would “make it hard for even the dull or duffer to go too far wrong”; one which (considering the litigation the suggested case-by-case approach could breed) might well prove less costly in the long run.

Moreover, and more fundamentally, an approach based exclusively on the likely or actual punishment overlooks that a stigma attaches to—and serious extra-legal consequences may stem from—such misdemeanors as larceny, assault, and drunken driving, even though a convicted defendant does not in fact see the inside of a jail.

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311. MINN. STAT. § 617.28 (1961). The Advisory Committee on Revision of the Minnesota Criminal Law proposed that the increase in penalty for a second conviction of “indecent exposure” be deleted, see Proposed Minnesota Criminal Code § 609.695 (1962) and accompanying comment, but before final passage of the new code, this recommended section, inter alia, was withdrawn pending further study.

312. Minn. Sess. Laws 1955, ch. 251, § 1. These Minnesota provisions were abolished by the new code, which went into effect subsequent to this interview. Minn. Sess. Laws 1963, ch. 758, § 609.155. See generally Firsig, Proposed Revision of the Minnesota Criminal Code, 47 MINN. L. REV. 417, 401–63 (1963). Nevertheless, the public defender’s comments in this regard remain significant, for provisions similar to old § 617.75, Minn. Sess. Laws 1955, ch. 251, § 1, are still prevalent throughout the country.


If the right to assigned counsel is extended to "serious" misdemeanors categorically, and in addition a broad discretion to appoint counsel is permitted in all other misdemeanor cases, the likelihood of a jail sentence should certainly be a dominant consideration in the exercise of this discretion. Indeed, there is something to be said for going further—for requiring the assignment of counsel whenever in fact a defendant is sentenced to jail in these lesser misdemeanor cases. If this were the test, then when there was a substantial likelihood that the defendant would be deprived of his liberty if convicted, assigned counsel would be available at the outset. If the judge miscalculated and failed to proffer assigned counsel, yet sentenced an indigent to jail—and in the overwhelming majority of cases, of course, this would be after a plea of guilty—then the defendant would have the option of starting anew—with counsel.

D. Other Selective Approaches

Two judges who favored furnishing counsel in some misdemeanor cases remain to be accounted for. One, a municipal judge, felt counsel should be assigned whenever an indigent defendant expressed a desire for one. Indeed, this judge indicated he was putting this policy into effect immediately: "I'm going to see to it that every indigent misdemeanor defendant who asks for a lawyer is going to get one—even if I have to call up the President of the Bar Association and request that he represent him."

It is not surprising that a judge would feel especially uncomfortable about forcing an indigent to "go it alone" in the face of his specific request for representation. Prior to the overruling of Betts, the practice in a number of jurisdictions was to honor specific requests even though their laws did not require the appointment of counsel in all felony cases. Analytically, however, it is difficult to see why the availability of counsel should turn on the defendant's request for representation—unless all indigent defendants are made aware that they can request such aid. Of course, once they are, the proposed "limitation" on the right to assigned counsel in the misdemeanor area disappears—it comes down to nothing more than the correlative right to waive counsel, one which now exists in all felony cases.

315. See note 309 supra.

316. See the extracts from correspondence with prosecuting attorneys and/or the attorney general's office in 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, 67-74 (1963).

317. See text accompanying notes 268-68 supra.
The last judge inclined to assign counsel in some misdemeanor cases was of the view that legal representation should be provided when — regardless of the gravity of the offense or the punishment it carried — “the defense appears to be of real substance or the facts of a particular case are sufficiently complex that a lawyer’s skills may affect the outcome.”

This approach smacks of the late and unlamented Betts v. Brady test. And such a test seems too vulnerable whether applied to misdemeanor or felony prosecutions. As 29 attorneys general pointed out, urging the overruling of Betts, in their brief amicus curiae, in the Gideon case:

[According to] Cash v. Culver, 358 U.S. 633, 637 (1959) . . . counsel is required if injustice is “apt to result.” This means that the Betts v. Brady test must now be applied through the perspective of the trial judge, not the reviewing appellate judge.

But it is difficult to comprehend how, as a practical matter, a trial judge can do this with the degree of consistency presupposed by a judicial determination placing the onus of such decisions upon him . . . . How can the judge . . . anticipate what is to come up in trial? . . . If the proof of an alibi . . . is extremely difficult to establish, or if the accused gets enmeshed in seeking to examine or cross-examine, is the judge expected to stay proceedings in order to bring in defense counsel? Suppose the trial proceeds without incident until the sentencing stage, at which point complicated problems of law arise: will counsel at that time be ordered in? . . . [The judges of the highest court in this land have often divided 5 to 4 on whether an indigent accused’s possible trial was a “denial of fundamental fairness.” It is now most unrealistic to expect that the trial judges, looking ahead, can accomplish that which has obviously been so disturbing to this Court from the vantage point of looking back.]

Moreover, and more fundamentally, it may be that only with the assistance of counsel can a “defense of real substance” emerge; that the complexity of the case may only be perceived after a lawyer has marshalled the relevant facts, studied the law, and presented his case. The decision in Douglas v. California manifests the Court’s concern that without legal aid “any real chance” an indigent defendant “may have had of showing that his appeal has hidden merit is deprived him.” What then may be said of an indigent defendant’s chances when he has never had the assistance of counsel to uncover the “hidden merit” in his case? How, consistently with the Douglas case, can an unchampioned indigent defendant be “forced to run this gauntlet of a preliminary showing of merit” in the first instance?

320. Id. at 356.
321. Id. at 357.
E. ARGUMENTS AGAINST APPOINTING COUNSEL

What reasons were advanced by the two judges and six prosecutors who would not apply the Gideon principle to any misdemeanor case? At least three were given:

1. Not "Serious" Enough

Misdemeanors "aren't that important" or "serious enough." One prosecutor pre-emptorily dismissed them as "de minimis"; another regarded the assignment of counsel in these cases a "luxury": "Society has no duty to go that far. A man may have a right to dental care at state expense, but not to gold inlays."

Persuasive reasons were given by others against this line of argument. One dwelt on the maximum punishment for many misdemeanors — "90 days in the county jail is no joke" — but most of those who favored the assignment of counsel in some misdemeanor cases stressed the extralegal consequences which stem from certain misdemeanor convictions. Thus, one municipal judge observed: "A number of college kids have pled guilty to petty larceny without thinking too much about it. Too many of them don't think it's a serious matter, either. But when a prospective employer checks up on them — and I know they do — and sees "petty larceny" in a kid's file, he's through, everytime."^222

A prosecutor made a similar point: "When a person is accused of shoplifting or passing a bad check, he's facing more than a misdemeanor charge, his job may be in jeopardy." He also pointed out that although "driving while intoxicated" is only a misdemeanor, a conviction for such an offense may not only lead to substantially higher insurance premiums, but suspension, severe restriction, or outright revocation of the person's driver's license. Although, he did not point to the language of the Minnesota Supreme Court in the recent case of State v. Moseng,^223 he might well have done so:

Much has been said as to whether a license to operate a motor vehicle is a right or a privilege. It has been variously denominated as a privilege

^222. Consider [1961-1962] SAN FRANCISCO CITY AND COUNTY PUBLIC DEFENDER ANN. REP. 5:
We are finding that an increasing number of so called minor offenses or misdemeanors are continually presenting more complex issues and carrying more severe penalties; some penalties, in their practical implications, are considerably more severe than penalties in some felony cases. Serious, surprising and unanticipated results often follow when an uninformed and inexperienced person pleads guilty to a minor offense either in order to save time or to win an expected suspension of sentence.

^223. 254 Minn. 263, 271, 95 N.W.2d 6, 12-13 (1959). See also State v. Moosbrugger, 263 Minn. 56, 60, 116 N.W.2d 68, 71 (1962).
in the nature of a right and as an important privilege or right under our present mode of living. No one will deny that we have reached a time in our modern way of life when the motor vehicle has clearly become a necessity to many people. The very livelihood of many, such as chauffeurs, truckers, traveling salesmen, men who work in skilled or unskilled labor, depends upon the operation of a motor vehicle. Their drivers' licenses are just as valuable as a license to engage in an occupation or profession . . . . It is therefore clear that, whether a driver's license be termed a "privilege" or a "right," such license, whether restricted or not, once granted, is of substantial value to the holder thereof . . . .

One judge summed it up this way: "Offenses such as drunken driving or petty larceny carry a stigma. Are they misdemeanors or felonies? The public just doesn't think that way. It just doesn't draw that kind of line here."

2. No "Prejudice"

Uncounseled misdemeanor defendants are not "prejudiced" in Minnesota. As one prosecutor put it, "This isn't Alabama, you know. Our judges are very fair." And a municipal judge maintained: "These misdemeanor defendants are not getting 'hurt' without counsel; I'm the best defense counsel these guys have."

This type of reasoning seems to be little more than the Betts v. Brady approach all over again. It was disposed of in Powell v. Alabama, the "old precedent" to which the Court "returned" in Gideon v. Wainwright. As the Court pointed out in that very first fourteenth amendment due process right to counsel case:

But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

Furthermore, although the municipal judges interviewed are all reputed to be able lawyers, many, if not most, of those who "judge" misdemeanor cases have no legal training whatsoever.

According to a 1958 report, of 123 municipal judges in the state, 55 were nonlawyers. Undoubtedly, even a smaller percentage of the justices of the peace — how many there are no one has been able to ascertain, but a 1957 questionnaire to clerks of
court in all counties uncovered over 700 — are members of the bar. Although
dissatisfaction with the functioning of the justice of the peace court
system culminated in the overwhelming approval by the voters in 1956
of a state constitutional amendment which abolished the justice of
the peace as a constitutional office . . . those who thought . . . this
would be followed by the early end of the justice of the peace system
were to be disappointed. An Attorney General’s opinion and a subse-
quent Supreme Court decision have held that justice of the peace courts
continue until abolished by law. Thus far, a relatively small proportion
of the justice of the peace courts have been abolished.8

It is difficult to exaggerate the inferiority of the brand of justice
dispensed by “justice courts.” Too often, their attitude is that of
one in Minnesota who, when being briefed by a county attorney
on a pending matter, had just one question — “Do I have to listen
to the defendant’s side of the case?” A similar attitude was ex-
pressed by another Minnesota justice whose response to a motor-
ist’s protestations of innocence was “What you say may be true,
but after all you did get a ticket. Guilty.”

A 1958 Lower Court Study Commission Report condemned the
fee system for justices of the peace: “For all practical purposes de-
fendants under the fee system are in reality deprived of due pro-
cess of law.” The report noted that even though in theory the
justice of the peace may be paid if he acquits a defendant by ap-
plying to the proper governmental agency for his fee,
this is a cumbersome process. Apparently very few justices of the
peace ever use it, and many may not be aware of it. The Highway Pa-
trol reported that very few of those authorized charges were billed
by the justices of the peace — probably not more than eight or ten per
year.

credible, we have been unable to ascertain for certain how many j.p.’s there
are in Hennepin County.” Municipal Courts Committee of Citizens
League of Minneapolis and Hennepin County, Report 12 (1962) [herein-
after cited as Citizens League Report].

This report led to the creation of a Municipal Court of Hennepin County,
to be manned by judges “learned in the law” and “admitted and qualified to
practice in the supreme court of this state”; with jurisdiction, inter alia to try
any charge of violation of “any ordinance, charter provision, rule or regulation
of any subdivision of government in the county”; the merger of the Munici-
pal Court of Minneapolis into the Municipal Court of the County; and the
abolition in Hennepin County, as of January 1, 1965, of, inter alia, all “just-

331. Reported in Note, 47 Minn. L. Rev. 98 (1962).
332. Ibid.
334. Id. at 16–17
Consider the remarks of a much-experienced and much-respected voluntary defender concerning lawyer-judges in felony cases:

Frequently in the trial of an uncounselled defendant, I have heard the judge announce that he will protect the defendant's legal rights. . . .

I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of the prosecuting witness. Not infrequently, this violation of the rules of trial procedure brings forth sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.

I have heard a judge presiding over the trial of a criminal case inadvertently misquote the governing law to the serious detriment of the unrepresented defendant. And I have observed the district attorney, preoccupied with the next case, remain silent while an excessive and illegal sentence was imposed on the uncounselled defendant whose interest he had said earlier in the proceedings he would protect.335

If such a proceeding is often a "travesty,"336 how should we describe the plight of the uncounselled misdemeanor defendant who appears before a layman, ignorant of the law,337 whose office "has become almost synonymous with miscarriages of justice and in too many instances with outright corruption"338 or before a non-lawyer municipal judge whose "judicial work is likely to be a sideline activity"?339

The need for legal representation in the "justice courts" may be illuminated by returning to the offense of driving while under the influence (DWUI). This crime is worth dwelling on, for, as previously noted, it was prominently suggested as a misdemeanor serious enough to be brought within the *Gideon* fold and it is un-

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336. Id. at 741.
337. When asked what he thought about trying a case against an unrepresented defendant, the one prosecutor who favored extending the *Gideon* principle to some misdemeanor cases responded, "I don't like it at all because I feel I am taking advantage of the defendant. It is especially bad before a lay justice of the peace. Here, the trial loses all semblance of a legal proceeding." Although they balked at assigning counsel in misdemeanor cases, the other prosecutors interviewed all voiced a considerable "uneasiness" about prosecuting an uncounseled defendant. "It's revolting," said one. Another said of his experience in bastardy proceedings, where counsel is not assigned: "These cases are fiascos."
339. Ibid.
doubtedly the most prevalent of all the misdemeanors so mentioned. While many instances of DWUI are prosecuted as statutory violations, many more are treated as municipal ordinance violations. Indeed the number of such municipal violations in Minneapolis alone almost equals the number of such statutory violations reported by all county attorneys.\footnote{340. In 1959, 1696 statutory prosecutions were reported throughout the state as against 1648 Minneapolis municipal prosecutions; in 1960 there were 1595 statutory cases as against 1293 Minneapolis municipal violation cases. See [1959-60] MINN. ATT'Y GEN. BIENNIAL REP. xxxi (Table No. 2); Note, 47 Minn. L. Rev. 93, 107 n.64 (1962).}

If the \textit{Gideon} principle is extended to statutory DWUI, it should surely embrace its municipal ordinance counterpart as well. The stigma and consequences are the same,\footnote{341. MINN. STAT. § 169.03 (1961) provides that "when any local ordinance regulating traffic covers the same subject for which a penalty is provided in this chapter [e.g., DWUI], then the penalty provided for violation of said local ordinance shall be identical . . . ."} the fact that the municipality is given authority to adopt such an ordinance does not change the nature and quality of the offense.\footnote{342. State v. Hoben, 256 Minn. 436, 443-44, 98 N.W.2d 813, 818 (1960). \textit{But cf.} State v. Moosbrugger, 263 Minn. 66, 116 N.W.2d 68 (1962).}

But until quite recently fewer procedural safeguards were available to one accused of an ordinance violation.

In the past few years, however, by virtue of court decision and legislative mandate, important rights have been extended to the accused ordinance violator. In 1959, the legislature provided that such a defendant may demand in writing that his case be removed from a justice court or a municipal court in which the judge is paid upon a fee basis to another court presided over by a salaried judge.\footnote{343. MINN. STAT. § 531.115 (1961).}

Furthermore, although prior to 1959 one charged with violating an ordinance had no right to a jury trial at any level, as a result of \textit{State v. Hoben} and new legislation,\footnote{344. 256 Minn. 436, 98 N.W.2d 813 (1959), 44 MINN. L. REV. 755 (1960).} most traffic offenders, notably, for our purposes, the alleged drunken driver, are now afforded a choice between a jury trial at the municipal court or justice of the peace level and, if a jury is waived at that stage, a jury trial upon appeal to the district court.\footnote{345. MINN. STAT. § 484.63 (1961).}

These new developments "reflect respected opinion to the effect that the trial of an action before a layman whose judicial work is a sideline activity is not consonant with the modern view of the sound adminis-
More particularly, and most significantly for our purposes, they manifest the notion that "it should be accepted without argument that under present-day conditions driving an automobile while under the influence of intoxicating liquor is an offense of a serious nature."\textsuperscript{348}

Has the recent movement to protect the defendant from the arbitrary procedures, too often present in our justice and municipal courts, minimized the need for counsel in this area? On reflection, ironically enough, these new procedural developments only seem to have accentuated the need.

A person charged with an ordinance violation may have the right to remove his case from a "judge" operating on a fee basis to one paid by salary,\textsuperscript{349} but absent counsel, who informs him of this right? Certainly not the "judge" the legislature was trying to protect him against! He wants the case — and the fee. Again, isn't the right — on paper — of the unrepresented indigent defendant to a trial by jury in the first instance and a trial by jury on appeal — or for that matter the right of appeal itself — likely to be nullified by his ignorance?

The choice of forum for jury trial not available to many alleged traffic ordinance violators gives rise to a number of interesting tactical possibilities. For example, after hearing the prosecution's case in municipal or justice court, the defendant may rest, without disclosing the nature of his defense, and demand a jury trial upon appeal to the district court.\textsuperscript{350} But how often is a lone lay defendant likely to use such a "discovery device"?

The new procedural developments in the municipal ordinance field graphically demonstrate how the right to counsel is "by far the most pervasive" of all the defendants rights, how "it affects his ability to assert any other rights he may have."\textsuperscript{351} These new safeguards illustrate poignantly how the more "advances" achieved in procedure, the more "rights" theoretically available, the wider grows the gap between those who can afford a lawyer and those who cannot.

\textsuperscript{347} Smith v. Tuman, 262 Minn. 149, 153, 114 N.W.2d 73, 76–77 (1962).

\textsuperscript{348} State v. Hoben, 256 Minn. 436, 441, 98 N.W.2d 813, 817 (1959).

\textsuperscript{349} "No provision is made . . . for the payment of any fees or costs . . . that have accrued in justice court prior to the time . . . [a defendant] demands a change of venue. The only time a justice of the peace can enter costs against a defendant, in a criminal case, is after his conviction. . . ." 1960 Op. Minn. Att'y Gen. 266b–7. A defendant may demand removal of his case even after arraignment and entry of plea of not guilty in justice court. Smith v. Tuman, 262 Minn. 149, 114 N.W.2d. 73 (1962).

\textsuperscript{350} See generally Note, 47 Minn. L. Rev. 93, 102–05 (1962).

\textsuperscript{351} Schaefer, supra note 306, at 8.
3. Financial Burden

Assignment of counsel in misdemeanor cases would prove an "intolerable" financial burden on the state, or at least on many counties.

Of course, the force of this objection varies inversely with the modesty of the proposal to extend counsel to misdemeanor cases. For example, minor traffic offenses (excluding those such as driving while intoxicated and driving while a license is suspended or revoked) account for the great bulk of all "crimes" and, as we have seen, none of those who favored carrying the Gideon principle beyond the felony-gross misdemeanor category advocated extending it to this large group. 352

True, a good number of those interviewed would apply Gideon to DWUI and even excluding its municipal ordinance counterparts 353 this is easily the most commonly committed offense cited for coverage. 354 But even if "indigency" should turn on a fixed standard — and we think it should not — the incidence of indigency will undoubtedly be much lower here than for most criminal defendants generally. Indeed, one judge thought "drunken driv-


No one suggests that representation by attorneys is a prerequisite to justice in such minor offenses as drunkenness or traffic violations. For the most part, these cases are disposed of with relative informality within the simple framework of procedure by elected magistrates who are chosen by the people . . . . We do not represent defendants in all misdemeanor cases, such as all vagrants and common drunks. We do, however, handle some of these cases when appointed by the Trial Judge . . . .


See also Packer, Mens Rea and the Supreme Court, in 1962 The Supreme Court Review 107, 160 (Kurland ed.):

The fact is that the processes of criminal justice are used, or misused, for purposes that have no odor of criminality except that which resides in the use of the word itself. Traffic offenses are perhaps the most extreme example. It makes trivial the concept of criminality to apply it to such minor infractions of the laws.

But see text accompanying notes 360-61 infra.

353. We have already indicated that the mere fact that a person is alleged to have violated a municipal ordinance rather than a statutory provision should not be considered significant for "right to counsel" purposes. See text accompanying notes 341-42 supra.

ing” should not be covered because “almost all motorists can afford a lawyer.” But this, it seems, cuts in favor of extending it to those few who cannot.

More fundamentally, however, the concept of “indigency” should not reflect a stated amount of assets but should vary, depending, among other factors, on the expense incident to the defense of the particular offense. As one municipal judge put it: “We can expect a much lower percentage of misdemeanor defendants to be ‘indigent’ than felony defendants. For many lawyers will be willing to defend a misdemeanor defendant for much less — many times less — than their ‘felony fee.’” On reflection then, cost may not be an insuperable obstacle after all.

The “plain guilt” of virtually all misdemeanor defendants was also advanced as a reason for not extending assigned counsel to this group. This, more or less, is another way of stating the second objection considered above — “misdemeanor defendants are not getting ‘hurt’ without counsel.” And the short answer is the same: This is Betts v. Brady all over again. The failure of the unrepresented defendant to develop a satisfactory theory, or, if he does, to support it with adequate evidence, may only be the not improbable consequences of being without the aid of counsel inside and outside the courtroom.

In all fairness, this much should be added. For certain offenses, because of victim-police-prosecution discretion, it may be true that virtually all those ultimately charged are “plainly guilty.” But in a way, this operates in favor of extending the right to as-

355. See generally notes 101–05 supra and accompanying text.


Moreover, even though a misdemeanor’s guilt may be “plain,” he still may have a great need for a lawyer at the sentencing stage. One of the Minnesota judges who was favorably impressed with the operation of the public defender’s office in his county cited as one of his reasons: “Even in the clearly guilty cases, they make good recommendations as to sentencing.” The Public Defender of the City and County of San Francisco, who has represented indigent misdemeanor defendants since 1955, has warned: “Serious and unanticipated consequences may follow when an uninformed and inexperienced person pleads guilty to save time or trouble or to win an expected suspension of sentence.” State of California, [1960–1961] Report of Assembly Interim Committee on Criminal Procedure 104 (1961).

357. For example, one of the authors, who has conducted field research in some 50 Minnesota counties in connection with another project, one sponsored by the Social Science Research Council, has been struck with the relatively small “hard core” of bad checks ever brought to prosecution (almost invariably on a misdemeanor charge, see note 294 supra). This “screening out” proc-
signed counsel. For one thing, it is fair to assume that the great bulk of these defendants will continue to plead guilty. In the unlikely event that a defendant with a meritorious case has not been “screened out,” he has a legal representative — for which he may have desperate need. Since the judges are well aware of the “screening out” process, protests of innocence at this late stage are not likely to command a receptive audience. Finally — surely if this can be done at minimal expense and effort — “justice must satisfy the appearance of justice.”

True, here as elsewhere, the establishment of public defenders may well strengthen the case for counsel at state expense at the misdemeanor level. A California judge has found “hurried representation” of indigent misdemeanor defendants in that state “adequate”:

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... appears to be the product of two factors: (1) the casual, patient manner in which first the victims themselves, then law enforcement officials, allow “bad check” offenders time to make amends; (2) the willingness — almost eagerness — of the part-time prosecutor (and this is the status of the county attorney in 82 of the 87 counties) to resolve legal and factual doubts in the potential defendant’s favor in order to get rid of this “nuisance” and devote more time to relatively serious criminal matters — or private practice.

358. It is well to recall that there is a very high incidence of guilty pleas among those indigent defendants entitled to assigned counsel under existing Minnesota law. According to the docket study, of those felony prosecutions against indigents actually decided (12% were nolle prossed and 2% dismissed), 92% were resolved by pleas of guilty. See note 233 supra. There is a like percentage of guilty pleas among those defendants with sufficient funds to retain counsel, but this group suffers a slightly higher overall conviction rate. Ibid. See also text accompanying note 360 infra.

The fear has been voiced that if indigent misdemeanor defendants were afforded the right to counsel, they “would be encouraged to plead not guilty and consequently more time would be consumed in the trial of minor cases.” Council of State Governments, Increased Rights for Defendants in State Criminal Prosecutions 30 (1963). But see [1958-1959] San Francisco City and County Public Defender Ann. Rep. 5:

... When a jury trial is demanded, the case is referred to the jury calendar for trial. After a thorough discussion of the case with the Deputy Public Defender appointed to represent said client, there is almost always a request by the client who had previously demanded a jury trial that the demand for the jury trial be waived, and the case referred back to the original Judge for final disposition.

Over the period of the last three years, we have had only 8 actual jury trials out of 178 demands. In other words, 170 waived their demand for a jury trial because of the faith and confidence they had in our Deputies’ abilities to see that they were properly represented in a court trial.

In the morning roundup, the defendants held in the Los Angeles City jail are arraigned before two criminal court divisions of the Los Angeles Municipal Court. In this police court procedure the misdemeanants pass in a steady stream. Sometimes 350 at a session are arraigned, advised of their constitutional rights, and plead. Those who wish the assistance of counsel to plead are referred to the deputy city public defender who is stationed in the courtroom.

While presiding for the first time in this court, doubts arose in my mind whether such hurried representation could be adequate. But in general it seems to be. Great numbers of those held for drunkenness, gambling, and morals offenses waive counsel and plead guilty. Those who do not are referred to the trial divisions in which they can secure assistance from the trial deputies of the Los Angeles City Public Defender.

Even absent a public defender arrangement, however, it may be that misdemeanor cases can be defended fairly expeditiously and economically on a "time," rather than a "case" basis. Consider Judge Prettyman's observations:

"The prosecutors come into these [lower] courts prepared to present eight, ten or a dozen cases in quick succession. The defense of the indigents on such a docket could, I think, be organized upon a similar basis. Instead of agreeing to take a case, counsel might agree to serve a day, or two days, or even three days. Advance preparation is easily possible with a bit of cooperation from the prosecutor . . . . Of course, it is the method where public defenders operate.

F. PRINCIPLE AND EXPEDIENCY

Should the right to assigned counsel be extended beyond felonies and gross misdemeanors? And if so, how far beyond? In


"Although section 859 of the Penal Code would appear to limit the provision for court-appointed counsel for indigents to those cases triable in the superior courts," 36 Op. Cal. Atty Gen. 87 (1960), as a result of various California court decisions, "the appointment of counsel is required in all misdemeanor cases where the defendant requires the aid of such counsel and is financially unable to employ one," id. at 86. Generally "the services of the county public defender in California are limited to offenses triable in superior court. Thus far in only four areas of the state [City of Los Angeles, City of Long Beach, and Alameda and San Francisco Counties] are public defender services provided in misdemeanor cases." Cuff, Public Defender System: The Los Angeles Story, 45 Minn. L. Rev. 715, 734 (1961). But "Alameda and San Francisco counties appear to take the position that representation is not an absolute requisite in cases of petty offenses." Note, Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems, 13 Stan. L. Rev. 522, 524 n.9 (1961).

searching for the answers, one might recall that —

No good society can be unprincipled; and no viable society can be principle-ridden. But it is not true in our society that we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line . . . .

Most often . . . and as often as not in matters of the widest and deepest concern . . . both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the immutable governing rule, is to affect the tendency of policies of expediency. And it is a potent role.362

To what extent should the Gideon-Douglas principle affect the “tendency of policies of expediency” in the misdemeanor area? To what extent should it yield to compromise?363 These are hard questions, but ones which the legislature or courts of this state should consider in the very near future, whether or not the federal judiciary provides further illumination in the meantime. And when the decision-makers do reach these questions they would do well to draw upon the wealth of thoughtful suggestions supplied by those interviewed in the seven counties surveyed.

IV. WHEN DOES THE RIGHT TO ASSIGNED COUNSEL “END”?  

If the point at which the right to assigned counsel “begins” is the subject of much uncertainty and controversy,364 the point at which it “ends” presents problems no less vexing. How demanding is fourteenth amendment equality? May Douglas v. California365 be confined to first appeals, or does the principle extend much further? These questions loom large when an inquiry is made into the practices and attitudes concerning assigned counsel at the ap-
pellate and post-conviction stages and in probation and parole revocation hearings.

A. Appeals and Post-Conviction Proceedings

1. Recent Local Developments

The Minnesota Legislature moved swiftly to bring state law into line with the Douglas case. In a bill approved May 23, 1963, effective during the biennium beginning July 1, 1963, it appropriated $34,000 dollars for appointed counsel who represent indigent felony defendants in appeals and post-conviction proceedings—the first time the state has ever allocated funds for such purposes.

Appointments both on appeals and in post-conviction proceedings are conditioned on a finding by the state supreme court that review is "sought in good faith" and upon "reasonable grounds." With respect to post-conviction proceedings, the legislature may have gone further than Douglas requires, so far as appellate review is concerned, it plainly has not gone far enough.

366. To make this section of the Article as current as possible, an August 5, 1963 interview with Chief Justice Oscar Knutson lasting several hours was supplemented by two lengthy telephone interviews with Associate Justice Robert Sheran on October 5 and October 15. Justice Sheran is processing most of the applications for counsel.


This modest sum may go a long way because, as Chief Justice Oscar Knutson expressed it recently, members of the state bar have responded "in marvelous fashion" to his request that attorneys volunteer on a nonfee basis to represent at least one indigent defendant a year on appeals or in post-conviction proceedings. St. Paul Dispatch, Sept. 3, 1963, p. 4, col. 1. Philip Neville, Esq., president of the State Bar Association, reinforced the Chief Justice's request with a long memorandum to all attorneys in the state marked "Urgent Appeal." Ibid. Irving Gottleib, Esq., president of the Ramsey County Bar Association, and Charles Mumane, Esq., president-elect of the state bar, secured the volunteer services of 125 lawyers in Ramsey County alone. Ibid. As of October 15, 1963, the volunteer attorneys outnumbered the prisoners who had applied to the state supreme court for appointed counsel.

368. While the courts may have inherent power to appoint counsel to represent an indigent person on appeal, we have no power to appropriate money to compensate such counsel. Only the legislature can do that. The only statutory provision for such compensation is that found in § 611.07, Subd. 2.


This statutory provision contemplates payment of the expenses of an attorney representing an indigent prisoner only in cases where the attorney has been appointed to assist defendant in the trial court.


370. See text accompanying notes 50-57 supra.
The California procedure, whereby appellate courts were to "deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court" did not pass muster in *Douglas v. California*. If anything, the indigent California defendant had to satisfy a less stringent preliminary showing of merit than that imposed by the new Minnesota law. Nevertheless, California procedure was held to violate the due process and equal protection clauses of the fourteenth amendment because:

[The type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merit of his case only after hearing the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided . . . Any real chance [the indigent] may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required.]

If Minnesota has not complied with the *Douglas* mandate in theory, however, there is every indication that it is doing so in practice. As of October 15, 1963, every application for appointed counsel on appeal, where the time for such direct review had not expired — some 25 requests since the historic decisions of March 18 — had been granted automatically. Fortunately, the state's highest court seems to have viewed the *Douglas* case more generously than the legislature.

The new Minnesota law permits a person convicted of a felony

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373. There is reason to think that the conditions imposed were simply included for their *in terrorem* effect. Whether this accounts for the small number of requests for counsel on appeal to date, however, is most doubtful. A more probable explanation is: (1) of those prosecutions against indigent felony defendants which result in convictions, about 95% are obtained by pleas of guilty, see note 233 supra; the district judges are (2) painstakingly careful in providing counsel before accepting a plea, see text accompanying notes 152–57 supra, (3) scrupulously careful in establishing, for the record, that the pleas were "voluntarily" and "understandably" made, *ibid.*

The new provision is generally regarded as a "stopgap" measure. As this Article went to press, a special committee, directed to "make an exhaustive study of the [right to counsel] situation so that the Bar Association might be able to recommend legislation," letter from Philip Neville to Yale Kamisar, Oct. 3, 1963, had already held its first meeting. The distinguished committee includes state supreme court and district court judges, legislators, leaders of the bar, county attorneys and defense attorneys, and is chaired by District Judge Donald T. Barbeau.
“who is unable, by reason of poverty, to pay counsel”\textsuperscript{374} to apply to the supreme court for the appointment of counsel and other expenses. In appeals to date, the trial court has been making a finding of “poverty” and the supreme court has simply been accepting that finding. Although no such case has yet arisen, Chief Justice Knutson contemplates instances where the defendant had counsel at the trial level but then exhausted his funds, or “his relatives ‘quit’ after he was convicted.” If, as a result of these post-trial developments, the trial judge makes a finding of indigency, the supreme court will also appoint counsel on appeal.

Although the items of expense allowed are not spelled out in the new law, according to the Chief Justice, travel expenses, funds for the preparation of the trial transcript and “anything else needed” will be supplied. If the particular error assigned requires preparation of only a portion of the transcript, no more will be prepared. The Chief Justice’s “guess,” however, is that in most cases the whole transcript will have to be furnished. On the basis of past experience, he expects the most commonly assigned error to be “inadequacy of counsel below,” and generally this requires the preparation of the entire transcript. To date no requests for transcripts have been made, perhaps because the fairly detailed summaries of the trial proceedings are sufficient\textsuperscript{375} or the appointed attorneys are making their requests for transcripts in district court, or, in some instances, simply because they have not progressed that far in their development of the case.

Under Minnesota law, the indigent gross misdemeanor defendant enjoys an absolute right to appointed counsel at the trial level.\textsuperscript{376} As previously noted, however, the new statutory right to counsel on appeal and in post-conviction proceedings is confined to felony cases. Whether the federal constitution demands more is unclear. Indeed, it is not yet known whether the \textit{Gideon} and \textit{Douglas} cases require a state to furnish counsel for an indigent non-felony defendant at any stage.\textsuperscript{377} Even if they do, it is conceivable that the right might not extend beyond the trial level.\textsuperscript{378}

Initially the Minnesota Supreme Court adopted the same approach with respect to applications for counsel on collateral attack as it did for such requests on appeal. The practice, in effect, was to grant an indigent who had not had the assistance of counsel on

\textsuperscript{374} Minn. Sess. Laws 1963, ch. 888, § 2(3).
\textsuperscript{375} See note 7 supra and accompanying text.
\textsuperscript{376} Minn. Stat. § 611.07 (1961).
\textsuperscript{377} See § III supra.
\textsuperscript{378} See note 52 supra.
appeal — and virtually none have\(^{379}\) — an absolute right to counsel in the first post-conviction proceeding. However, the steady flow of applications for counsel on habeas corpus\(^{380}\) coupled with the realization that some were abusing this liberal practice\(^{381}\) led the court to modify its approach. Thus, in late September, it appointed an attorney to "sift" these applications for merit.

To date, about half of the estimated 125 applications for counsel in post-conviction proceedings have been granted and only three have been denied; the rest are still pending. Two of the three denials came about only after the attorney appointed to screen out the applications had established, by personally interviewing the prisoners, that an alleged defect in the informations filed against them was the sole basis of their claims. The court studied the relevant informations and found no fatal defect. The third denial came about only after an attorney appointed for the indigent found no substance to his claim and requested that he be relieved, accompanying his request with a statement by the prisoner that he was now satisfied that no error had occurred at the trial.

2. Attitudes of Those Interviewed

The suddenness of the potentially far-reaching \textit{Douglas} decision and the uncertainty it has generated are reflected in the fact that seven of the 22 district judges, prosecutors, and public defenders queried about the desirability of appointing counsel in post-conviction proceedings "hadn't thought it through yet" or had "no comment."

Four, one judge and three county attorneys, favored appointment as of right, at least in the first post-conviction proceeding. One of these county attorneys picked up a habeas corpus petition on his desk and complained: "This petition is virtually unintelligible. It would be a good thing if lawyers were available to assist in the drafting of such petitions. Then, they would at least be readable."

Five others, four judges and a public defender, felt that counsel should be appointed whenever there is "substance" or "merit" to the claim, or as several expressed it, whenever a hearing is granted.

\(^{379}\) In the past, the public defender has taken an appeal on behalf of his indigent client if and when he "felt duty bound to do so as the trial attorney," but some public defenders and assistant public defenders have never felt this need in all their years in office. See also note 388 \textit{supra}.  

\(^{380}\) The applications for appointed counsel on appeal and in post-conviction proceedings did not reach the state supreme court in volume until July of 1963, and have been averaging about 30 to 40 a month ever since.  

\(^{381}\) One prisoner requested an attorney to assist him in a post-conviction proceeding although he already had his own lawyer. Two others, on being interviewed, were unable to allege any specific error.
Another judge suggested that before the decision is made to furnish or withhold counsel “an independent panel ought to screen the cases for merit.” Still another judge would require, where counsel had been provided on appeal, that the prisoner make a “special showing” before being furnished counsel in a post-conviction proceeding.

The remaining four, three judges and a prosecutor, were inclined to deny counsel in all post-conviction proceedings. As one judge put it: “He’s had his day in court. And post-conviction proceedings are just too tedious.” Another judge made essentially the same observation with one caveat: perhaps counsel ought to be provided when the petition for habeas corpus raises a “coerced confession” issue. The other two persons interviewed who were opposed to the appointment of counsel on collateral attack admitted that they had no experience with post-conviction proceedings whatever; “these proceedings are unknown in this county.”

In short, the median view seems to be that counsel should be appointed only when there is some merit to the prisoner’s claim for collateral relief. Any prisoner brash enough, or lucky enough to have the assistance of a “jailhouse lawyer,” however, can make a meritorious allegation. Anybody can point to a recent case and maintain: “this is just what happened to me!” Conversely, the prisoner whose case does have real merit may lose out because “the record is unclear or the errors are hidden.”

Although the state supreme court is currently utilizing a “merit” system of sorts in collateral proceedings, it seems to have gone a step further — a long step further — than those interviewed who

382. The prisoner, however, may not even see the “coerced confession” problem. For example, he may think the confession is unchallengeable because he was not subjected to any physical violence. Or the first confession may not have been introduced and the prisoner may not have the faintest notion that even a second or third confession is inadmissible if tainted by the coercive measures that evoked the first. Similarly, the prisoner may not have the slightest suspicion that his case presents a substantial “search and seizure” question. See generally 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, 21-37 (1963).

383. By contrast, 11 of 15 district judges and 28 of 55 prosecutors responding to the mail questionnaire favored providing counsel for the prisoner who sought post-conviction relief. Three judges and five prosecutors were inclined to furnish counsel in some cases, presumably when the allegations entitled the prisoner to a hearing.

384. Appointment of counsel in post-conviction proceedings would undoubtedly operate to reduce, if not virtually eliminate, unscrupulous and perjured allegations and to minimize the impact of the “jailhouse lawyer.” Cf. Brownell, Legal Aid in the United States 145 (1951).

advocated such an approach were prepared to go. To date, the supreme court has not denied counsel in post-conviction proceedings unless and until counsel has in fact consulted with the prisoner. In a real sense, it has not "decided the merits . . . without benefit of counsel." Even if the Griffin-Douglas principle were to extend to counsel in post-conviction proceedings, it may be said that current Minnesota practice is in substantial compliance with this principle.

B. Probation Revocation Proceedings

Until September of this year, Minnesota, as is still true of most

386. Id. at 357. Indeed, two Supreme Court Justices, Harlan and Clark, have taken the position — in a case where petitioner was sentenced to death — that a public defender (or, presumably, a specially appointed attorney) may completely foreclose an indigent's avenue of appeal, at least from a denial of collateral relief, "were it clear that the decision of [counsel] not to appeal had been subject to judicial review." Lane v. Brown, 372 U.S. 477, 486 (1963) (concurring opinion).

387. We were not directed to make any inquiries about parole revocation, but, nonetheless, this matter was raised in the interviews. A proponent of assigned counsel in probation revocation hearings felt that the same need to "check" the state warranted providing counsel in parole revocation proceedings as well. An opponent of assigned counsel in probation revocation hearings saw "no difference" between probation and parole revocation either, but he reasoned that since the indigent parolee is not furnished counsel, the indigent probationer should not be either: "Why," he asked, "do we trust the corrections commission more than our district judges?"

So far as we have been able to ascertain (one of the authors was a member of the Advisory Committee on Revision of the Minnesota Criminal Law), the new code deals with probation, but not parole, revocation simply because only the former was deemed an integral part of sentencing procedure. Thus, the new code leaves unchanged Minn. Stat. § 243.05 (1961), which permits parole to be revoked without notice or hearing.

The observation that "in the parole area, the controversy [over the right to counsel] centers around an issue largely a matter of history in most areas — the very privilege of being represented by one's own lawyer," Kadish, The Advocate and the Expert — Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 825 (1961) [hereinafter cited as Kadish], is amply corroborated by a recent account by the counsel for the National Council on Crime and Delinquency of a "workshop session" dealing with due process in parole revocation hearings: "Applause greeted the ridiculing of the right to counsel as a device to make business for lawyers . . . [O]ne board member considered the appearance of an attorney as an affront to the board, implying that the board does not represent the parolee." Rubin, Due Process is Required in Parole Revocation Proceedings, Fed. Prob., June, 1963, p. 45.

A number of theories have been advanced to rationalize the striking distinction between the procedural rights of a person accused of crime and those of a convicted person granted parole. These same theories have also been utilized to defend the failure to afford probationers facing revocation trial-type safeguards. The principle ones are (1) parole is a matter of "favor" or "grace"
states, did not view probation revocation proceedings as subject to the procedural safeguards surrounding criminal prosecutions, even as regards the right to a hearing and confrontation. Indeed, Minnesota law expressly dispensed with notice and hearing. The new code, however, provides that a probationer facing revocation “is entitled to be heard and to be represented by counsel.”

Indeed, to effectuate the “policy” reflected in the new provision, several judges in the two counties had begun to routinely appoint the public defender in probation revocation proceedings some months before September 1, 1963, the date the new code officially went into effect.

and the state may attach such conditions to the favor as it pleases; (2) the conditional liberty granted a parolee is the result of a “bargain” entered into between state and prisoner and its violation is in the nature of a “breach of contract”; (3) constructively, the parolee is still a “prisoner”; although the “prison walls” have expanded, parole rules and regulations are nothing more than prison rules and regulations. See, e.g., Urbaniak, *Due Process Should Not Be a Requirement at a Parole Revocation Hearing*, Fed. Prob., June, 1963, p. 50. These fictions are exposed in Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. Chi. L. Rev. 482, 491–94 (1962); Kadish 825–28; Rubin, *supra* at 44–45; Tappan, *The Role of Counsel in Parole Matters*, 3 Pract. Law. 21 (Feb. 1957); Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. Crim. L., C. & P.S. 531 (1942); Note, 59 Colum. L. Rev. 311, 324–26 (1959); Note, 58 N.Y.U. L. Rev. 702, 704–20 (1963). See also text accompanying notes 403–05 infra.

Only this year, the Court of Appeals for the District of Columbia directly addressed itself for the first time to the question of whether an indigent parolee is entitled to appointed counsel at a federal parole revocation hearing. A majority ruled he was not, Bazelon, C.J., and Edgerton, J., dissenting. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963) (en banc).

See *Kadish* 815–17.

*Minn. Laws* 1909, ch. 391, § 3.


Even three of the interviewees opposed to the appointment of counsel in such proceedings and a fourth who had “no comment” on the issue “recognized” that an indigent probationer is entitled to assigned counsel under the new code. All four (two district judges, a county attorney and a public defender) were from Hennepin and Ramsey Counties. Somewhat surprisingly, no person interviewed in the other five counties suggested that the new code had any bearing on the issue. Outside these two counties, several judges have been appointing counsel in some probation revocation hearings for years. One indicated he does so “if there is any question about the facts.” A second “assigns counsel” when the attorney appointed at the original trial learns that the probationer is facing revocation and asks permission of the judge to appear at the revocation hear-
1. **Constitutional Dimensions**

The constitutional dimensions of the problem, however, cannot be put aside. Indeed, probation revocation procedure dramatically illustrates the tremendous impact *Douglas v. California*\(^9\) may have had on the entire criminal process.

Even if the new Minnesota provision is read only to permit the man with sufficient funds to *retain* counsel in revocation proceedings, the formidable authority to the effect that due process requires neither notice nor hearing on revocation\(^8\) may no longer stymie the indigent probationer. It may be that he need only point to the new Minnesota provision, and then paraphrase the *Douglas* case:8

There can be no equal justice where the kind of revocation hearing a probationer receives depends on the amount of money he has; if the probationer with sufficient funds can make the court listen to argument by counsel, the poor probationer must not be forced to shift for himself. The new Minnesota provision manifests the policy that a probationer facing revocation "be given a chance to tell the court his disagreement with these charges and to offer proof that they are unfounded."

Prior to the passage of the new code, the Minnesota "practice" was not running nearly as far ahead of the "law" as it is in New York, for example. Although state law does not impose an obligation on the court to inform probationer of his right to counsel or to appoint counsel in his behalf, a recent questionnaire disclosed that 23 of the New York judges responding always assign counsel, four usually do, seven usually do not, and only one never does. See *Note, Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 329 n.138 (1959).
More than legal symmetry may be involved. If "the real question is to what extent procedures can be employed that will permit probationers a greater degree of safeguards without defeating the purposes of the probation system," to permit the probationer with sufficient funds to enjoy the assistance of counsel may well supply the answer. Can it really be argued that assigned counsel—but not retained counsel—would impede the revocation proceedings or conflict with the goals of the system?

2. **Attitudes of Those Interviewed**

The 22 trial judges, county attorneys and public defenders questioned on this matter were evenly divided on the desirability of furnishing counsel in probation revocation proceedings: nine favored it in all cases, a tenth in some; ten opposed in all cases; three were undecided. It is significant that seven of the twelve judges who took a position on the issue favored the appointment of counsel in all probation revocation hearings ("perhaps counsel should be provided in all but the very clear cases,” commented an eighth), but only one prosecutor shared the view—the same lone prosecutor who was inclined to appoint counsel in some misdemeanor cases. One prosecutor had “no comment”; the other five were flatly opposed. The two public defenders split on the issue.

Two district judges who favored appointing counsel in all proceedings hold that the standard of effectiveness is dependent upon the affluence of the parolee. Since neither the needs of the Board nor those of the convict vary an iota when an indigent parolee is involved, the Escoc-Tate rationale, consistently applied, demands the same decision as to counsel in his case.

The decisions referred to in the Note are Escoe v. Zerbst, 295 U.S. 490 (1935), where the Court, per Cardozo, J., construed a provision in a federal probation statute that after arrest the probationer facing revocation "shall forthwith be taken before the court" as requiring such notice and hearing as will "enable an accused probationer to explain away the accusation," id. at 492–93; and Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946), which ruled that the requirement in the District of Columbia parole statute that a parolee arrested for violation of his parole "shall be given an opportunity to appear before . . . [the] Board" connotes an "effective appearance . . . and thus necessarily means the presence of [his retained] counsel." Id. at 849. Since the Note was written, the Court of Appeals for the District of Columbia, sitting en banc, ruled that neither the statute nor due process requires that indigent parolees be assigned counsel in federal parole revocation hearings. Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); id. at 225 (Bazelon, C.J., and Edgerton, J., dissenting).

398. Hink, supra note 387, at 485.

399. See text accompanying note 289 supra. The mail questionnaire revealed that six of 14 district judges responding, but only 18 of 55 prosecutors who replied, favored appointing counsel in probation revocation proceedings.
bation revocation hearings stressed that such proceedings may well be as important to the probationer as the original trial itself. A third regarded the prospect that a person might be "deprived of his liberty" at this stage the decisive factor. Other reasons advanced for providing counsel were that a trained spokesman for the probationer should "test" the state's case for revocation; that such a champion would "keep the probation officer honest." One judge took the position that counsel should be provided "if it only affects the outcome in one case out of ten." By implication, he conceded that generally the result would be the same, whether or not counsel appeared. But is it not fair to point to the high percentage of guilty pleas and ask: How often does counsel, assigned or not, "affect the outcome" of the original criminal proceeding?

Professor Sanford Kadish has felicitously articulated the position of those we interviewed who would appoint counsel in revocation proceedings:

Given the character of the issue to be determined and the fact that the continued liberty of a person depends on the outcome, it is difficult to understand the view sometimes expressed that a lawyer has no proper business in these matters. The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the "immutable principles of justice." Indeed, in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act...[T] would seem patently at war with the central concept of procedural justice to deny a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel.

Several of those who were against the appointment of counsel at this stage recalled that after all, probation is a "privilege," a

400. The freedom of action which a probationer enjoys prior to revocation is sufficiently extensive that it should be considered "liberty" within the meaning of a due process clause, either by viewing the granting of probation as a restoration of a part of the liberty of which the offender had duly been deprived by his conviction and by then viewing the revocation of probation as a deprivation of the restored liberty, or by theorizing that the offender was deprived of only part of his liberty when his conviction resulted in his being put on probation and that incarceration upon revocation of probation represents a further deprivation of liberty.


401. See note 233 supra.

402. Kadish 833.
“favor,” and “act of grace.” Professor Kadish has forcefully met this “common justification for the ostracism of the law and the lawyer”:403

While the argument is repeatedly made, generally in supporting a denial of legal processes against constitutional attack, it is hard to believe that anyone really believes it. First of all, even if it is solely the quality of mercy which is being dispensed, it is apparent that it is not a personal act of grace by a reigning monarch, but a highly institutionalized system administered to tens of thousands of offenders each year by hundreds of governmental officials. So administered in a democratic community, even grace itself ... must be dispensed and withdrawn according to some sense of principle and order and with some respect for the forms of procedural regularity associated with concepts of basic fairness. But more significantly, [parole and probation] ... are not remotely charity, but an integral part of our system of criminal law ... and as such can hardly be viewed as being properly administered outside the framework of the legal order appropriate to other laws.

Moreover, the contention that because the state has the uncontrolled option to require convicted persons to remain imprisoned for the full length of their sentences, it also has the uncontrolled discretion, with or without cause, to revoke probation or parole, collides with the rule that the power to prohibit does not include the power to do so subject to unconstitutional conditions.404 “Recent Supreme Court decisions in other contexts [for example, in the area of public employment] ... cast increasing doubt on the proposition that an interest is unprotected by the due process clause merely because it was granted as a matter of grace or discretion.”405

Most of those opposed to providing counsel at this stage main-

403. Id. at 826–27.


The most persuasive analogy ... to support the proposition that the Constitution applies to a parolee [or probationer], is the fact that substantive and procedural due process rights attach to the alien who has entered the country although he has no initial right to enter our borders. The positions of the alien and the parolee [or probationer] are not dissimilar. Neither has a right to join the society of free men; only by the permission of the sovereign is either permitted to enter that society.

tained that an attorney was “unnecessary,” that, as one judge put it, probation officers “lean over backwards” in the probationer’s behalf and generally are “more sympathetic” to his plight than the judges. “It’s too hard to revoke probation as it is,” protested one rural prosecutor.

If counsel is not “necessary,” if probation officers are so slow to institute proceedings to revoke that when they finally do so, attorneys cannot affect the outcome, one might ask why the State of Minnesota has deemed it wise and just that a probationer be permitted to retain counsel at these proceedings? Has the legislature simply empowered members of the bar to take money “under false pretences” in all those revocation proceedings where they accept a retainer but cannot influence the result?

Two judges who would not provide counsel underscored the great leeway they had in these proceedings. One prosecutor, who labeled the idea of appointing counsel in revocation proceedings “ridiculous,” felt that the combined judgment of the trial judge, county attorney and probation officer amply protected a man who “has had enough ‘breaks’ already.” Along these same lines, another prosecutor commented: “These people have been convicted and have already been given a ‘break.’ We shouldn’t have to ‘try’ them a second time.”

Much of the foregoing reasoning, however, would also support the denial of counsel at sentencing — but it is too late in the day to argue that the Constitution does not require the assistance of counsel at this stage — to deny that


True, it may be argued that counsel is helpful in probation revocation proceedings, but that the cost of providing counsel for indigent probationers is prohibitive. Only two of the ten interviewees who opposed appointing counsel at this stage, however, even mentioned the “cost factor.” Nor is there any indication that the expansion of the public defender office’s duties in the state’s two largest counties to include representation at revocation hearings will require an increase in staff or salaries.

407. In Townsend v. Burke, 334 U.S. 786 (1948), the Court appears to have equated the right to appointed counsel at the sentencing stage with the right at the trial itself. Accordingly, Gideon v. Wainwright, 372 U.S. 315 (1963) would seem to render lack of counsel at the sentencing stage as conclusively “prejudicial” or “unfair” as such absence is at the trial. To approach the problem from a somewhat different route: Prior to Gideon, the lower federal courts had held that the sixth amendment right to assigned counsel extends to the sentencing stage of the criminal process, see Kadish 897–98. As a result of Gideon, it is fairly clear that fourteenth amendment due process now “incorporates” the sixth amendment right.
There is then a real need for counsel . . . . Then is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendant's past record; and, in short, to appeal to the equity of the Court in its administration and enforcement of penal laws. Any Judge with trial court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension, of penalty.408

Yet, at this point the defendant has already been convicted. Here too, it may be said that together, the trial judge, county attorney and probation officer furnish sufficient protection. Here too, the judge has great latitude.

The very fact that a sentencing judge "usually moves within a large area of discretion and doubts"409 would seem to augment, rather than reduce, the need for counsel at this stage. It might be forcefully argued that the sentencing stage is "the most important step in the trial" because the sentencing procedure "gives the court the widest latitude including placing the defendant on probation."410

One district judge who favored providing counsel in revocation proceedings relied heavily on the sentencing analogy:

After all, we provide an attorney for sentencing, even though there is no doubt about the man's guilt. So here, even if there is a violation, the disposition is crucial. There are many things I can do short of sending the probationer back to prison. I might feel that something less than commitment to prison is called for, that, for example, sending him to a work farm for a few months is sufficient under the circumstances. A lawyer, a spokesman, can be helpful in this connection.

V. APPOINTED COUNSEL V. PUBLIC DEFENDER

For almost 50 years, Minnesota law has provided that the district judges in counties of certain population may appoint a public defender for all impoverished criminal defendants in the county.411 To date only two counties — Hennepin (greater Minneapolis) and Ramsey (greater St. Paul) — have qualified. Both utilize the public defender system412 and both were included in the seven

408. Martin v. United States, 182 F.2d 225, 227 (5th Cir. 1950).
410. Kent v. Sanford, 121 F.2d 216, 218 (5th Cir. 1941) (Hutcheson, J., dissenting). This dissenting view later prevailed in the Fifth Circuit. See note 408 supra and accompanying text.
412. In one of these counties, some judges will, on rare occasion, appoint private counsel for an indigent. This might occur when the defendant flatly refuses, for some reason, to be represented by the public defender. Other judges would just appoint another member of the public defender staff.
counties surveyed. In the remaining counties the district judge appoints individual lawyers for indigent defendants on a case-by-case basis. Compensation for appointed lawyers, described in a recent comparative study as being "reasonably liberal,"413 is fixed by statute.414 The cost is borne by the county.


414. "Compensation, not exceeding $25 per day for each counsel for the number of days he is actually employed in the preparation of the case, and not exceeding $50 per day for each day in court, together with all necessary and reasonable costs and expenses incurred or paid in said defense, shall be fixed by the court in each case." Minn. Stat. § 611.07 (1961).

The general practice followed by all the district judges questioned is to have the appointed lawyer submit an itemized statement showing time and expenses.

As to time, one judge reported that he automatically gives the maximum statutory fee; another, that he awards between $35 and $75 for a guilty plea; others commented that they "adjust" the statutory fees depending on how much time they feel was spent on the case. One judge remarked that he had reduced amounts claimed when he had felt that they were excessive.

The judges' responses varied considerably when asked whether they believed that the present rates of compensation were adequate. Three said yes: "No one is complaining." "This is a public service and an opportunity for young fellows to get experience." "Yes, except for the long, hard fought trial."

Another felt that it was "a little too low. You want them willing, but not too eager." Several believed that the rates were too rigid: "It may be too little for a full day and too much for just a quick appearance." One was of the opinion that the minimum bar fee should be paid, "but more or less money will not greatly remedy the defects of the system." The replies of the county attorneys to this question fit almost into an identical pattern.

The replies to the mail questionnaire on this point were as follows:

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<tr>
<th>Compensation</th>
<th>District Judges</th>
<th>County Attorneys</th>
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<tbody>
<tr>
<td>Adequate</td>
<td>7</td>
<td>51</td>
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<tr>
<td>Inadequate</td>
<td>8</td>
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<tr>
<td>Inadequate for difficult case</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

Eleven appointed lawyers responding by mail reported that the present system was fair to lawyers, but 12 disagreed; 15 felt that appointed lawyers should be paid more for their services.

In several counties comments were received from those interviewed that there was a great disparity among the various judges in the county as to their awards of compensation.

As to expenses, all the judges reported that they either had provided or would compensate for various types of expert witnesses. In one of the counties, the approval of the prosecutor appears to be required. Several judges conceded that "court appointed psychiatrists" reveal a good deal more to the court and prosecution than do retained psychiatrists—a rather obvious "payment" made by the indigent defendant. See United States v. Brodson, 241 F.2d 107, 114 (7th Cir.) (dissenting opinion), cert. denied, 354 U.S. 911 (1957); cf. Wis. Stat. § 165.04 (1) (1961) (which bars examination by the prosecution of evidence developed by the state crime laboratory for indigent felony defendants).
In the five "appointed counsel" counties, the extent to which an indigent's request for a named attorney should be taken into account was the subject of considerable dispute. Inquiries about the quality of representation in these counties also evoked wide disagreement. In the "public defender" counties, on the other hand, general satisfaction with the system was expressed. In all the counties the question of the relative merit of the two systems was a lively topic of discussion, particularly in the light of the contemplated expansion of aid to indigent defendants occasioned by the recent Supreme Court decisions.

A. APPOINTED COUNSEL COUNTIES

1. The Judges' Lists

With one exception, every judge interviewed in the "appointed counsel" counties reported that he encountered no serious problem in getting lawyers to serve. One asserted that every lawyer in the county takes his turn, although, as is true elsewhere, postponements for cause will be granted. Two others, both from the same county, observed that all serve willingly except the "older lawyers — and they have already done their job." Judges from the remaining three counties ask only those whom they believe are willing to serve, one estimating that this included about 75 percent of the bar; another reporting that generally only "younger men" were so willing.

Most appointments are made by the judge from a list of names which he has compiled. Several have the clerk of court make the appointment informally from a roster of almost all the attorneys.

415. The judge who reported having some problem regularly appoints only experienced lawyers. See discussion after note 419 infra. He has been on the district bench for a short period and estimated that the lawyer he calls asks to be excused about half of the time. "Criminal work is looked down upon. If they have cases on the civil calendar they don't want to appear." (Cf. Winters, Preliminary Report on Counsel for the Indigent Accused in Wisconsin 8 (1903) (unpublished preliminary report in Minnesota Law School Library): "It has been rather generally surmised by respectable authority that there exists a lower class of lawyer who works among the criminal class using the protections supplied by law to keep his guilty clients out of jail as long as possible.") This judge informs the lawyer that, if excused this time, no excuse will be accepted the next, and therefore he should think carefully "about consuming his one chance for postponement."

416. Eleven of twelve judges reporting by mail questionnaire encountered no problem in getting lawyers to serve as appointed counsel. The twelfth said that on occasion he had some difficulty.

417. These lawyers, comprising about 30% of the bar in this county, are excused.
in the county; one has the prosecutor make an informal appointment when the judge is not sitting in the county.

To a large extent, of course, the quality of representation is dependent on the content of the judges' lists. Here, as already indicated, there is great diversity. One judge reported that his list is comprised of younger men but that he appoints more experienced lawyers for "very serious cases" and those in which there is real doubt of the defendant's guilt. Another judge in the same county follows a markedly different approach. His "regular list" (18 lawyers) is made up of attorneys with criminal defense experience; his "special list" (4 lawyers) of inexperienced lawyers is reserved for "clearly guilty" cases.

Those judges, representing three different counties, who revealed that their roster is confined to "willing" lawyers pointed out that almost every law office furnishes at least one such person. In the fifth and final "appointed counsel" county, all active attorneys are on the list. All of these judges stressed that an experienced lawyer is specially selected for "more serious cases"—one judge defining this to cover all criminal cases that go to trial.

Prima facie, indigent defendants would seem to be receiving equitable treatment if their attorneys were appointed from a list.

418. In one of the two counties in which this is done, the county attorney in fact selects the lawyer to be appointed. In the other, there is an "understanding" between the judges and the clerk that "older lawyers" not be asked. For further description of the "informal appointment" system, see text accompanying notes 159--60 supra.

419. When asked if he had a special system for very serious cases, he replied, "Whenever a man denies his guilt, it's a serious case." Does not any position contrary to this have the marked effect of prejudging the case and placing the defendant at a distinct disadvantage from the outset?

420. One judge said that he personally (instead of the clerk of court) "hand picks" the lawyer in a murder case; another, that the clerk of court makes a special selection in a special case.

421. A special practice of one judge is to attempt to appoint counsel from that town in the county in which the defendant resides.

In answer to the mail questionnaire, five judges reported that their list is comprised of almost every attorney in the county; four—of "willing" lawyers; one—of a group of names furnished by the prosecutor; one—of lawyers the judge knows; one—of "qualified" attorneys.

Every judge interviewed insisted that if there are two defendants whose interests conflict, separate lawyers are appointed. As to this matter in the two "public defender" counties, one defender stated that his requests for special appointment of counsel in "conflict" cases have been refused. In the other county, although one judge reported that he has appointed private counsel in such cases, the defender commented that, in several such cases, different defenders have represented the defendants.
representing a cross section of the local bar. That not every practitioner takes a turn representing indigents is balanced by the fact that many lawyers will not undertake a criminal defense for paying clients. Furthermore, economy of manpower may warrant special selection for "different types of cases," especially if such classifications are thoughtfully drawn.

Particular concern was expressed by one judge about the need to instill the indigent with "confidence in his appointed lawyer. After all, the rich man has confidence in his lawyer." Accordingly, this judge usually asks the indigent if he wishes to have a particular lawyer and, if one is named, appoints him unless the lawyer has already been "overburdened." If so, the indigent is awarded a second choice. If no specific attorney is requested, rather than act on a simple rotation basis, the judge selects a lawyer from his list "consistent with" the background of the indigent and the nature of the offense.

2. Request for Named Attorney

Whether the indigent's request for a specific attorney should be honored was the subject of some dispute. Three judges confirmed that they do appoint the named lawyer, although their experience

<table>
<thead>
<tr>
<th>County</th>
<th>Number of Indigent Defendants</th>
<th>Number of Practicing Lawyers</th>
<th>Number of Appointed Counsel</th>
<th>Maximum Number of Appointments for one Lawyer</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>92</td>
<td>210</td>
<td>34</td>
<td>11</td>
</tr>
<tr>
<td>2</td>
<td>54</td>
<td>20</td>
<td>16</td>
<td>14</td>
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<td>3</td>
<td>25</td>
<td>31</td>
<td>13</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>23</td>
<td>39</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>5</td>
<td>8</td>
<td>4</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

Furthermore, seven of the appointed lawyers who answered the mail questionnaire suggested that the selection system be improved.

However, whatever criticism may be leveled against the system in these counties, it seems preferable to the "catch-as-catch-can" practice, employed in some federal courts, of appointing lawyers who happen to be present in the courtroom when the indigents appear. See Note, 76 Harv. L. Rev. 579, 681 (1963); Bar Ass'n of the District of Columbia, Report of the Commission on Legal Aid 101 (1958).

423. For example, if the accused has a long record and will be likely to "spot" an inexperienced lawyer, this judge, to insure a better rapport, will not appoint one, regardless of the seriousness of the felony involved.
was that such a request rarely is made.\textsuperscript{424} They also pointed out that they would more or less automatically appoint a second lawyer if the defendant objected to the first appointment.\textsuperscript{425}

However, four judges voiced strong resistance to complying with an indigent's request for a named lawyer.\textsuperscript{426} Reasons advanced for this resistance were: (1) "They can't tell us what to do!" (2) Honoring such a request "encourages" false claims of indigency since it results in the defendant getting the lawyer he wants without charge. (3) It is unfair to the named lawyer since "high-priced" attorneys with large overheads have cause to resent frequent appointments.\textsuperscript{427}

On the related matter of appointing another lawyer if the defendant objects to the first appointee, these four judges split. Two would routinely appoint someone else and two would require a showing of good cause.\textsuperscript{428}

The approach of the "lenient" judges seems preferable. In the first place, if the defendant's wishes may be fulfilled without placing an undue burden on any lawyer,\textsuperscript{429} any affront to the judicial ego scarcely outweighs the desirability of doing so. As for the second matter, false claims of indigency, it should be met more di-

\textsuperscript{424} One judge commented that there is no objection to this from the bar in his county because, generally, the lawyers named are "those who want the business."

\textsuperscript{425} One judge commented that he interprets Minn. Stat. § 611.07 (1961), which provides that the district judge shall appoint counsel for indigent defendants, "not exceeding two," as entitling the defendant to one rejection. The judge wanted to cut off any chance of reversal. See discussion at note 163 \textit{supra}.

\textsuperscript{426} One did remark, however, that he might honor such a request if there were a special reason, such as that the lawyer had formerly represented the defendant.

\textsuperscript{427} As one judge expressed it: "You can't take a $50,000 a year man and give him $50 per day very often." He pointed out that, in such situations, an appointment was undesirable from both the lawyer's and defendant's viewpoints: The lawyer may be prejudiced in his other cases (civil and criminal) if the jury knows that the lawyer is also representing "this bum." The defendant may be prejudiced before the jury because the lawyer may give more enthusiastic representation to a paying client whom he believes to be innocent.

\textsuperscript{428} One of these judges felt that a change of lawyers should be permitted sparingly because of "bad public reaction to this practice."

\textsuperscript{429} Cf. David, \textit{Institutional or Private Counsel: A Judge's View of the Public Defender System}, 45 Minn. L. Rev. 753, 755 (1961): "The defendant without means . . . may also request that the court assign Jerry Geisler or Grant Cooper, or some other lawyer whose publicized successes in criminal defense have inspired his confidence. . . . These requests will be forwarded, but it is obvious that the volume of such requests alone must defeat any general plan to make such able men general public defenders.
If there is reason to believe that a higher incidence of mendacity exists among those few who seek a specific lawyer, perhaps the financial status of this small group merits closer attention. Finally, no lawyer need be overburdened. An indigent defendant may hardly complain if the lawyer he seeks is unavailable. Many nonindigent clients find themselves in a similar predicament.

3. Performance of Appointed Counsel

How well do appointed lawyers perform? This is the crucial question, transcending the manner of selection. Judicial reaction in the five “appointed counsel” counties surveyed ranged from great unhappiness to warm enthusiasm.

Two of the seven district judges in this group emphatically reported that appointed lawyers compared unfavorably with retained lawyers. One said flatly that “many indigents do not receive adequate representation.” Both maintained that, with some exceptions, the appointed lawyers “don’t put as much into investigation and preparation.” However, they noted that most appointed counsel did their best once they got into court: “Put a lawyer in front of a jury and it makes no difference whether he is retained or appointed.”

A third district judge acknowledged that appointed lawyers

430. See discussion at notes 99–100 supra.
431. One was very sharply critical: “When I was a prosecutor, I used to love the way the system works. Many appointed counsel wanted to avoid a trial; many didn’t know how to conduct a trial. Thus, they were prone to plead their clients guilty.”
432. “Everything is wrong with the system,” protested this judge. His major specific objection, also made by others, was to the widespread practice in his county of almost exclusively appointing “new law graduates.”

A judge in another county, acknowledging that this was the practice, explained, “How else are these young lawyers ever going to get any experience?”

Professor Trebach’s retort seems most persuasive:

A sink-or-swim philosophy for young attorneys in the criminal courts (whereby if there is any “sinking” to be done, unfortunately, it is done by the defendant) is fundamentally at odds with the concept of effective defense in an adversary system. The criminal courts cannot be considered an extension of the law school moot court system when the defendant happens to be indigent . . . . Counsel assigned to the indigent may gain experience in the process, but it would be an inverse set of values indeed which emphasized this incidental benefit at the expense of the primary function of defendant’s counsel, that of providing a vigorous and professional defense.

were generally less experienced than retained counsel.\textsuperscript{433} He reported that, until recently, too many appointed counsel were "more concerned with their fee than with their client." Fortunately, this situation has now been remedied.\textsuperscript{434} Three other judges pointed out that quite often appointed and retained lawyers\textsuperscript{435} are the same people and that generally they are equally conscientious.\textsuperscript{436} The remaining judge, although acknowledging their relative inexperience, was enthusiastic about the quality of appointed counsel: "Because of their 'sense of responsibility,' many of them just 'work their hearts out.' They raise every conceivable issue."\textsuperscript{437}

The opinions of the prosecutors in the five "appointed counsel" counties on this subject fell at about the same points on the spectrum, but the correlation between prosecutors and judges in the same county was something less than perfect. Three found little to choose between appointed and retained counsel.\textsuperscript{438} A fourth noted

\textsuperscript{433} When this judge feels that appointed defense counsel is inexperienced, he extensively questions the defendant to be sure that he has been properly represented.

\textsuperscript{434} In the past, a former prosecutor (who handled most of the appointments) favored his friends who were neither competent nor interested. The judges who sit in this county have corrected the situation by carefully instructing the newly elected county attorney.

\textsuperscript{435} Perhaps too often in one county. Here, charged both the county attorney and the resident judge, one law firm “solicited” indigent cases by getting many defendants to retain them and then, if the defendant is found to be indigent, suggesting to the judge that they be appointed since they have already conferred with the defendant. The judge also stated that, in his opinion, this firm’s lawyers were “flashier” but less capable than many other local counsel.

\textsuperscript{436} Although one of these judges noted that most appointed lawyers were "younger fellows," he stated that they were also most often retained counsel in criminal cases. He did point out, however, that occasionally an experienced lawyer from one of the metropolitan areas will be retained and that he will probably be better than most local counsel.

\textsuperscript{437} He also suggested that appointed counsel are often particularly careful because they know that the judge will interrogate the indigent defendant extensively as to whether counsel was "competent."


No amount of talk of "professional responsibilities" will ever succeed in obscuring one hard fact: All a lawyer has to sell is his time! And it is no answer to this dilemma to give the cases to those lawyers whose time is not so valuable. No matter how eager and industrious a young lawyer may be, he is seldom a match for the able, adroit, powerful and experienced prosecutor whom he is likely to meet in a criminal action.

\textsuperscript{438} "They are better than some retained lawyers who have no criminal experience but not as good as the criminal specialists," was the comment of one of these.
that appointed counsel were generally younger and less experienced. Finally, one prosecutor — disquieting to note, from the same county in which the judge reported favorably — was most critical.439

B. PUBLIC DEFENDER COUNTIES

In contrast to the mixed reaction about the quality of appointed counsel, there was unanimous agreement as to the high calibre of the present public defenders in Hennepin and Ramsey counties.440 Five of the six judges interviewed, as well as one of the

439. Some of his comments: “They don’t plead an innocent man guilty but they don’t do much else.” “The defendants are really little better off then they would be without a lawyer at all.” “The whole job is done on a very routine basis. They don’t dig in.” “They pick up $50 pretty easily.” “Maybe they are afraid that if they do too much, they won’t be appointed again.” (As a practical matter, the county attorney appoints counsel in this county.)

The answers received in the mail questionnaire to this query were as follows:

<table>
<thead>
<tr>
<th>Compared with</th>
<th>District Judges</th>
<th>County Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retained counsel</td>
<td>10 39</td>
<td>5 8</td>
</tr>
<tr>
<td>Less experience than retained counsel</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

Finally, only half of the appointed lawyers who replied to the mail questionnaire believed that indigents were being treated fairly under the present system. 440. In both counties, the defender is appointed by the district judges, a unanimous vote being required in Hennepin County for the initial four year appointment. See Minn. Stat. § 611.12 (1961). Although critics of the public defender system have attacked this method of appointment because of the defender’s unfavorable “position to stand his ground before a tyrannical judge,” Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 748 (1961); cf. text at note 447 infra, there appears to be no credence to this in Hennepin or Ramsey counties. Nonetheless, appointment by some less interested body is worthy of consideration, particularly if the defender system is to be extended to the smaller counties.

Neither defender devotes all of his time to his public defender’s duties. See note 442 infra. The present defender in Hennepin County took office on July 1, 1963, having been an assistant for a number of years previously. He has four part-time assistants. His predecessor had served for over 20 years. The Ramsey County public defender is now serving his second two year term. This is the first time in many years that the defender has been permitted to succeed himself, thus there have been a number of defenders in that county. By the time this Article appears, there will have been one part-time assistant appointed at an annual salary of $8500.

Some typical comments of the judges were: “Not only does he fight hard when the case demands it but has good balance. He won’t file trivial motions.” “They have heart for the defendants yet are very practical and sift out cases
county attorneys, maintained that the public defender was superior to most retained criminal defense lawyers. They conceded that the “top” criminal lawyers were probably better, but added that there were very few criminal specialists in the state. They pointed out that even many excellent trial lawyers have little or no criminal experience and are thus no match for public defenders. The other two people interviewed both regarded the defenders as good as — but no better than — most retained counsel.

The contrast between the quality of appointed counsel and the public defender was even more sharply drawn when the judges were asked to compare them with the county attorney’s office. Five of the six judges in the “public defender” counties felt that the defender was probably better than many or most of the lawyers in the prosecutor’s office. One stated that he was about equal. On the other hand, three of the seven judges interviewed in the “appointed counsel” counties believed that, due at least to the county attorney’s greater experience, he “had the edge” on the majority of appointed lawyers. The other four felt that the quality of appointed lawyers was “about the same” as the county attorney.

C. **General Appraisal of Public Defender System**

A common objection to the public defender system voiced by one — but only one — of the district judges in an “appointed very well. Even in the clearly guilty cases, they make good recommendations as to sentencing.”

There were some scattered adverse comments regarding past public defenders: “One public defender was awful. He almost always pled guilty.” “I had to reprimand one once for inadequate representation.” “One of the current public defender’s predecessors was not too good.”

441. One judge explained this on the ground that the defender “has a tremendous workload and can’t point for one or two cases.”

442. Both public defenders are permitted to engage in private civil practice but estimate they spend over 30 hours per week in their public capacity. Each has practiced criminal law for over ten years. The Ramsey defender estimated that he represented 170 defendants in 1962; the Hennepin defender estimated that his office represented 600 in district court and 188 in juvenile court — mostly dependency and neglect cases.

443. One of these pointed out that the prosecutor was often quite inexperienced himself. (Of the seven county attorneys interviewed, one had more than 15 years criminal experience; two, more than 10 years; three more than 5 years; and one had little previous criminal experience but had been in practice over 10 years before being elected.) Another was of the opinion that the county attorney usually came “from the middle of the ladder, as the quality of the bar goes.” A third judge in this group did feel that the county attorney “got the jump” on the case. Interestingly, one prosecutor stated that if appointed lawyers were appointed at an earlier stage in the proceedings, their
counsel" county, is that due to the defender's frequent contact with the county attorney's office, they would both get "too chummy." This judge feared a "tendency on the part of the defender to be less concerned with the individual case than with his overall problems — thus perhaps sacrificing one case in order to get the county attorney to accept pleas in others." He voiced alarm that the defender's office "might become an adjunct of the county attorney's office."

Another judge, in an "appointed counsel" county, expressed doubt about the part-time public defender. He speculated that such an official might be tempted "to plead 'em guilty and get back to the private practice."

One of the public defenders specifically addressed himself to this point sua sponte. He strenuously argued the merit of having a part-time, rather than a full-time, defender. He maintained that a full-timer, "because of lack of financial independence, would be more subservient" to the judges who appointed him. Thus, he performance would be improved since they would be less disadvantaged and more likely to "dig in."

Replies received from district judges in the mail questionnaire were as follows:

<table>
<thead>
<tr>
<th>Appointed Counsel</th>
<th>No. of District Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compare favorably with county attorney</td>
<td>10</td>
</tr>
<tr>
<td>Compare unfavorably with county attorney</td>
<td>1</td>
</tr>
<tr>
<td>Less experienced than county attorney</td>
<td>4</td>
</tr>
</tbody>
</table>

444. Edward Bennett Williams has voiced a similar feeling:

Another disadvantage is that the public defender and the prosecutor are trying cases against each other every day. They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time get to be good friends. The biggest concern of the wrestlers is to be sure they do not hurt each other too much. They don't want to get hurt. They just want to make a living.

445. For further criticism of this "mass-production criminal justice," see id. at 9.

446. Although most county attorneys in the state are also on a part-time basis, the judge felt that the pressures from the press and public would be greater on the county attorney not to shirk his duty; that the fact that the county attorney is elected while the public defender would probably be appointed would cause the defender to be relatively unconcerned with his public image.

It is undoubtedly true that the success of the defender system is dependent on the ability and attitude of the appointee. But, as to the "public image" point, it should be noted that the defender's "electorate" (the district judges) is much more likely to critically evaluate the defender's work than would be the case with the public and the county prosecutor.

447. See generally note 440 supra.
might feel inhibited about conducting a long trial before a judge who was trying to complete his calendar, or he might feel intimidated by a judge who hesitated to provide a free transcript. This defender also felt that a full-timer might well get depressed and calloused because of the constant strain of this type of practice and because of the paucity of innocent defendants to really get excited about: "In my opinion, in all my years as public defender, I've only represented three men who were really innocent."

In addition, the six district judges interviewed in the two "public defender" counties, as well as the respective county attorneys, unanimously rejected the anti-defender arguments.448 Their attitude was well summed up by one judge:

The public defender is zealous. The fact that the defender is paid out of the public treasury is irrelevant. So are judges. That he may deal frequently with the prosecutor has no more significance than the fact that personal injury specialists, who often meet in trial, may be good friends. But this doesn't affect their courtroom performance. In a sense it may make them even more competitive. They want the other fellow's respect.449

One judge doubted that "the defender is as desirous of victory as private counsel since his future practice doesn't depend on it." He took the position, when asked what a defender might do if he consulted with his client shortly after arrest, that the defender would probably not insist that the defendant remain silent as much as retained counsel would. This viewpoint was vigorously

448. One judge did recall that many years ago, these arguments were true of a particular public defender. However, several judges also pointed out that, quite to the contrary, in one county, a public defender has been known to have "feuded" with the county prosecutor and, in the opinion of one judge, "that's all to the good." A judge from the other county said, "There's no love lost here," and stated that the defender has complained that the prosecutors overcharge and issue complaints too easily (to please the police), and then are reluctant to dismiss.

449. One of the county attorneys related this story: A former public defender was a close friend of, and on the campaign committee for, a former county attorney. Nonetheless, during the campaign, the defender beat the prosecutor badly in some highly publicized cases.

One judge in an "appointed counsel" county who favored the public defender plan pointed out that if "close friendship" was a defect of the defender system then it was also a defect of the appointed counsel system because, due to the small bar in his county, the county attorney was quite friendly with all attorneys.

contested, not only by both defenders but by one county attorney as well. Indeed, the latter complained that the defender in his county immediately cautions his clients to remain silent.

More extensive investigatory facilities is one of the principle advantages claimed by supporters of the public defender system. Not only does this allegedly provide the indigent accused with a more adequate defense, but quite often, a thorough investigation of the case will uncover evidence to persuade the defendant of the hopelessness of the matter, thus avoiding a needless and costly trial. Yet, unlike defender offices in other jurisdictions, neither Minnesota public defender has an investigator on his staff. And, although several judges felt that the defenders’ investigatory funds were inadequate, only one of the two defenders registered any complaint on this count. Whatever funds may be available for investigation, it would seem desirable to enlarge the defender’s access to “the prosecution’s records in order partially to redress the imbalance in investiga-

450. One stated that particularly in cases in which he is clearly convinced that the defendant is guilty he is very careful not to “coerce” a guilty plea by giving any assurances of the possibility of a lighter sentence. Thus, this defender complained that he has ended up trying “worthless cases.”

451. In fact, in one pending murder case, the public defender advised strongly against confessing despite the fact that the defendant wanted to—and, according to newspaper reports, did.


453. The point has been made that many criminal cases are won by relatively inexperienced lawyers “because of an excellent marshaling of the facts . . . by a trained investigator.” STAFF OF HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPRESENTATION FOR INDIGENT DEFENDANTS IN FEDERAL CRIMINAL CASES 29 (Comm. Print 1960).

454. See BLISS, DEFENSE INVESTIGATION 41 (1956).

455. For example, the Legal Aid Agency for the District of Columbia, established in 1960, has four investigators (for seven attorneys). Note, 76 Harv. L. REV. 579, 595 (1963). In 1961, the Los Angeles County Public Defender Office had nine investigators (for 51 attorneys). Cuff, supra note 437, at 729 n.36.

456. This defender reported that he has no investigative funds whatever, although one of the judges in the county was convinced that such funds would be available on request.

The “satisfied” defender remarked that although he could retain an investigator when necessary, he did almost all of his investigative work person-
tory facilities which normally exists in a criminal case."

A large majority of those interviewed in the "appointed counsel" counties who addressed themselves to the issue, including a number who were pleased with their present system, favored the establishment of some sort of public defender system. A number of reasons were given, but one predominated: Because of his greater experience, the defender would give indigent defendants more diligent representation. This view was supported by several judges in "public defender" counties who have had experience with both systems. It seems fair to conclude that the "Minnesota opinion," as evidenced by this survey, calls for a more exten-

ally — "any attorney worth his salt goes out to the scene himself." He does utilize both the prosecutor’s staff and the police for such purposes as serving subpoenas, getting witnesses to "cooperate," and for "protection in tough neighborhoods."

As to funds for investigation in the "appointed counsel" counties, see note 457 supra.


458. Some of the "minor" reasons advanced were that it would relieve the judges of the obligation of determining whom to appoint each time; that it would bring client and lawyer together much more quickly; that the "local" public defender might cooperate with a state-wide defender’s office in handling appeals. For a good summary of the arguments pro and con public defenders, see Note, 76 Harv. L. Rev. 579, 602-03 (1963).

459. It should be noted that "experience" is a many-faceted concept: It may well be true that the basic doctrines of the criminal law do not torture the intellect. Under the protection that the law gives the defendant, however, there is a premium upon detailed knowledge of the statutes and upon adequate experience with criminal procedure; otherwise the defense may overlook the weaknesses of the prosecution’s case. This involves far more than the statutes and the case law. It frequently involves knowledge of police operating procedures; knowledge of police record systems; familiarity with the work of the local crime laboratories; and acquaintanceship with the local experts in such things as narcotics, ballistics, arson, forensic chemistry, handwriting, toxicology and criminal identification. This arsenal of information is available through a specialized public or voluntary defender, and a private practitioner entering a criminal case may be unfamiliar with it.

David, supra note 429, at 762-63.

460. One judge stated that he favored a public defender only for those counties which have many inexperienced lawyers who often end up as appointed counsel. He noted that this would be true of two of the ten counties in his judicial district.

461. Examination of the literature reveals that enthusiasm for the public defender system is exhibited, throughout the country, by those having experience with it. See, e.g., Note, 76 Harv. L. Rev. 579, 606 (1963); David, supra note 429, at 765, 769.
sive utilization of public defenders.462

Which is more costly? A public defender or an appointed counsel system? While there was speculation both ways by those interviewed, the statistics indicate that the defender system is significantly more economical.463 Perhaps this is because the “public defender expedites trials and disposition of cases and [eliminates] unnecessary trials and [waives] jury trials where that can be legitimately done.”464 Perhaps, because of the relative inexperience

462. Chief Justice Oscar R. Knutson of the Minnesota Supreme Court, pointing out that, “it is a known fact to those of us who have served on the trial courts in the country areas . . . that many of the attorneys appointed are wholly unfamiliar with criminal practice,” has “come to the conclusion that some kind of public defender system is imperative.” Knutson, The State-Wide Public Defender System, Bench & Bar of Minnesota, May, 1968, pp. 16, 17.

Furthermore, five of the appointed lawyers who responded to the mail questionnaire voluntered the suggestion that some sort of public defender system be established.

463. The following table was composed from 1962 statistics:

<table>
<thead>
<tr>
<th>Public Defender</th>
<th>Number of Indigent Defendants</th>
<th>Public Compensation for Counsel</th>
<th>Cost per Indigent Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counties</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>735</td>
<td>$35,000</td>
<td>$48</td>
</tr>
<tr>
<td>2</td>
<td>170a</td>
<td>3,000?</td>
<td>47</td>
</tr>
<tr>
<td>3</td>
<td>8</td>
<td>1,150</td>
<td>144</td>
</tr>
<tr>
<td>Appointed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>25</td>
<td>2,462</td>
<td>93</td>
</tr>
<tr>
<td>3</td>
<td>92</td>
<td>3,923</td>
<td>93</td>
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<tr>
<td>4</td>
<td>23</td>
<td>1,325</td>
<td>58</td>
</tr>
<tr>
<td>5</td>
<td>54</td>
<td>2,680</td>
<td>50</td>
</tr>
</tbody>
</table>

a Estimate

b Chief Public Defender — $8,000; four assistants — $6,000 each; general fund available for all other expenses — $3,100.

c Public Defender—$7,500; no specific additional funds set aside so $500 estimated.

The 1954–1955 figures from nine California counties which utilize the public defender system confirm this finding. The “cost per indigent defendant” there ran from $9 to $72, the median being $31. Cuff, supra note 437, at 724. An average cost of less than $45 per indigent case was reported in 1962 by the Legal Aid Agency in the District of Columbia. Murray, Defender System in the District of Columbia, 21 LEGAL AID BRIEF CASE 63, 72 (1962). On the other hand, in Detroit, where the appointed counsel system is used, the 1956 cost per indigent defendant was $89. [1956] Recorder's Court of the City of Detroit, Michigan Ann. Rep. II, cited in Wilcox & Bloustein, Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime, 59 COLUM. L. REV. 551, 572 n.49 (1959).

of appointed counsel, “they have called upon the court for the appointment of experts, at court expense, have prolonged trial by more extensive cross-examination than necessary, and have generally obtained their quid pro quo in experience, without regard to the fact that in the total context of the case the litigation did not justify all of the expensive defensive actions taken.”

Is a public defender system feasible for the relatively small counties? Would it be undesirable financially because “the economies of representation by a public defender are present only where there is substantial business and where it is relatively evenly spread throughout the year?”

There was general agreement that no rural county could support a full-time public defender and that, due to the large geographical area of most judicial districts, it would not be practical for one full-time defender to cover so much ground. However, several affirmative suggestions were made by officials in the smaller counties: (1) A part-time defender—a obvious counterpart to the part-time prosecutor in these counties—was advanced as a feasible solution. (2) Since a three-county probation officer system has worked out quite well, a similar arrangement for a public defender seems practicable.

It should be noted that the same arrangement which might prove quite workable for a multi-county probation officer might break down in the case of a multi-county public defender. The pressure to be at a particular place at a particular time is much greater for the defender. Nonetheless, both proposals appear to have substantial merit—enough to warrant a fair trial.


467. A federal judge in a relatively small district has suggested the desirability of a part-time defender for his district, comparable to his present part-time referee in bankruptcy; estimated cost—$4,000 per year. STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPRESENTATION FOR INDIGENT DEFENDANTS IN FEDERAL CRIMINAL CASES 30 (Comm. Print 1960). See also Willecox & Bloustein, supra note 463, at 573.

468. A particularly apt example of where such a system could be instituted may be found in one of the cities visited during this study. In St. Cloud, the jurisdiction of the municipal court extends to three counties—Stearns, Sherburne, and Benton, all of which converge in St. Cloud.
Through the years, the "wedge" objection has been raised by those resisting the expansion of the "right to counsel"; the "horrors"—if the principles contended for were extended far enough—have been paraded. Thus, 21 years ago, in seeking to confine the indigent defendant's right to appointed counsel to capital cases, the State of Maryland argued:469

Will it be contended that even where a person is given a preliminary hearing before a committing magistrate or a United States Commissioner, such magistrate or commissioner must appoint counsel if the prisoner is indigent and requests it? And yet, the right to be heard by counsel as distinguished from the right to the appointment of counsel is guaranteed at every stage of the proceedings, even as to preliminary hearings. . . . The logic of the Petitioner's argument certainly compels the appointment of counsel at such preliminary hearings since he makes no distinction between the right to such appointment and the right to be heard by counsel . . . .

Somehow, this "horror" no longer seems very frightening.470

Nor, we venture to say, will the "horrors" of today—such as appointment of counsel even before preliminary hearings, or in misdemeanor cases, post-conviction proceedings, probation and parole hearings—strike terror in many hearts tomorrow.

470. As previously noted, since 1959, Minnesota law has entitled an indigent defendant to appointed counsel "prior to his preliminary examination by a magistrate." See note 3 supra and accompanying text.